

ENTERTAINMENT AND SPORTS LAWYER

A PUBLICATION OF
THE ABA FORUM ON
THE ENTERTAINMENT
AND SPORTS INDUSTRIES

VOLUME 28, NUMBER 3
FALL 2010



In re Dewey Ranch Hockey II *A Pragmatic Outcome to the Phoenix Coyotes* *Section 363 Dispute*

BY ALAN S. GOVER AND IAN J. SILVERBRAND

PSE Sports & Entertainment, LP ("PSE"), an acquisition vehicle controlled by James Balsillie, twice attempted to secure approval from the Bankruptcy Court of the District of Arizona (the "Bankruptcy Court") to purchase the Phoenix Coyotes franchise from Dewey Ranch Hockey, LLC (the "Debtor" or "Dewey Ranch Hockey") and then relocate the hockey team to Hamilton, Ontario, Canada. In *Dewey Ranch Hockey I*, the Bankruptcy Court rejected the first attempt because "there [wa]s no factual or legal history for the court to analyze," and because there was insufficient time for all of the critical bankruptcy and antitrust issues to be fairly presented.¹ Considering

CONTINUED ON PAGE 23

Fair Use and Its Application in News and Reviews

A Defense to Copyright Infringement and *Not a Doctrine*

BY PIERRE VUDRAG

Imagine that *Rolling Stone* music critic David Fricke, while reviewing U2's latest CD, wants to include a small portion of U2's lyrics to underscore his criticism in his review of the album but is prevented from doing so because the inclusion of the lyrics would be deemed copyright infringement and could lead to potential litigation. Or ESPN's *SportsCenter* is prevented from including clips of Carlos Lee's three-run homer lifting the Houston Astros to a 3–2 win over the St. Louis Cardinals because of a potential lawsuit for copyright infringement. Without the ability to use the lyrics in the review or the video clips in the news story to highlight the commentary without repercussion, negative

CONTINUED ON PAGE 28

PROFILE

Peter Dekom *The Creative* *Translator*

BY ALISON LANDIS

A shy junior takes the podium in front of what seems to be an endless ocean of blank stares. The silence is deafening, and it takes all of this shy junior's might to push past the fear and speak to the group. He originally entered the race for class president as a class clown, but after learning more about the issues in the school, decided that he wanted to do something positive and effect change. When he addressed the audience, he did so with the might and veracity of a championship boxer, something that would become one of his signatures. In one unrehearsed speech, this shy junior ripped apart his opposition's arguments, illustrated problems that needed to be addressed, and outlined his plan for attacking such problems. In this moment at an international school in Beirut, Lebanon, Peter Dekom found his voice. The next day the school was plastered with flyers and campaign posters of his speech that his newly inspired classmates posted. Dekom won the race by the largest landslide in school history.

Since that time, Dekom has grown into a talented and highly regarded businessman who advises governors, politicians,

CONTINUED ON PAGE 36

comment or criticism would be suppressed. Fair use is a doctrine that is used to encourage criticism and commentary of copyrighted works. It is based on the concept that one should be free to use portions of copyrighted materials, such as music lyrics, thumbnail images of works of art, brief excerpts from novels, short film clips, and sports highlights, without asking permission from the copyright owner.

To understand the principle of fair use, one must have a cursory understanding of copyright law and the protection it provides to both published and unpublished works to prevent the violation of any rights owned by the holder of such copyright. Without getting mired in the minutia of well-accepted copyright principles, suffice it to say that fair use is an equitable principle that has been defined as “a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without consent, notwithstanding the monopoly granted to the owner by the copyright,”¹ and is frequently used as a defense if sued for copyright infringement.

WHEN COMMENTING ON OR CRITIQUING A COPYRIGHTED WORK, FAIR USE PRINCIPLES WOULD ALLOW ONE TO REPRODUCE SOME OF THE WORK TO ACCOMPLISH ONE’S INTENT.

To get a general sense of how fair use is applied, one must understand a set of fair use factors outlined in the lineage of case law dealing with copyright infringement. These factors, which in some cases are confusing and contradictory, are weighed in each case to determine whether a use qualifies as a fair use, often through varying court decisions with an expansive or restrictive meaning that could be open to interpretation. If a use is deemed not to be a fair use, then one would essentially be infringing upon the rights of the copyright owner and may be liable for damages. Unfortunately, even if you strictly follow these factors and the copyright owner disagrees with your fair use interpretation, your dispute may have to be resolved through litigation or the payment of licensing fees.

Fair use in the general sense, with no hard-and-fast rules, is the use of copyrighted material without permission from the appropriate copyright owner for a limited and, as the courts deem, “transformative” purpose so as to comment on, criticize, or parody such copyrighted work. The concept of fair use has existed in common law for more than a century and was codified in the 1976 Copyright Act in section 107. Additionally, there are several court cases that help to define what is meant by a “transformative” use. Specifically, the Supreme Court emphasized that the transformative use factor determines whether the material has been used to assist in the creation of something new, rather than merely copied verbatim into another work. In other words, one must ask:

- 1) has the material taken from the original work been transformed by adding new expression or meaning? (For example, has commentary been added to highlight footage of a tennis match that brings something new to the audience other than just telling them that, e.g., Andy Roddick lost the Wimbledon final to Roger Federer?); and
- 2) was value added to the original thereby creating new information, or new aesthetics, or new insights and understandings? (In other words, has the use of the highlights and commentary provided the audience with a new insight into how Andy Roddick lost to Roger Federer, other than just giving the audience a blow-by-blow description of the action that they can see for themselves on the screen?)

Generally, two categories are used when making a fair use—commentary (which includes criticism) or parody. Generally, when focusing on news and editorial reviews, one would look to the first category, commentary. When commenting on or critiquing a copyrighted work, fair use principles would allow one to reproduce some of the work to accomplish one’s intent. Some examples of commentary and criticism include:

- 1) using a small portion of a clip highlighting an outrageous comment by Glenn Beck in a news report;
- 2) using a sports clip from a game when reporting on the outcome of that game;
- 3) when reporting on an actor’s arrest or death, using a short clip from a movie featuring such actor;
- 4) summarizing and quoting from a medical article on steroid use in sports in a news report; or
- 5) quoting a few lines from a Sheryl Crow song in a music review.

Courts have generally used four factors in resolving fair use disputes, which are laid out in section 107 of the Copyright Act:

- 1) the purpose and character of the use;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion taken; and
- 4) the effect of the use upon the potential market.

PURPOSE AND CHARACTER OF THE USE

The “purpose and character” factor of fair use is often the determining factor in many fair use decisions, as it allows the court to take a subjective look into the potentially infringing party’s intentions behind the use. Particularly in cases involving news reports, footage, reviews, and sports highlights, this factor typically favors the party claiming fair use for various reasons.

The first thing that we need to know is that copyright protection does not protect factual information conveyed in the copyrighted work, meaning that publicizing the scores of a sporting event or other factual information such as injuries, retirement, and so forth is considered fair use and does not constitute copyright infringement. What helps to strengthen a fair use argument in a case not involving the use of mere factual information is the use of the copyrighted material for the purpose

of *legitimate* news commentary. For example, when using a clip or photograph to report the results of a sporting event or other factual information, courts have regarded the use of copyrighted material as fair use when the use is

- 1) brief quotations or use;
- 2) use in a news report; and
- 3) use in a newsreel or broadcast of a work located in the scene of an event being reported.

The key determination, which news programs and organizations use to test fair use, is whether the *use is for purposes of commentary, criticism, or news reporting* and in a bona fide *news program*, such as ABC News or ESPN's *SportsCenter*. Uses for these purposes strengthen the argument in favor of fair use, especially if the use of the copyrighted clip includes the reporting on a fairly recent event (usually within 24 to 48 hours) and the clip is used to underscore the reporting and commentary on the factual outcome of the event.

NATURE OF THE COPYRIGHTED WORK—PUBLISHED OR UNPUBLISHED

The scope of fair use is narrower for unpublished works because an author has the right to control the first public appearance of his or her expression. You didn't see a news story with any footage from the last *Indiana Jones* film. This is because Steven Spielberg went through a lot of trouble to keep the picture under wraps until he and the studio decided to release limited amounts to the public to promote the film's release. Because an author has the right to control the first public appearance of his copyrighted work, you have a stronger argument in favor of fair use if the material copied is from a published work rather than an unpublished work.

AMOUNT AND SUBSTANTIALITY OF THE PORTION TAKEN

A general misnomer in a fair use application is the "seven-second rule," which many clearance representatives follow. A brief use of footage may not be deemed fair use unless all fair use factors can be applied. But the amount of footage used is a key factor in determining if a use is not fair, as highlighted in a key 1977 court case. The Second Circuit found that a CBS affiliate's use of a one-minute-and-15-second clip of a 72-minute Charlie Chaplin film was not a fair use when used in a news report about Chaplin's death. The court deemed that the portions taken were "substantial" and part of the "heart" of the film.²

THE CONCEPT OF FAIR USE HAS EXISTED IN COMMON LAW FOR MORE THAN A CENTURY AND WAS CODIFIED IN THE 1976 COPYRIGHT ACT IN SECTION 107.

The court's analysis may have been different if CBS had used only a limited portion of the footage to simply enhance its news commentary on Chaplin's death. However, the extended use for more than a minute appeared to be more of a way to exploit the footage rather than a complement to the brief commentary on Chaplin's death. CBS's use in this newscast did not transform the use of the footage or add new expression or meaning to the footage. It didn't add any value to the original by creating new information, aesthetics, insights, and understandings of the film. CBS simply used the film as a backdrop to the news story that Charlie Chaplin had died and let the film clip run onscreen without commentary for an extended period of time. The Second Circuit's ruling is a clear indication that this type of use will never be considered fair use.

EFFECT OF THE USE UPON THE POTENTIAL MARKET

One of the most important fair use factors is whether the use deprives the copyright owner of income or undermines a new or potential market for the copyrighted work. If a copyright owner feels that he or she has been deprived of income, this is very likely to trigger a lawsuit. This is true even if you are not competing directly with the original work. An example is when artist Jeff Koons used a copyrighted photograph without permission as the basis for sculptures depicting a man and woman holding puppies. Although certain aspects were exaggerated, the photo was copied in detail. Koons earned several hundred thousand dollars selling the sculptures. When the photographer sued, Koons claimed his sculptures were a fair use because the photographer would never have considered making sculptures. The court disagreed, and said that it did not matter whether the photographer had considered making sculptures; what mattered was that a potential market for sculptures of the photograph existed. Koons' use of the photograph was deemed not fair use.³

While the four-factor test of Copyright Act section 107 provides a firm foundation for understanding which uses are fair uses, courts have infamously favored different factors in different cases, resulting in very unpredictable outcomes. Because it is often quite difficult to predict how a court will interpret the facts in a fair use determination, the most advisable approach is to seek the copyright holder's permission to use the material beforehand, whether it is offered free of charge or in the form of a license. Obtaining the copyright holder's permission, however, often proves to be a daunting task, especially in the news reporting industry where timeliness and exclusivity are often critical.

One may be led to believe that the unique requirements of the news reporting industry and the hardships those requirements create in obtaining permission make news reports a special candidate to receive fair treatment under fair use. After all, section 107 specifically lists "news reporting" as an example of fair use that does not infringe on the underlying copyright. But even in the most cut-and-dried cases that appear to fall under section 107's protection, the courts remain unpredictable.

Most Americans have seen the video of Reginald Denny's brutal beating during the Los Angeles riots of 1992, after the acquittal of police officers involved in the beating of Rodney King. Many may not realize that the footage of the beating caught by an overhead media helicopter resulted in an ugly legal battle over fair use, which proved that even exemplary "news reports" cannot always depend on the fair use defense. The Denny beating was caught on camera by an overhead helicopter operated by Los Angeles News Service ("LANS"), an independent news organization that often licenses news stories, footage, and other audiovisual works out to other media outlets. LANS had issued more than a dozen footage licenses for the helicopter shots of the beating to other media outlets but refused to issue a license to KCAL radio station. KCAL obtained the footage from another source, without paying any licensing fee, and aired the footage a number of times in the coming days.⁴

YOU HAVE A STRONGER ARGUMENT IN FAVOR OF FAIR USE IF THE MATERIAL COPIED IS FROM A PUBLISHED WORK RATHER THAN AN UNPUBLISHED WORK.

While the Ninth Circuit engaged in a thorough analysis of each fair use factor, the court was strongly convinced that KCAL's use of the footage was highly commercial, thus depriving LANS of an opportunity to make a profit (therefore failing to satisfy the "no effect on the market" factor). While the opinion repeatedly admitted that many factors, including the transformative, informational, and factual nature of the *news report*, weighed heavily in favor of KCAL, the court felt the commercial nature of the use was enough to overcome a fair use defense, therefore finding that KCAL's use was an unlicensed infringement of LANS's copyrighted work.

What makes this case unique and somewhat surprising in terms of "fair use" analysis is the fact that KCAL in fact reached out to LANS seeking a license, and only resorted to the fair use defense once that license request was rejected. Is it "fair" for KCAL to be left without news footage that other news agencies had received license rights to broadcast? Perhaps the court felt that LANS's consistent role as footage licensor made the commercial nature of this case more important than the typical fair use determination.

Regardless of the application and rationale based on the specifics of this case, *LANS v. KCAL* stresses the unpredictability of a court's fair use analysis, even in situations relating to news footage and highlights, in which many may consider fair use protection to be fundamentally necessary. This unpredictability, in turn, emphasizes the high importance of making every possible attempt to obtain the rights holder's permission to use the footage, if possible. One should only consider relying on the fair use factors as a last resort, when all else fails.

When the copyright holder is outside the United States, the importance of seeking the holder's approval before resorting to fair use is multiplied exponentially. Until recently, fair use was a concept unique to U.S. copyright law (however, some common law countries have begun to adopt the concept of fair use in their copyright laws). To be safe, it is not advisable to syndicate or license any news programs containing fair use material outside the United States without getting permission from the rights holders in each country.

The difficulty in claiming fair use is that there is no predictable way to guarantee that a use will actually qualify as a fair use. While one may follow the fair use factors and might believe that their application of the factors qualifies their use as fair use, if the copyright owner disagrees, the dispute may have to be resolved in court. Even if one ultimately wins such a suit, the outcome in one's favor could come at great expense and time

and may outweigh any benefit of using the material in the first place without first seeking permission and possibly paying a license fee. Because there is a sizable gray area in which fair use may or may not apply, there is never a guarantee that your use will qualify as a fair use.

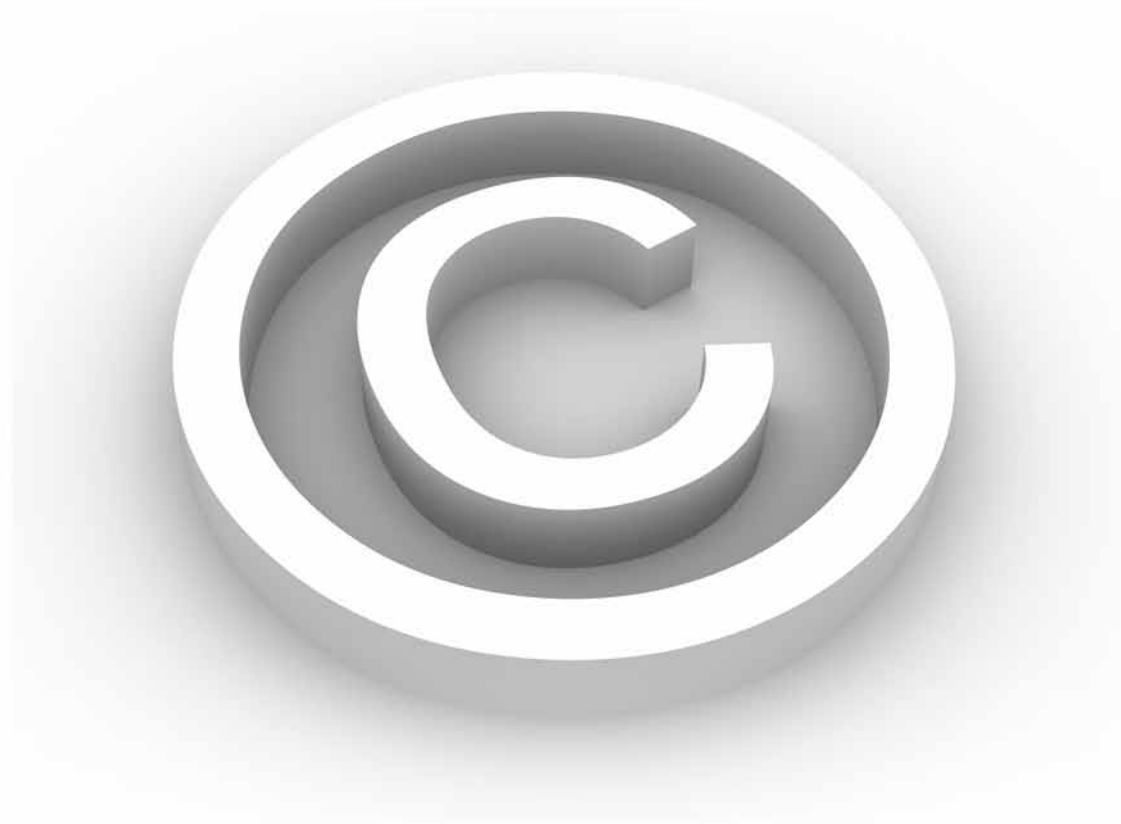
So how does a news organization invoke fair use without invoking potential litigation and falling within the permitted guidelines established by case law? The simplest way is to get permission from the copyright holder, but this is not always possible given the fluidity and immediacy of news reporting. To invoke fair use when using noncleared third-party clips, the news organization should follow these guidelines: (1) make sure the use is for a legitimate *news report*; (2) the clip should only be used when reporting on a *fairly recent news event* (usually 24 to 48 hours); (3) make sure that the use is a *brief use* of the clip to underscore the reporting of the news; (4) there must be actual *commentary* or *criticism* by a news reporter or anchor of the action appearing in the clip (remember: there has to be a "transformative use" of the copyrighted material); (5) if reporting on a sporting event, make sure the event *has been concluded*, meaning it may not be fair use if the game has not been completed (most sports rights holders deem use of sporting footage before a game has been completed as not a fair use, so remember not to deprive the copyright owner of income); and (6) the materials should be used in a bona fide news program. ♦

Pierre Vudrag serves as in-house general counsel for the Los Angeles based cable network, Tennis Channel, where he oversees all business and legal affairs, including rights, programming, content and library acquisition, intellectual property matters, marketing and affiliate matters, litigation issues, and all operations of the channel's studio facilities. He can be reached at pierre.vudrag@gmail.com.

ENDNOTES

1. Horace Ball, *The Law of Copyright and Literary Property* 260 (1944).
2. Roy Export Co. Establishment of Vaduz v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1100 (2d Cir. 1982).
3. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).
4. See *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).

FAIR USE QUIZ



Fair use often requires us to judge for ourselves whether the use of copyrighted material will qualify as a fair use, leaving us vulnerable to a challenge by the copyright owner if they believe their rights have been infringed upon. Courts must then engage in a fact-intensive study, based on the above-mentioned fair use principles, to determine if the use was fair. To test your understanding of the fair use principles and your ability to predict what the courts will decide, use the following fact patterns and resulting court decisions to determine if the use of copyrighted material qualifies for the fair use defense.

CASES INVOLVING TEXT

1 An author copied more than half of an unpublished manuscript to prove that someone was involved in the overthrow of the Iranian government.

2 A biographer of Richard Wright quoted from six unpublished letters and 10 unpublished journal entries by Wright.

3 A biographer paraphrased large portions of unpublished letters written by the famed author J.D. Salinger. Although people could read these letters at a university library, Salinger had never authorized their reproduction. In other words, the first time that the general public would see these letters was in their paraphrased form in the biography. Salinger sued to prevent publication.

4 *The Nation* magazine published excerpts from former President Gerald Ford's unpublished memoirs. The publication in *The Nation* was made several weeks prior to the date of serialization of Ford's book in another magazine that had already purchased the exclusive rights to publish the memoirs.

5 A company published a book entitled *Welcome to Twin Peaks: A Complete Guide to Who's Who and What's What*, which contained direct quotations and paraphrases from the television show *Twin Peaks* as well as detailed descriptions of plot, characters, and setting.

6 A company published a book of trivia questions about the events and characters of the *Seinfeld* television series. The book included questions based on events and characters in 84 *Seinfeld* episodes and used actual dialogue from the show in 41 of the book's questions.

7 Publisher Larry Flynt made disparaging statements about the Reverend Jerry Falwell on one page of *Hustler* magazine. Falwell made several hundred thousand copies of the page and distributed them as part of a fund-raising effort.

RESULTS CASES INVOLVING TEXT

1. **NOT A FAIR USE.** *Love v. Witny*, 772 F. Supp. 1367 (S.D.N.Y. 1989).

Important factors: A substantial portion was taken (half of the work) and the work had not yet been published.

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

Important factors: No more than 1 percent of Wright's unpublished letters were copied and the purpose was informational.

3. **NOT A FAIR USE.** *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

Important factors: The letters were unpublished and were the "backbone" of the biography—so much so that without the letters the resulting biography was unsuccessful. In other words, the letters may have been used more as a means of capitalizing on the public interest in Salinger than in providing a critical study of the author.

4. **NOT A FAIR USE.** *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

Important factors: *The Nation's* copying seriously damaged the marketability of Ford's serialization rights.

5. **NOT A FAIR USE.** *Twin Peaks Productions v. Publications International, Ltd.*, 996 F.2d 1366 (2d Cir. 1993).

Important factors: The amount of the material taken was substantial and the publication adversely affected the potential market for authorized books about the program.

6. **NOT A FAIR USE.** *Castle Rock Entertainment, Inc. v. Carol Publ. Group*, 150 F.3d 132 (2d Cir. 1998).

Important factors: As in the *Twin Peaks* case, the book affected the owner's right to make derivative *Seinfeld* works such as trivia books, thereby having an impact on the copyright holder's potential market.

7. **FAIR USE.** *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526 (C.D. Cal. 1985).

Important factors: Rev. Falwell's copying did not diminish the sales of the magazine (because it was already off the market) and would not adversely affect the marketability of back issues.

INTERNET AND SOFTWARE CASES

1 The Los Angeles County Sheriff's Department purchased 3,663 licenses to use a software program but installed the software onto 6,007 computers. Although the software was installed onto 6,007 computers, the computers were configured such that the total number of workstations able to access the installed software did not exceed the total number of licenses the Sheriff's Department purchased.

2 Entire publications of the Church of Scientology were posted on the Internet by several individuals without the church's permission.

3 The *Washington Post* used three brief quotations from Church of Scientology texts posted on the Internet (see previous case).

MUSIC CASES

1 A karaoke manufacturer paid a compulsory license fee for the right to reproduce musical compositions on its machines. The music publisher requested an additional fee for the right to reproduce the lyrics on the karaoke video monitor. The manufacturer refused to pay additional fees and claimed that it had a fair use right to reproduce the lyrics.

2 A woman was sued for copyright infringement for downloading 30 songs using peer-to-peer file-sharing software. She argued that her activity was a fair use because she was downloading the songs to determine if she wanted to later buy them.

3 A television film crew, covering an Italian festival in Manhattan, recorded a band playing a portion of a copyrighted song, "Dove sta Zaza." The music was replayed during a news broadcast.

RESULTS INTERNET AND SOFTWARE CASES

1. **NOT A FAIR USE.** *Wall Data Inc. v. Los Angeles County Sheriff's Department*, 447 F.3d 769 (9th Cir. 2006).

Important factors: The installation of the software onto nearly all of the sheriff's office computers was not transformative, did not promote an advancement of the arts, and was commercial in nature.

2. **NOT A FAIR USE.** *Religious Technology Center v. Lerma*, 40 U.S.P.Q.2d (BNA) 1569 (E.D. Va. 1996).

Important factors: Fair use is intended to permit the borrowing of portions of a work, not complete works.

3. **FAIR USE.** *Religious Technology Center v. Pagliarina*, 908 F. Supp. 1353 (E.D. Va. 1995).

Important factors: Only a small portion of the work was excerpted and the purpose was for news commentary.

RESULTS MUSIC CASES

1. **NOT A FAIR USE.** *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522 (9th Cir. 2008).

Important factors: Display of the lyrics was not a fair use because singing along to lyrics was not a transformative use, the karaoke company used all of the lyrics, and the manufacturer's use was for profit.

2. **NOT A FAIR USE.** *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

Important factors: Because numerous sites, such as iTunes, permit listeners to sample and examine portions of songs without downloading, the court rejected this "sampling" defense.

3. **FAIR USE.** *Italian Book Corp. v. American Broadcasting Co., Inc.*, 458 F. Supp. 65 (S.D.N.Y. 1978).

Important factors: Only a portion of the song was used, it was incidental to the news event, and it did not result in any actual damage to the composer or to the market for the work.

ARTWORK AND AUDIOVISUAL CASES

1 A Google search engine returned search results displaying thumbnail photos from a subscription-only Web site (featuring nude models), inducing the copyright holder of the photos to file suit against Google for copyright infringement.

2 Reproduction of Grateful Dead concert posters, in reduced size, were included within a biography about the band.

3 The artist, Jeff Koons, used portions of a fashion photo—a woman's legs in Gucci sandals—in a painting, "Niagara." The painting included a montage of popular culture images spread over a Salvador Dali-like landscape.

4 A nonprofit foundation presented a program called "Classic Arts Showcase" for broadcast principally to public television and cable channels. The foundation used an 85-second portion (of a five-minute performance) by an opera singer from a two-hour movie, *Carnegie Hall*.

5 The makers of a movie biography of Muhammad Ali used 41 seconds from a boxing match film in their biography.

6 A poster of a church quilt was used in the background of a television series for 27 seconds.

7 Several copyrighted photographs appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable in the Brad Pitt, Morgan Freeman motion picture *Seven*.

RESULTS

ARTWORK AND AUDIOVISUAL CASES

1. **FAIR USE.** *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

Important factors: The Ninth Circuit considered Google's use of thumbnails as "highly transformative," noting that a search engine transforms the image into a pointer directing a user to a source of information (versus the image's original purpose: entertainment, aesthetics, or information). This transformative use outweighs any commercial factors regarding Google's ability to earn money from placement of ads on the search results page. The court's reasoning—that "a search engine provides an entirely new use for the original work"—reaffirmed the principles established in the Ninth Circuit's decision in *Kelly v. Arriba-Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2003).

Similarly, it was found that the search engine's practice of creating small reproductions ("thumbnails") of images and placing them on its own Web site (known as "inlining") did not undermine the potential market for the sale or licensing of these images.

Important factors: The thumbnails were much smaller and of much poorer quality than the original photos and served to index the images and help the public access them.

Google was involved in another fair use case when the search engine results retrieved and displayed a cached Web site. A "cache" refers to the temporary storage of an archival copy—often a copy of an image of part or all of a Web site. With cached technology it is possible to search web pages that the Web site owner has permanently removed from display.

An attorney/author sued Google when the company's cached search results provided end users with copies of copyrighted works. The court held that Google did not infringe.

Important factors: Google was considered passive in the activity—users chose whether to view the cached link. In addition, Google had an implied license to cache web pages because owners of Web sites have the ability to turn on or turn off the caching of their sites using tags and code. In this case, the attorney/author knew of this ability and failed to turn off caching, making his claim against Google appear to be manufactured. *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

2. **FAIR USE.** *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

Important factors: The Second Circuit focused on the fact that the posters were reduced to thumbnail size and reproduced within the context of a timeline.

3. **FAIR USE.** *Blanch v. Koons*, 396 F. Supp. 2d 476 (S.D.N.Y. 2005).

Important factors: Unlike the "sculpture" case previously discussed, the court viewed "Niagara" as a transformative use because it commented on the use of fashion imagery in consumer culture.

RESULTS

ARTWORK AND AUDIOVISUAL CASES

4. **NOT A FAIR USE.** *Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Foundation*, 2005 U.S. Dist. LEXIS 26302 (S.D.N.Y. 2005).

Important factors: Although the court considered the use to be educational and noncommercial, and to consist of an extremely small portion of the work, these factors were outweighed by the potential loss of licensing revenue. The copyright owners had previously licensed portions of the work for broadcast and the court determined that the foundation's use affected the potential market.

5. **FAIR USE.** *Monster Communications, Inc. v. Turner Broadcasting Systems Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996).

Important factors: A small portion of film was taken and the purpose was informational.

6. **NOT A FAIR USE.** *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).

Important factors: The court was influenced by the prominence of the poster, its thematic importance for the set decoration of a church, and the fact that it was a conventional practice to license such works for use in television programs.

7. **FAIR USE.** *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998). The court excused the use of the photographs as "de minimis" and a fair use analysis was not required.

PARODY CASES

1 An author mimicked the style of a Dr. Seuss book while retelling the facts of the O.J. Simpson murder trial in *The Cat NOT in the Hat! A Parody* by Dr. Juice.

2 A movie company used a photo of a naked pregnant woman and superimposed the head of actor Leslie Nielsen. The photo was a parody using similar lighting and body positioning of a famous photograph taken by Annie Leibovitz of the actress Demi Moore for the cover of *Vanity Fair* magazine.

3 An artist created a cover for *The New Yorker* magazine that presented a humorous view of geography through the eyes of a New York City resident. A movie company later advertised their film *Moscow on the Hudson* using a similar piece of artwork with a similar theme and recognizable elements from the magazine cover.

RESULTS

PARODY CASES

1. **NOT A FAIR USE.** *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

Important factors: The author's work was nontransformative and commercial. The Ninth Circuit Court of Appeals determined that the book was a satire, not a parody, because the book did not poke fun at or ridicule Dr. Seuss. Instead, it merely used the Dr. Seuss characters and style to tell the story of the murder.

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

Important factors: The movie company's use was transformative because it imitated the photographer's style for comic effect or ridicule.

3. **NOT A FAIR USE.** *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

Important factors: Why is this case different from the Leslie Nielsen/Annie Leibovitz parody? In the *Leibovitz* case, the use was a true parody, characterized by a juxtaposition of imagery that actually commented on or criticized the original. The *Moscow on the Hudson* movie poster did not create a parody; it simply borrowed *The New Yorker's* parody (the typical New York City resident's geographical viewpoint that New York City is the center of the world).