Fan Art, Fair Use, and Foul Play

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Los Angeles, CA
July 3, 2019
California Court of Appeal rules for First Amendment in closely-watched “Feud” right of publicity case

March 26, 2018 by Jack I Lerner

In January, the IPAT Clinic filed an amicus brief on behalf of the International Documentary Association in the closely-watched de Havilland v. FX Networks case, in which Olivia de Havilland sued FX over the portrayal of her in the hit miniseries FEUD: Bette and Joan. Today, the Court of Appeal issued its opinion, and it is a massive victory for the First Amendment. “The trial court’s ruling leaves authors, filmmakers, playwrights, and television producers in a Catch-22,” wrote the Court.
What is copyright?

- Creative expressions
- A limited bundle of rights:
- Lots of exceptions!
What is *not* covered by copyright?

- Facts!
- Ideas! Including methods or systems
- “Useful articles” like clothing, appliances
- Titles, names, short phrases
- Lists of ingredients
- “Common property” like weight and height charts
- U.S. government works (for state governments, varies)
- Works in the public domain
Copyright basics

• **How long does it last?**
  Life of the author plus 70 years / 95 years if made by a corporation

• **How do I get a copyright?**
  Automatically, but registration is easy and provides important benefits
Fair Use

https://www.youtube.com/watch?v=vTLQ4h4yKSk

Fair Use FAQs: https://www.youtube.com/playlist?list=PLDQ6BYd73QHwi8xRoMPCOOZXs5IeT-Ua4
Fair use

The right to use someone’s work without permission or payment, for certain socially valuable uses
Fair use: four factors

- **Purpose** and character of the use (transformative use)
- **Nature** of the copyrighted work (published or unpublished, fact vs creativity)
- **Amount** of the portion used
- Effect of the use upon the potential **market** for or value of the copyrighted work
Transformative Use *(Campbell v. Acuff-Rose)*
Transformative Use (Campbell v. Acuff-Rose)

“The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely supersedes the objects of the original creation (or supplants the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus 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.
Transformative Use (Campbell v. Acuff-Rose)

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Documentary Filmmakers’ Statement of Best Practices in Fair Use

• For social, political, or cultural critique;

• To illustrate an argument or a point;

• Incidental to the process of filming something else;

• In a historical sequence.
Best practices in online video

- To comment on or critique material
- For an illustration or example
- If it is captured incidentally
- If it is being reproduced, reposted or quoted in order to memorialize or preserve an event or cultural phenomenon
- If it is being copied in order to launch a discussion
- If it is being quoted in order to be recombined as a new work such as a collage
Fair Use – 3 rules of thumb

IS THE CLIP YOU ARE USING ILLUSTRATING A POINT?

IS THIS POINT CLEAR TO THE AVERAGE VIEWER?

DID YOU USE ONLY THE AMOUNT THAT WAS REASONABLY APPROPRIATE TO MAKE YOUR POINT?

H/T Donaldson & Callif LLP

https://ipat.law.uci.edu
case study: *Buffy vs Edward: Twilight Remixed*

https://www.youtube.com/watch?v=RZwM3GvaTRM
case study: *Buffy vs Edward: Twilight Remixed*
case study: *The Narutrix*

[YouTube Video Link](https://www.youtube.com/watch?v=26vQ3FlV7GA)
case study: Machinima

https://www.youtube.com/watch?v=9BAM9fgV-ts
Lombardo v. Dr. Seuss Enterprises

• Affirmed district court’s declaratory judgement of fair use

• Play is a parody, “imitating the style of the Grinch for comedic effect and to mock the naïve, happy world of the Whos”
Dr. Suess Enterprises v. Comicmix
Paramount v. Axanar Productions
Cariou v. Prince
Cariou v. Prince
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What’s appropriate? “Stealing” vs “Taking”

<table>
<thead>
<tr>
<th>Stealing?</th>
<th>vs</th>
<th>Taking?</th>
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<tbody>
<tr>
<td>• Art theft</td>
<td></td>
<td>• Tracing</td>
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<tr>
<td>• Plagiarism</td>
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<td>• Copying/Mimicking</td>
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<td>• Copyright infringement</td>
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<td>• Appropriation</td>
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Protecting your work

• Access ≠ Ownership

• Strategies:
  Copyright  Shout it out
  Watermarks  Create a license
  Lower resolution files  Sign it
  Sharing  Read the terms of service
Resolving Disputes

• Not everything is a lawsuit.
• Idea vs. expression.
• Context and respecting fair use.
• It’s amazing what a conversation can do.
• There are serious remedies available.
  - Like copyright litigation, DMCA takedowns.
Dealing with YouTube

• Know your rights!
  • Fair use
  • DMCA vs Content-ID
• Watch out when uploading lots of videos at once
• Don’t just take something down if you get a notice and want to appeal
• Register your work if you want to protect it!
  • Consider registering your videos’ “packaging”
  • If it goes viral, register it!
• Consider contacting the infringer directly
• Sometimes the community can help!

https://ipat.law.ucir.edu
Business norms are not the law
Copyright registration
These are the types of work available in claim registration. Click on a Type of Work listed below for more information about each type.

- Literary Work
- Work of the Visual Arts
- Sound Recording
- Work of the Performing Arts (includes music, lyrics, screenplays, etc.)
- Motion Picture / Audio Visual Work
- Single Serial Issue
- Works that include more than one type of authorship

Click here for information on what may be included on a single application.

Select 'Type of Work' that you are registering.

Type of Work cannot be changed after you click "Continue." Click here for more information.
For more information (links!)

- [The Organization for Transformative Works](#)
- [The Center for Media & Social Impact](#)
- [Reclaiming Fair Use: How to Put Balance Back in Copyright](#), 2nd Ed. by Patricia Aufderheide and Peter Jaszi
- [Everything Is A Remix: Fair Use](#) (video by Kirby Ferguson and Jack Lerner)
- [Documentary Filmmakers’ Statement of Best Practices in Fair Use](#)
- [Stanford Fair Use Project](#)
- [Digital Millennium Copyright Act: resources for filmmakers](#)
- [UCI Intellectual Property, Arts, and Technology Clinic resources page](#)
Thank you!

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