

“A Principled Approach to Copyright Policymaking”

Presentation By Susan M. Kornfield, J.D.
BODMAN, LONGLEY & DAHLING LLP

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I am here today to share with you some information about U.S. copyright law and some perspectives on copyright policymaking. I am indebted to the experts who have assisted me in my copyright journey, in particular Prof. Ray L. Patterson of the University of Georgia, a scholar and copyright theoretician whose copyright scholarship has been relied upon many times by the U.S. Supreme Court in its copyright jurisprudence. I have also been assisted by professors, students, scholars, researchers, and professional organizations that have supported the public interest in copyright law through, among other things, the filing of amicus briefs.

In this presentation I am going to make a number of statements about copyright law that may surprise some of you. Accordingly, and just so you do not think I am making up any of this, I will provide references to the U.S. Constitution, the U.S. Copyright Act, Supreme Court case law, and other significant judicial decisions, so that you can review the original sources yourself and discuss these important issues with your attorneys.

THE PURPOSE OF COPYRIGHT LAW

We will begin with a few questions from my copyright self-assessment. Here is the first question:

Q1. The purpose of U.S. copyright law is to:

- (a) Reward authors for their creative efforts.
- (b) Provide an economic incentive to write and publish.
- (c) Advance public learning.
- (d) Provide legal remedies for infringement.

I begin with this inquiry because the purpose of copyright is critical to a correct understanding of copyright law, and because most people choose the wrong answer. In the media we hear so much about copying as stealing, about using the “property” of someone else, and about the “evil” of file-sharing, that we almost reject as absurd the correct answer, which is “(c) Advance public learning.” It is important to understand the purpose of U.S. copyright law because it is the purpose that is both the underpinnings and the framework of copyright law. That purpose helps us understand what is copyrightable and why, what is not copyrightable and why not, the rights of owners, and the important limitations on those rights.

REACTION TO THE PRINTING PRESS – CENSORSHIP

My own understanding of copyright law truly began only after I understood the relationship between the printing press, England, censorship, and copyright. (For a proper understanding, see Patterson, L.R. and Lindberg, S.W. (1991) *“The Nature of Copyright: A Law of Users’ Rights,”* The University of Georgia Press.) In the 1550’s, about eighty years after the printing press had arrived in England, the Crown and the Church wanted to control “the dangerous possibilities of the printed word” and “the publication of seditious, heretical, and schismatical materials.” *Id.* at 23. The result was a law that required special permission from

the Crown and its chartered guilds to be able to publish a book. Because it regulated the right to copy a book, it was the first “copyright” law. That first law had the following attributes:

- Its purpose was censorship.
- Publishing a work was illegal without permission of an entity chartered by the Crown.
- Copyright vested in the publisher, not the author, of the work.
- Copyright protection did not require that the author contribute anything new.
- Copyright lasted forever.
- Copyright controlled the movement of the books even after lawful purchase, so books could not be given away or sold without the permission of the publisher.

In 1710, in response to public pressure, Parliament enacted The Statute of Anne. This statute completely changed the purpose and structure of copyright law. Its full title was “An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.” *See Patterson and Lindberg p. 27.* The Statute of Anne had the following attributes:

- Its purpose was to educate the public and encourage learning.
- Copyright vested in the author of the work.
- Copyright protection required that the author contribute new authorship.
- Copyright lasted only for limited times (14 years, with a renewal term of 14 years if the author was alive at the end of the initial term), and thus created the “public domain,” meaning there would be a time when the work was no longer subject to copyright.
- Copyright was only the right to print, publish, and vend (sell) a book, and thus the copyright owner could not control the movement of the books after lawful purchase.

U.S. COPYRIGHT LAW – BASED ON THE PUBLIC GOOD

Next test question:

Q2. U.S. copyright law is derived from the:

- (a) Constitutional power of Congress to regulate interstate commerce.
- (b) Constitutional power of Congress to promote the progress of science and arts.
- (c) Natural and moral rights of authors.
- (d) Rights of personal property.

The power of Congress to enact copyright law is founded in the U.S. Constitution, which states that the “Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const., Art 1, § 8, cl. 8. The title of the first U.S. copyright statute, enacted in 1790, was entitled “An Act for the encouragement of learning, by

securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.” You can see the influence of the Statute of Anne in U.S. copyright law, and our adoption of the “encouragement of learning” foundation, namely, the adoption of the purpose of the law, the notion of the public domain, the ownership vesting in authors, and the ownership of copies of books by those who purchased the copies. *See* Patterson and Lindberg, pp. 47-55.

For a number of reasons, the federal courts in the United States have a difficult time grasping and applying the public interest purpose of copyright law. They seem not to believe that the rights of copyright owners really and truly are, in fact, subject to many, many limitations.

Until 1994, certain federal courts of appeals had policies that favored awarding attorneys’ fees in cases where the copyright owner prevailed, but not where the defendant prevailed – as if the defendants were sufficiently rewarded by the fact that they did not lose. But in *Fogerty v. Fantasy, Inc.*,¹ the Supreme Court straightened this out and told us one more time (hopefully we are now listening) that the purpose of copyright law is to advance public access to information and creative works.

The facts were as follows. John Fogerty, the lead singer and songwriter with the musical group known as “Credence Clearwater Revival” wrote a song in 1970 entitled “Run Through the Jungle.” As is the way with so many artists, he sold the exclusive publishing rights to a company, and that company ultimately sold them to Fantasy, Inc. Credence Clearwater Revival disbanded in 1972 and Mr. Fogerty published under another recording label. In 1985, he published a song entitled “The Old Man Down the Road.” Fantasy, Inc. sued Mr. Fogerty, claiming that his song “The Old Man Down the Road” was just “Run Through the Jungle” with different words, and thus infringed the copyright in Fogerty’s song owned by Fantasy, “Run Through the Jungle.” The copyright infringement case went to trial, and a jury returned a verdict in favor of Mr. Fogerty.

But that was not the end. After he successfully defended against a claim of infringement, Mr. Fogerty filed a motion with the trial court seeking reimbursement of his attorneys’ fees and expenses. He relied upon a section of the U.S. Copyright Act that stated that the court, in its discretion, could award attorneys’ fees to the “prevailing party.”² Mr. Fogerty asserted that he had prevailed. The trial court denied the motion, finding that Fantasy’s infringement suit was not brought frivolously or in bad faith. The U.S. Court of Appeals for the Ninth Circuit affirmed, admitting that it treated successful plaintiffs differently from successful defendants. This “dual standard” was followed by a number of federal appeals courts, including the Second, Seventh, and D.C. circuit courts.

A different approach, called the “even-handed” approach, used the same criteria for successful plaintiffs and successful defendants. The even-handed approach was followed by the

¹ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

² 17 U.S.C. § 505.

Third, Fourth, and Eleventh circuit courts of appeals. The U.S. Supreme Court decided to resolve this split in the federal circuit courts.

The Supreme Court unanimously ruled that “prevailing party” meant “prevailing party,” in other words, the party that prevailed. The Supreme Court held that U.S. Copyright Act not favor successful plaintiffs over successful defendants, and reminded us that the entire underpinning of copyright law was to promote the public interest:

“The monopoly privileges that Congress has authorized, while intended to motivate the creative activity of authors and inventors by the provision of a special reward, are limited in nature and must ultimately serve the public good. The limited scope of the copyright holder’s statutory monopoly reflects a balance of competing claims upon the public interest. Private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The ultimate aim is . . . to stimulate artistic creativity for the general public good. The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.’ Defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (emphasis supplied).

Mr. Fogerty was awarded his attorneys fees, which, after years of litigation, were about \$1.4 Million.

CATEGORIES OF WORKS; STATUTORY RIGHTS

Copyright is a series of rights, limited in nature, to which a certain type of work is subject for a specified period of time.³ That series of rights, all of which are subject to limitations in the Copyright Act,⁴ are:

- (1) to reproduce the copyrighted work in copies;
- (2) to prepare derivative works⁵ based upon the copyrighted work;
- (3) to distribute copies of the copyrighted work to the public;

³ See *Dowling v. United States*, 473 U.S. 207, 216 (1985); Patterson, L.R., “Copyright and the Exclusive Right of Authors.”

⁴ “Subject to Section 107-120, the owner of copyright has the following exclusive rights . . .” 17 U.S.C. § 106.

⁵ A “derivative work” is “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” 17 U.S.C. § 101.

- (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 rights relate to those works that contain original authorship. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.⁶

THE REQUIREMENT OF ORIGINAL AUTHORSHIP

The concept of “authorship” examines the issue of creative choices. This issue of creative choices (and not simply content) is crucial to an understanding when a work (or a portion of it) is entitled to protection under copyright law, and when it is not. Whether or not certain content embodies creative choices is a fertile area for disagreement.

In the famous case *Burrow-Giles Lithographic Co. v. Sarony*,⁷ the Supreme Court had to decide if a particular work (a photograph) made through the use of a machine (a camera) could be entitled to copyright protection. The Court described the photograph itself as “a useful, new,

⁶ 17 U.S.C. § 102(a).

⁷ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

harmonious, characteristic, and graceful picture” and identified the creative choices, the “authorship,” in the photograph as having begun with an “original mental conception” to which the photographer “gave visible form” by posing the subject, writer Oscar Wilde, “in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression.” It found the photograph to be copyrightable because it embodied these creative choices.

Just a few years ago, in *Bridgeman Art Library, Ltd. v. Corel Corp.*,⁸ a district court in New York applied these principles and shocked the art world. The subject matter of that case involved the making of digital copies by Corel, a software company, of transparencies created by Bridgeman. The Bridgeman copies were of artwork whose copyright was in the public domain.

We know that we can go to art museums, historical libraries, and other repository of cultural artifacts and purchase posters, postcards, photographs, transparencies, and other goods that bear the image of these works of art and artifacts. We may have noticed, in particular on the art transparencies, that there are copyright notices and other statements advising us that we may not reproduce copies of the transparencies. These notices appear even where the copyright in the artwork has long passed into the public domain. The institutions offering these transparencies, and the photographers who photographed them, have assumed that it was the newly created photograph in which they could assert copyright ownership. Many of us know of educational institutions, professors, and scholars who have worried about whether they could reproduce copies of those transparencies.

Before I review the judge’s decision in *Bridgeman*, here is the next test question:

Q3. Digitizing public domain print text into electronic text into a digital version of that text:

- (a) Results in a public domain work.
- (b) Results in the creation of a derivative work.
- (c) Results in copyright ownership by the digitizer.
- (d) Requires permission of the publisher of the print work.

The answer, of course, is “(a) results in a public domain work.” That answer is not obvious to some who sell copies of public domain works, who feel as though their technology, skill, effort, labor, time, and attention to detail should result in something protectable. However, unless they give us “original authorship,” they have not met the legal requirement entitling them to copyright.

In *Bridgeman Art Library, Ltd. v. Corel Corp.*, Bridgeman had created transparencies from photographs of public domain artwork. Corel used those images to create digital files of the artwork. Bridgeman sued for copyright infringement. Bridgeman representatives testified

⁸ *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp.2d 191 (S.D.N.Y. 1999).

that it took considerable skill to reproduce transparencies that were as true to the original work as possible, and that had to go from one medium to another. They explained that color bars were used to make sure that “the transparency is a genuine reflection of the colors” of the original works of art. “In creating the transparencies . . . Bridgeman strives to make the transparency look as identical to the underlying work of art as possible.”

The court concluded that “slavish copying,” although doubtless requiring technical skill and effort, did not qualify as authorship. Skill and effort were not the “creative spark” which is the *sine qua non* of originality. “Copyright is not available in these circumstances.”

As far as the legal requirement of “originality,” the federal courts consider this as having been met if the source of the authorship is the author, and is not copied by that author from another source.⁹ “Originality” is nothing like the “novelty” requirement of patent law, and does not imply uniqueness.

INFRINGEMENT

Infringement is the violation of any of the exclusive rights of a copyright owner.¹⁰ Of course, there are a number of procedural requirements that must be met by the plaintiff, and a number of legal defenses that, where applicable, can defeat a claim of infringement.

HOW COPYRIGHT ADVANCES KNOWLEDGE

There are many ways in which copyright fulfills its Constitutional and historical purpose of advancing public knowledge. Some of those are embodied in specific sections of the U.S. Copyright Act, and some arise by the process of common law adjudication.

There is, in this country, a great battle for the heart and soul of copyright. Sometimes it appears to me as if people think that the “right” result is the one that results in greater power for the copyright owner, perhaps as a reward for their effort and, in some cases, sacrifice and commitment. Accordingly, I see many instances where judges react negatively to arguments from defense counsel to the effect that the defendant’s conduct is perfectly lawful, and/or that the plaintiff’s case for copyright infringement must fail. It is as if the exclusions from copyright protection, and limitations on the rights of copyright owners, are technicalities and should be construed narrowly and against the defendant.

If we think about the larger picture of what copyright law is supposed to accomplish, we can see how copyright truly advances the public interest with the following exclusions from copyright protection and limitations on the rights of owners:

⁹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

¹⁰ 17 U.S.C. § 501.

1. No Copyright Protection For Ideas, Processes, Etc.

The U.S. Copyright Act declares that “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”¹¹

These are not considered “authorship” or “expression.” They are protected, if at all, by patent or trade secret, and then to claim protection under those theories, must meet certain legal requirements.

2. The Work Must Be in a Form Sufficiently Permanent That We, the Public, Can Access It.

We do not give copyright protection to works, even those that contain original authorship, if they are not fixed in a medium sufficiently permanent that we can access it. This is referred to as the “fixation” requirement. Under the U.S. Copyright Act, “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”

Without the fixation requirement, we would be granting powerful rights for a work that might not exist in a form that allows us to access, study, learn from, criticize, or build upon it. And if it does not exist in a sufficiently permanent form, it will not be around to enter into the public domain, after which we can freely use it.¹²

3. No Copyright Protection For Forms.

For a number of reasons, there is no copyright protection for forms.¹³ The content and structure of forms are typically dictated by the subject matter of the form, or are representations of systems or methods, thus there are no “creative choices.” (Remember, not all documents organizing information are “forms” and the rule that there is no copyright protection for “forms” still requires a careful analysis as to whether the document is without creative choices.) Giving one person the right to represent data in a particular way gives that person a monopoly, as others will not be able to represent the same categories of information without infringing. Unlike patent law, copyright law grants no monopolies on noncreative representations of information.

4. No Copyright Infringement Without Access to the Underlying Work.

Copyright protection does not prevent the existence of similar works, or even of identical works. Copyright is not like patent, which is a true monopoly. Copyright infringement requires

¹¹ 17 U.S.C. § 102(b).

¹² *Goldstein v. California*, 412 U.S. 546 (1973).

¹³ *Baker v. Selden*, 101 U.S. 99 (1880).

that a person have had access to a work, copied authorship from that work, and create a substantially similar work. It does not give a copyright owner the assurance that others, who have not had access to a particular work, might create another work that is substantially similar.

5. No Copyright Protection For Any Fact, and No Copyright Protection For Unoriginal Arrangements of Facts.

Next test question:

Q4 Copyright does not exist in a fact because a fact:

- (a) Is not authored.
- (b) Can be discovered by two individuals at the same time.
- (c) Can be later disproved.
- (d) Does not require effort to discover.

For seventy years, the federal courts used copyright law to protect works comprised of arrangements of facts. They invented a doctrine to justify this protection, called “sweat of the brow” or “industrious collection.” In 1991, the Supreme Court straightened us out.¹⁴ In the famous decision of *Feist v. Rural Telephone*, the Supreme Court ruled that the white pages of the telephone book were not protected under copyright law because (1) names, addresses, and telephone numbers were “facts” and facts were not “authored” but were “discovered” thus there was no authorship in *any* fact, *ever*; and (2) arrangement in alphabetical order did not evidence any creative choices.

This decision rocked the information industry, which had assumed that the effort and cost that went into collecting facts would give them copyright protection for their collections.

The Supreme Court said “It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation . . . however, this is not some unforeseen byproduct of a statutory scheme. It is, rather, ‘the essence of copyright,’ and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors but ‘[t]o promote the Progress of Science and useful Arts.’ Art. I, § 8, cl. 8. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”

The *Feist* decision is difficult to understand only if you do not yet grasp the concept of “authorship.” As the Supreme Court has said, there is a certain *quid pro quo* when it comes to copyright. If you do not give us (society) a work of original authorship, we will not give you the bundle of rights that we call copyright. The patent parallel is that if you do not give us a novel invention, will not grant you a patent. The trade secret parallel is that if you claim to have a proprietary interest in a formula, process, or compilation of information, it had better be something not generally known or capable of being reverse-engineered. Thus, if you would like

¹⁴ *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991).

to claim the benefit of the rights under an intellectual property doctrine, you have to meet the requirements for claiming that right (and you must accept the limitations that go along with that right).

The Supreme Court reminded us of the importance of not protecting facts under copyright law, referring to the fact that even where a person has taken facts and selected, coordinated, and arranged them in such a way as to have created, as a whole, a work of authorship (a “compilation” as that term is used in the U.S. Copyright Act¹⁵), copyright protection for that compilation extends only to the selection, coordination, and arrangement but will never extend to the facts and data themselves that are selected, coordinated, and arranged.

This is consistent with a central proposition of intellectual property law: not all workproduct is ownable. Not everything that is written down, or that appears in an original work of authorship, is itself original authorship.

What is difficult to understand is that the federal courts had been getting it wrong for seventy (70) years, and had been according copyright protection to the white pages of the telephone book for that entire time. The Copyright Office, too, had been issuing certificates of registration for telephone books. The landmark Supreme Court decision correcting all of this was just twelve years ago. We have been making erroneous assumptions about copyright law for a long time.

6. No Copyright Protection For Published Research.

The *Feist* decision was consistent with decisions that some courts had handed down over the past forty years (40) dealing with published news accounts, research results, and historical theories.

In December, 1968, the daughter of a wealthy Florida land developer was kidnapped from an Atlanta motel room and buried alive in a plywood and fiberglass capsule. She was kept alive by a crude life support system. Gene Miller, a reporter for the Miami Herald covered the story and collaborated with the victim to write a book about the ordeal, which was published in 1971, along with a condensed version in Readers Digest. In January, 1972, a Universal City Studios producer read the condensed version of the book, thought it would make a good movie, and gave the book to a scriptwriter. They negotiated with Miller to purchase the movie rights but no agreement was reached. Universal created a movie and broadcast it as an ABC Movie of the Week. Miller sued for copyright infringement.

The jury found in favor of Miller. On appeal, the verdict was reversed and the case remanded for a new trial, on the grounds that the jury had been instructed by the judge that research was protected by copyright law. The court of appeals noted that “the issue is not whether granting copyright protection to an author’s research would be desirable or beneficial, but whether such protection is intended under the copyright law.” Citing a recently-decided

¹⁵ 17 U.S.C. § 101, 103.

Second Circuit decision, the court stated “we cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. . . It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent.”

“The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if research is held to be copyrightable.” *Miller v. Universal City Studios, Inc.*¹⁶

In the case of *Hoehling v. Universal City Studios, Inc.*,¹⁷ the plaintiff published a book in 1962 about the destruction of the Hindenburg, written as a factual account in an objective, reportorial style; the premise of his book was that the Hindenburg had been deliberately sabotaged by a member of its crew for the purposes of embarrassing the Nazi regime. In 1972, Michael McDonald Mooney published a book about the same event, also offering the hypothesis of sabotage. Universal purchased the movie rights, made a movie, and was sued by plaintiff. The court of appeals affirmed the lower court’s grant of summary judgment, noting that neither facts, ascertained through personal research, nor theories based upon interpretation of historical facts, were copyrightable:

“The line drawn between uncopyrightable facts and copyrightable expression of facts serves an important purpose in copyright law. It provide a means of balancing the public’s interest in stimulating creative activity, as embodied in the Copyright Clause, against the public’s need for unrestrained access to information. It allows a subsequent author to build upon and add to prior accomplishments without unnecessary duplication of effort.”

“The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works. Nevertheless, the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author’s original expression of particular facts and theories already in the public domain.”

Likewise, in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967), the court ruled that defendant’s biography of Howard Hughes did not infringe an earlier biography of the reclusive alleged billionaire. Although the plots of the two works were necessarily similar, there could be no infringement because of the “public benefit in encouraging the development of historical and biographical works and their public distribution . . . To avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots.”

¹⁶ 650 F.2d 1365 (5th Cir. 1981).

¹⁷ 618 F.2d 972, cert. denied, 449 U.S. 841 (1980).

These cases may seem disappointing to some scholars and researchers who desire to possess their research, but once that research is published, we (society) have the same rights to the information and theories as do the researchers.

7. No Copyright Protection For Any Work of the U.S. Government.

The U.S. Copyright Act specifically prohibits any copyright protection for any “work of the United States Government,” which is defined as “a work prepared by an officer or employee of the United States Government as part of that person's official duties.”¹⁸ Thus we may freely copy, adapt, distribute, perform, display, and transmit such things as a report from the EPA, or the Centers For Disease Control and Prevention, or a speech by the President, or a photograph from Hubbell, or a report from the Attorney General, etc., it can be freely copied.¹⁹

We can see that this provision not only enables the citizenry to be more informed and educated, it is pivotal to a free society. Otherwise, “the government” could meaningfully limit participation by those it governed.

One of the disturbing trends in the area of library government collections are companies and organizations that digitize government documents (remember, no copyrights are obtained by mere digitization of uncopyrightable content) and then bundling the material with proprietary software, claiming a copyright in the software and seeking (usually through shrink wrap licenses) to limit the ability of the user to upload, copy, and distribute the government content!

The area of shrink wrap contracts, click wrap contracts, and postings on web sites is heading for a collision with copyright law, in that those contracts seek to limit rights that Congress has specifically reserved to the public.

8. Copyright Notices and Copyright Warnings.

Copyright protection exists at the moment the original authorship is fixed. A work does not have to be registered with the U.S. Copyright Office in order to be entitled to copyright protection, although registration confers certain procedural benefits, but no substantive benefits (that is, no “additional” copyright).

Notices of copyright should be used any time copies of the work is distributed to the public, or offered for public distribution. The notice of copyright for a published work consists of the symbol “©” or the word “copyright,” the year the work was published, and the name of the copyright owner (e.g., © 2003 Susan M. Kornfield).

¹⁸ 17 U.S.C. § 105.

¹⁹ Although there is not a corollary provision in the Copyright Act dealing with works created by state governments, there are judicial decisions finding that state statutes, judicial decisions, minutes of meetings of state officials, reports of state officials, regulations, and other written workproduct that are the framework for official accountability and citizen participation in a democracy, are not protected by copyright law.

Copyright attaches whether a work is published or unpublished (meaning, for example, still in manuscript form). There is no particular form of notice required for a work that has not been published, and a simple statement to the effect that “The copyright in this work is owned by Dr. Eli Singer” will suffice to put someone on notice that copyright ownership is claimed in the work.

The notice of copyright does not mean that a work is registered with the U.S. Copyright Office, and does not mean that copyright even exists in a work (the telephone book contains copyright notices, as do many works that are later found not to be copyrightable). A notice of copyright means that copyright protection is being asserted, to the extent it exists. It preserves the rights of owners to defeat certain defenses from a party who later claims that they had no idea copyright was being claimed in a work.

Thus, we should not assume that the existence of the notice has any bearing as to whether a work is protected by copyright law. The proper question is whether the work contains authorship that is still under the term of copyright protection. The copyright in a work still under the term of copyright protection does not extend to the portions in which copyright has expired.

The warnings that appear in the front of most literary works, CDs, and DVDs, to the effect that no copying is lawful, are patently false. I have a book entitled “The American Intellectual Tradition” which contains essays from 1630 – 1865. None of those essays are under copyright protection (indeed, many predate the existence of the country, much less the existence of copyright law), although the copyright notice, from Oxford University Press warns, in the scariest language possible, that no portion of the work may be reproduced.

Statements such as this are used routinely by publishers to limit the uses that people might otherwise make of the material – indeed, material in which there exists no copyright whatsoever! Those warnings are false and may be ignored when the portion to be copied is not under copyright. Some day, when the U.S. Justice Department is finished with Microsoft, it should turn its attention to the clearly illegal tactics of publishers.

9. No Control Over the Right of Fair Use.

One of the most important limitations on the right of a copyright owner is the right of fair use. Fair use is a right of users, and its purpose is to assist copyright law in achieving its purpose – “promoting broad public availability of literature, music, and the other arts.”

Although these ringing words from the U.S. Supreme Court may sound as though the Court is granting permission to copy anything and justify it by asserting that such copying broadens public access to works, the fair use calibration is not so easy (as you know), or else there would end up being no protection for works used in the educational and academic environments (and no need to consult attorneys, for that matter).

A. The Language of the Copyright Act.

The right of fair use is expressly set forth in the Copyright Act. The entirety of that section states:

“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, new 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.”²⁰

B. Some Important Fair Use Threshold Issues.

Fair use is not an infringement. Fair use is a limitation on the rights of copyright owners. According to the Supreme Court, fair use exists notwithstanding the copyright owner’s attempt to prohibit it, or to charge a fee for such use.²¹

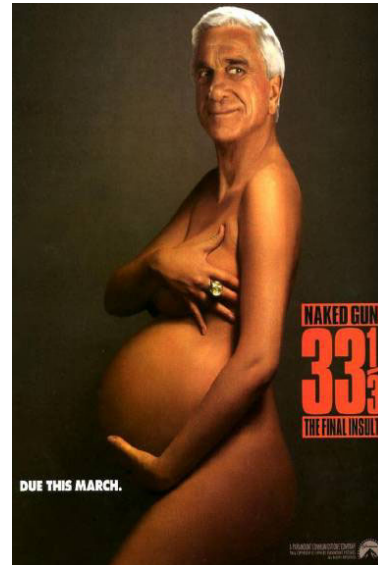
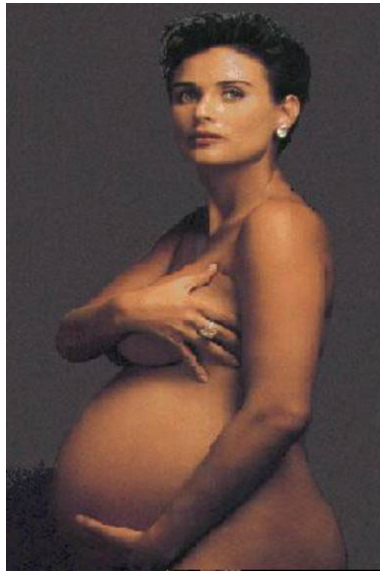
Courts have grown increasingly comfortable with the notion that copying a work for purposes of parody, criticism, and commentary, is likely to be a fair use.²² Example are the copying by Paramount Pictures of the famous Annie Leibovitz photograph of Demi Moore (with the face of actor Leslie Nielsen instead of the face of Demi Moore) in order to parody what the court called the “pretentious seriousness” of the Moore expression. The copying was found to be fair even though almost the entire work was copied and the use was commercial.²³

²⁰ 17 U.S.C. § 107.

²¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (commercial use of a copyrighted work can be a fair use).

²² Part of the rationale for finding criticism and parody to be allowed a greater scope of copying is that the copyright owners of those works are not likely, or less likely, to grant permission. Thus, where you are asked to copy something for the purpose of enabling criticism or parody, the right of fair use may be broader.

²³ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).



The federal court deciding the *Leibovitz* case, above, would probably not have reached its conclusion that a commercial parody can be a fair use had not the rap group 2 Live Crew decided to do its own version of the song “Pretty Woman.” Two Live Crew asked permission from the Estate of Roy Orbison (the copyright owner of “Pretty Woman”), to do a rap parody version. The Estate said “no.” Two Live Crew did it anyway. The Estate sued for copyright infringement. The trial court ruled that 2 Live Crew’s version was parody, that parody is a type of commentary and criticism, and is thus a type of protected speech under the fair use doctrine.

The court of appeals overruled, stating that every commercial use was presumptively unfair. On appeal, the U.S. Supreme Court, in 1996, ruled that parody is indeed a type of commentary and criticism; that we can use creative works for purposes of parody, we can make a commercial use of those works, and that we do not have to seek permission from the copyright owner, or pay fees to the copyright owners, when the uses are fair uses.²⁴ In the 2 Live Crew decision (technically, the “*Campbell*” decision), the Supreme Court stated that there was still an open fact question, namely whether 2 Live Crew’s version harmed the rap, nonparody market, and sent the case back down to the trial court for an answer to that question. The parties settled.

To me, an important aspect of the *Campbell* decision was that it decimated the rationale of the 1991 *Kinko’s* decision.²⁵ In *Kinko’s* a New York trial court ruled that a for-profit copy shop could not reproduce coursepacks for students at the request of their professors, a practice that had been in existence for decades. That decision, which was poorly analyzed and failed to grasp fundamental copyright fair use issues, stayed at the trial court level and was never ruled upon by the U.S. Supreme Court. However, because of the heavy promotion of the *Kinko’s* decision by the Association for American Publishers, universities, businesses, copyshops, and others somehow got the impression that *Kinko’s* was the law of the land.

²⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (commercial use of a copyrighted work can be a fair use).

²⁵ *Basic Books, Inc. v. Kinko’s Graphics Corporation*, 758 F. Supp. 1522 (S.D. N.Y.1991).

But I would like to show you the four pillars on which *Kinko's* rested, and how the U.S. Supreme Court knocked out those pillars in its copyright fair use decision of *2 Live Crew*.

- Commercial Use.

One of the bedrocks of the *Kinko's* decision was that “every commercial use of a copyrighted work is presumptively an unfair use.” The Supreme Court held it was reversible error to rule that a commercial use is presumptively an unfair use.

- Transformative Use.

One way that certain fair uses can educate and inform us is where the use takes the underlying work and portrays it to us so that we see it differently. Such a use is sometimes referred to as “transformative.” An example of this is the rap parody version of a love song.

Kinko's stated that a use must be transformative to be fair, but the Supreme Court rejected that proposition. It reached out to the world of photocopying for students and declared that “The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.” Now take a moment and think about this. The *2 Live Crew* case was about music. It had nothing to do whatsoever with reproduction of materials for classroom use, and yet the Supreme Court went out of its way to tell us that straight reproduction for classroom use is an example of a fair use where it is ridiculous to require “transformation” of the underlying material.

- Use of the “Heart of the Work.”

As to the issue of the qualitative and quantitative amount of the copying from the underlying work, courts have sometimes asked whether the alleged fair user used “the heart of the work.” We might say that this is another way of asking if the user used more than was necessary to accomplish the task, and if the use is likely to simply act as a market substitute for the underlying work.

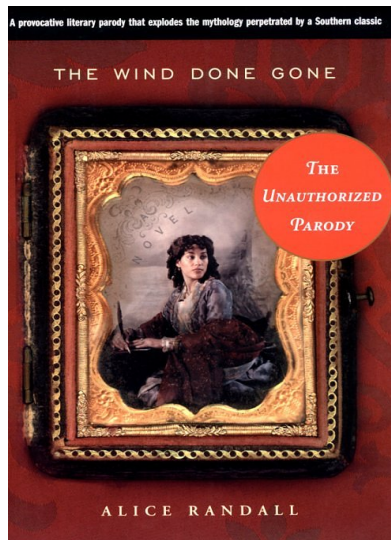
Kinko's ruled that whatever the professors selected for copying must have been the heart of the work or else the professor would not have selected it; thus whatever was selected was too much and unfair. (Note circularity of that reasoning.) But the Supreme Court held that a fair use may include copying the “heart” of a work, and that the proper inquiry looks to the purpose for the use and the effect of the use on the market for the work.

- The Relevance of Permission Fees.

Kinko's held that the publishers' permission system for charging for the making of multiple copies for classroom use was relevant to whether the publishers were injured when they were not paid classroom copying fees. (Again, note the lack of integrity in this argument – if I am not obligated to pay you a fee, then the fact that you want the fee is beside the point.) The Supreme Court ruled, in *Campbell (2 Live Crew)*, that a court may not consider, as economic injury to a copyright owner, claimed injury to the fair use market.

Now, with all this lovely copyright fair use jurisprudence from the highest court in the land, you might think that the publishing trade groups would respect the rights of users. You would be mistaken. We face the same kind of thinking that gripped the copyright world in England in the 1500's.

There have been a few interesting battles, however.



Above, we see the cover of the book “The Wind Done Gone,” by Alice Randall. It was published two years ago and marketed as a parody of “Gone With the Wind” by Margaret Mitchell. Ms. Randall said that the original story painted the black characters as one-dimensional, stupid, and lacking character. She wanted to take those characters and give them lives, motives, loves, and depth. The Estate of Margaret Mitchell was not amused, regarding the story as something sacred and over which it had complete control. The Estate sued. Both sides lined up impressive experts, one side claiming that “The Wind Done Gone” was a blatant rip off and the other claiming it showed the time period and the original story in an entirely different light and was a fair use of the underlying characters, plot, sequence of events, etc.

The trial court ruled that the fair use defense was not likely to succeed, and ordered the presses to stop and the book banned. The case went immediately to the U.S. Court of Appeals for the Eleventh Circuit (interestingly, which sits in Atlanta), and which ruled from the bench that serious and important copyright fair use issues existed, that the injunction violated the First Amendment to the U.S. Constitution, and that the use was likely to be found to be fair. It is a rather dramatic and thrilling opinion, and I highly recommend that you read it for a history of fair use, and a very contemporary application of its principles on a topic of great importance to the country, namely racial stereotyping.²⁶

²⁶ *SunTrust Bank v. Houghton Mifflin*, 252 F3d 1166 (11th Cir. 2001).

Finally, another fascinating dispute can be heard at www.evolution-control.com. At that site, navigate to the song “Rocked By Rape,” which is a commentary on the evening news. The Evolution Control Committee sampled the CBS Evening News and the newscast of Dan Rather, combined it with some riffs from ACDC, and made a scathing statement about the substance (or lack thereof) in television news reporting. CBS News was furious, writing a somewhat goofy letter accusing the Evolution Control Committee of various intellectual property transgressions, including using the CBS Name, the opening theme music, Dan Rather’s name, Dan Rather’s voice, and the actual CBS recorded sound. There was a somewhat amateurish but successful return volley from ECC and CBS went away. I love the composition, and I love the ideas and criticism conveyed.

If we still have fair use rights in 10 years, it will be because of creative, tough, opinionated artists.

PARSING OUT THE FAIR USE FACTORS

I want to close this discussion of fair use with a list of factors that are relevant to the fair use inquiry. There are no percentages or other bright lines when it comes to the calibration of fair use. The core inquiry for fair use is whether the use is likely to supplant or replace the functioning market for the underlying work. Even if a relatively small amount of copying is a substitute for having the students purchase their own copy of the work, the copying is likely to be an infringement and not to be fair.

► Here are examples of factors that weigh in favor of fair use:

- (1) The purpose for the copying is for one of the uses identified in the fair use section of the Copyright Act, namely criticism, comment, new reporting, teaching (including multiple copies for classroom use), scholarship, or research.
- (2) The intended use is personal, as opposed to commercial.
- (3) The intended use is nonprofit, as opposed to commercial.
- (4) The intended use is educational and nonprofit.
- (5) There is no charge by the copy shop for the material, only for the service of copying and binding, etc.
- (6) The copy shop does not engage at all in the decision as to what should be copied, or the amount of the material to be copied.
- (7) Only so much of the work is copied as is needed to accomplish that purpose.

- (8) The amount assigned is not a substitute for the purchase of a copy of the work.
- (9) The author is properly identified (if known).
- (10) The publisher is properly identified (if known).
- (11) The underlying work is otherwise not available (out of print).
- (12) The material to be copied has not been stolen.
- (13) The material to be copied is more in the realm of factual as opposed to highly imaginative (this does not work for the humanities, and may not even be relevant in light of the Supreme Court's decision in *2 Live Crew*).
- (14) The work has been published, so that the copying will not deprive the copyright owner of the right of first publication. If the work has not been published, then the person requesting the copying should be the copyright owner.
- (15) The copyright owner is difficult to locate, even after a good faith search.
- (16) In circumstances where the copyright owner is hard to locate or unreasonable but you have been able to locate the author, the author gives you permission.
- (17) There is no ready market for permissions.
- (18) The type of copying, if it were widespread, would not have an appreciable effect on the market for the work.
- (19) The materials will not be bound together and replace the purchase of a book (this is, I appreciate, a ridiculous factor, but it is one that at least 8 judges out of 13 on the U.S. Court of Appeals for the Sixth Circuit thought made sense in 1996).

SOME CLOSING THOUGHTS FOR POLICY MAKERS

- At least “do no harm.” If you can’t create a rational copyright policy, please do nothing.
- Get real legal advice from attorneys who understand the law and your circumstances. Don’t use someone else’s antibiotics and don’t use their legal advice, either.

- Understand when you are getting legal advice and when someone is making a risk management decision cloaked as legal advice. It is amazing how often attorneys or managers answer a question with “because the law says so” when the law does not say so, or does not exactly say so, or when we really are not sure what the law says. Anyway, the law changes, new cases come down, new practices evolve. Stay on top of this ever-changing area.
- Educate your team, your boss, your board of trustees. Otherwise, they will make decisions anyway, even if they wildly guess at what the law requires.
- Understand the rights of owners and the limitations on those rights. While you have to respect the rights of copyright owners, you have to understand that those rights come with built-in limitations.
- Understand when your use of materials is outside the copyright owner’s control.
- Understand the rights of users.
- Don’t narrow your rights of fair use. On the other hand, don’t assume that because you mean well, and you are a nonprofit, your use will be fair.
- Don’t accept contracts that narrow your rights.
- Don’t assume every copyright decision applies to you.
- Copyright owners overstate their rights.
- Nonprofit users sometimes overstate their rights.
- Look for organizations with balanced policies.
- Exercise good faith.
- Stop worrying about going to jail! Jail is for copyright pirates, not for those who make a mistake in good faith.

Thank you for your time this morning. It has been a pleasure talking with you.

Susan M. Kornfield, J.D.
Bodman, Longley & Dahling LLP
110 Miller, Suite 300
Ann Arbor, Michigan 48104
skornfield@bodmanlongley.com
(734) 930-2488
www.bodmanlongley.com