

# Copyright Law

Prof. Madison

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## Topics:

- Legal rules as tools for solving problems
- Identify and understand the problem(s)
- Fair use problems:
  - (i) How to enable cultural “progress”; all creation builds on other material.
  - (ii) How to identify (reinforce?) markets that do/don’t work.
  - (iii) How to keep copyright out of non-copyright areas (*e.g.*, trademark, identity, & branding interests, free expression, tech development, privacy).

## Fair use: Some elementary economics (add to *transformative use*)

Copyright law is “justified” (its existence is explained; its persistence is reinforced) by a theory of **market capitalism**: people are better off if they have “stuff.” “Stuff” has to come from somewhere. “Markets” explain how “stuff” gets produced and sold. So long as demand > supply, then producers of “stuff” can charge money for it. Because every sale depletes the pool of that “stuff,” demand always > supply (remember: theory). Profits motivate production.

Some “stuff” is “non-depletable” (or sometimes, “non-rival”). It never runs out. These are “**public goods**.” Sunlight is a natural “public good.” “Information” is a human-made “public good.” For public goods, demand never > supply, because supply is, by definition, inexhaustible. So producers can’t charge money for public goods. Copyright creates *artificial scarcity* in some information “stuff” so that authors and producers can do that. Profits motivate production.

Sometimes, “markets” don’t work. Buyers can’t find sellers; buyers don’t have the money to pay; buyers and sellers put different possible prices or values on “stuff”; sellers don’t want to sell but for bad reasons (e.g., they don’t like the buyers, or what the buyers will do with the stuff). We label these: “**market failures**.” One way to think about fair use is: fair use should kick in – sometimes – when we see market failure. Sometimes, judicial outcomes follow this logic; sometimes, not. Should they?

## Fair use: Beyond elementary economics

“**Market failure**” is a theory/policy framework that courts sometimes use explicitly in deciding copyright cases. More often, it’s a theory/policy framework that helps some lawyers and law professors (and some judges) understand why fair use cases come out the way that they do (and why infringement cases generally come out the way that they do). But **the “market failure” explanation has some big limits.**

Some fair use cases say: to heck with markets, the law shouldn’t stand in the way of individuals (and some social groups) expressing themselves or creating cultural value of other sorts. Progress isn’t just about money.

Some fair use cases say: focusing too much on markets gives too much power to copyright interests concerned with \$\$ (authors, publishers, platforms), which means needlessly high prices and too little access to cultural content. Big culture/money/power imbalances are often suspect. Because copyright covers so many things today and affects all of culture and tech, we need to pay attention to overall cultural patterns and impacts, not only “this author” or “this user.”

Some fair use cases say: copyright needs an all-purpose “relief valve” for unexpected, new contexts, such as “what new problems arise if computer programs are covered by copyrights?”

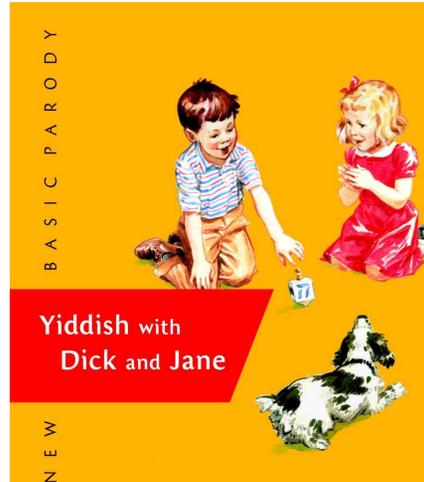
# A simple view of a complex space. Client counseling v. litigation.

(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;

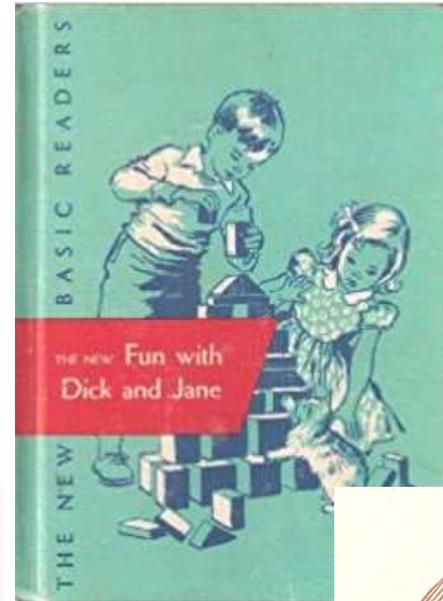
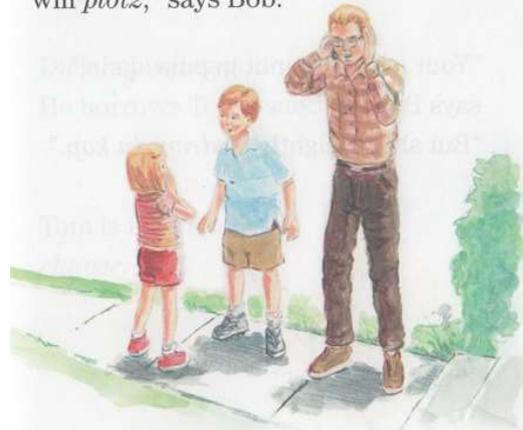
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.



Bob takes out his cell phone to call Jane.

"When your mother hears this she will *plotz*," says Bob.



**Would you advise the publisher of *Yiddish with Dick and Jane* to release the book? Why/not?**

## Fair use: Does it work differently for visual art?

**(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.



© 2008 Mannie Garcia / The Associated Press



**Associated Press & Mannie Garcia v.  
Shepard Fairey**

## Fair use: Does it work differently for visual art?



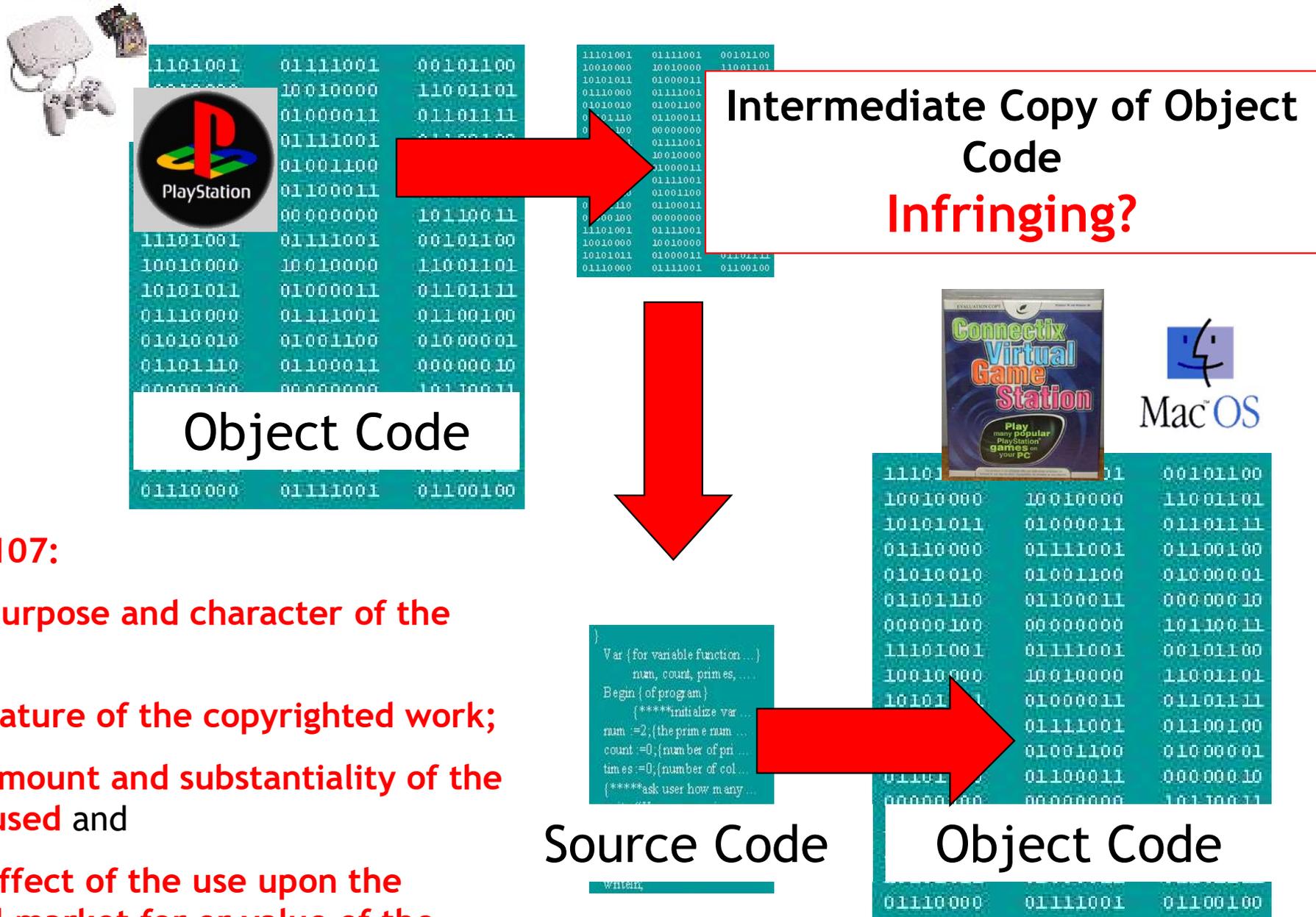
© 2006 Mannie Garcia / The Associated Press



**What is the work?**

**Associated Press & Mannie Garcia v. Shepard Fairey**

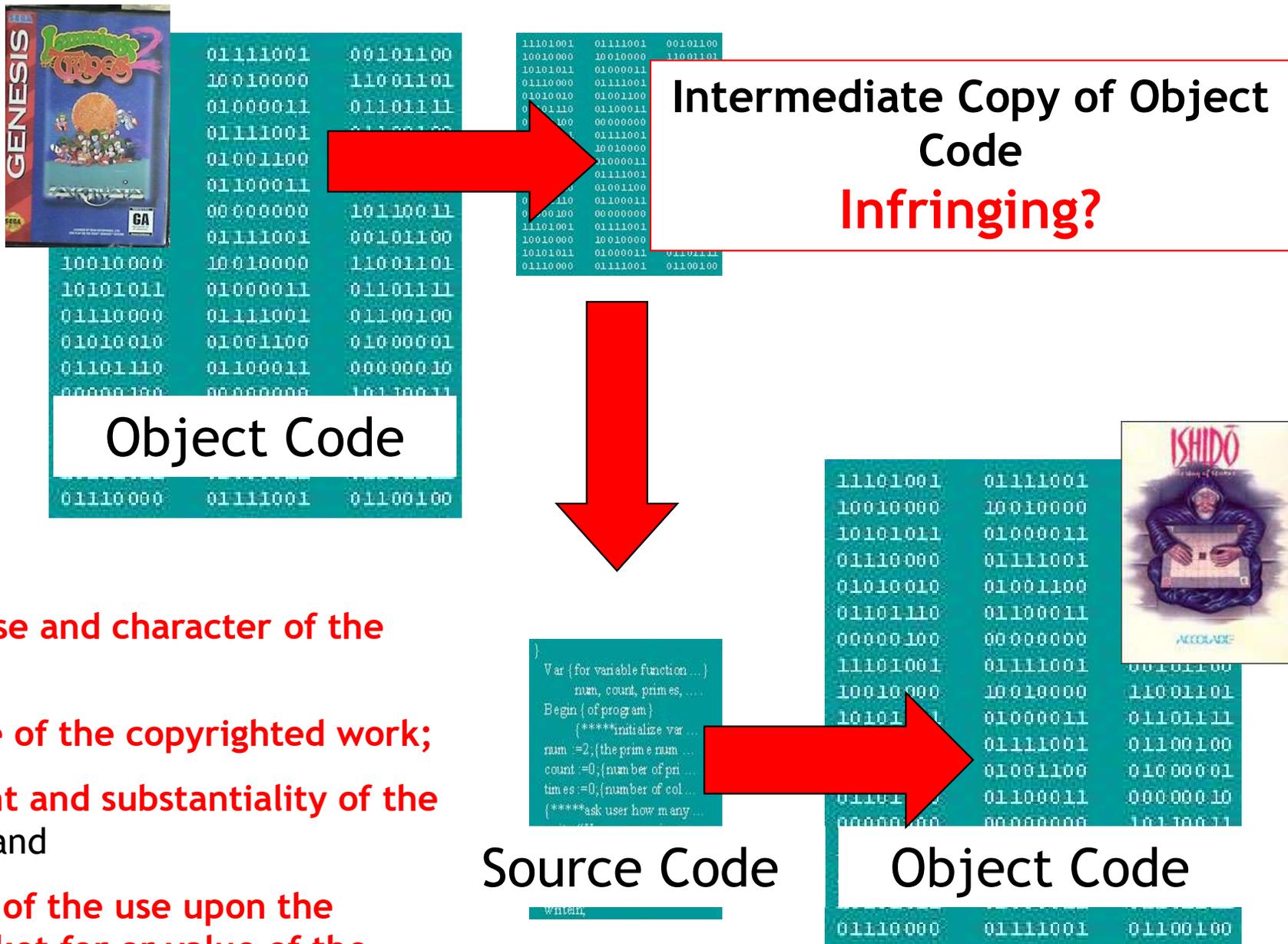
# Reverse engineering and interoperability?



## Section 107:

- (1) the purpose and character of the use,
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

# Reverse engineering and interoperability?



## Section 107:

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## Fair use: More on client counseling and risk assessment

**(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.

[1] **Risk assessment:** It's always easiest to conclude that a use is not fair use and to ask for permission and pay a license fee / clear the rights / etc. BUT:

[2] **Clients:** They may not have the time or the money to license the work(s).

[3] **Close cases:** If you never argue (and sometimes litigate) them, you never win the close cases. Always clearing the rights may, over time, establish a precedent, or at least a custom, that weakens the principle of fair use.

[4] **Bright lines?** Never believe anyone who says that fair use "rules" exist in the law. They don't. Publishers may set their own rules, those but cannot trump the law.

[5] **Changing the law:** Look for fair use activism in ©, in the US and around the world. US & Israel have the clearest and broadest fair use principles.

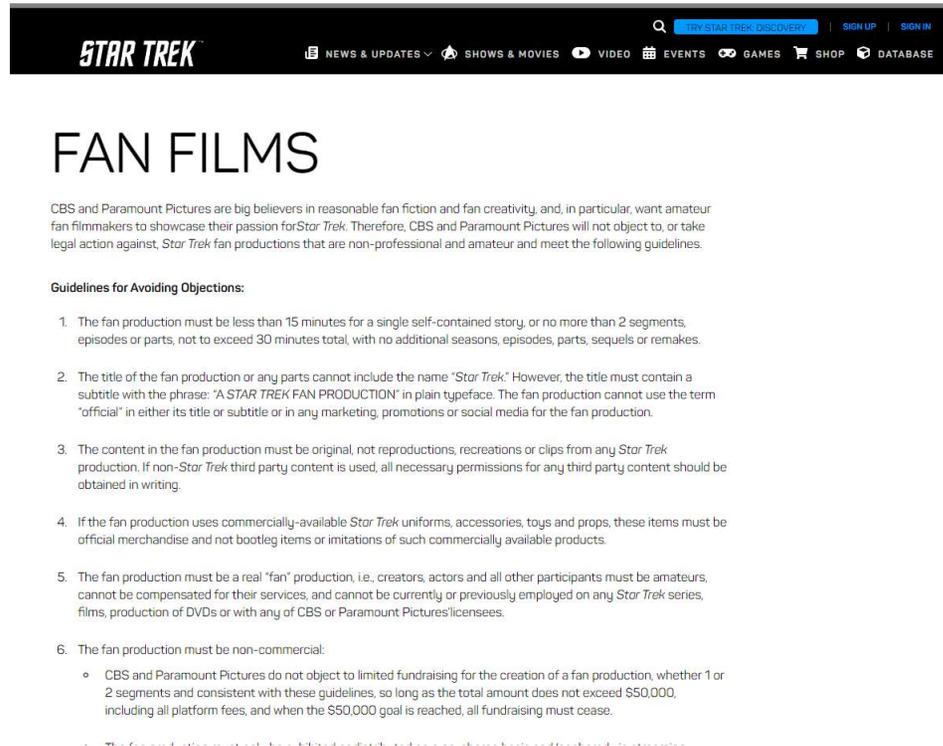
# Fair use: More on client counseling and risk assessment

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**STAR TREK** NEWS & UPDATES SHOWS & MOVIES VIDEO EVENTS GAMES SHOP DATABASE

## FAN FILMS

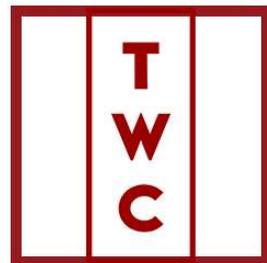
CBS and Paramount Pictures are big believers in reasonable fan fiction and fan creativity, and, in particular, want amateur fan filmmakers to showcase their passion for *Star Trek*. Therefore, CBS and Paramount Pictures will not object to, or take legal action against, *Star Trek* fan productions that are non-professional and amateur and meet the following guidelines.

**Guidelines for Avoiding Objections:**

1. The fan production must be less than 15 minutes for a single self-contained story, or no more than 2 segments, episodes or parts, not to exceed 30 minutes total, with no additional seasons, episodes, parts, sequels or remakes.
2. The title of the fan production or any parts cannot include the name "Star Trek." However, the title must contain a subtitle with the phrase: "A STAR TREK FAN PRODUCTION" in plain typeface. The fan production cannot use the term "official" in either its title or subtitle or in any marketing, promotions or social media for the fan production.
3. The content in the fan production must be original, not reproductions, recreations or clips from any *Star Trek* production. If non-*Star Trek* third party content is used, all necessary permissions for any third party content should be obtained in writing.
4. If the fan production uses commercially-available *Star Trek* uniforms, accessories, toys and props, these items must be official merchandise and not bootleg items or imitations of such commercially available products.
5. The fan production must be a real "fan" production, i.e., creators, actors and all other participants must be amateurs, cannot be compensated for their services, and cannot be currently or previously employed on any *Star Trek* series, films, production of DVDs or with any of CBS or Paramount Pictures/licenseses.
6. The fan production must be non-commercial:
  - CBS and Paramount Pictures do not object to limited fundraising for the creation of a fan production, whether 1 or 2 segments and consistent with these guidelines, so long as the total amount does not exceed \$50,000, including all platform fees, and when the \$50,000 goal is reached, all fundraising must cease.



## Organization for Transformative Works



Fair use in practice as *community organizing* rather than 1 work v 1 work.

Which community sets the rules? A continuing cultural negotiation.

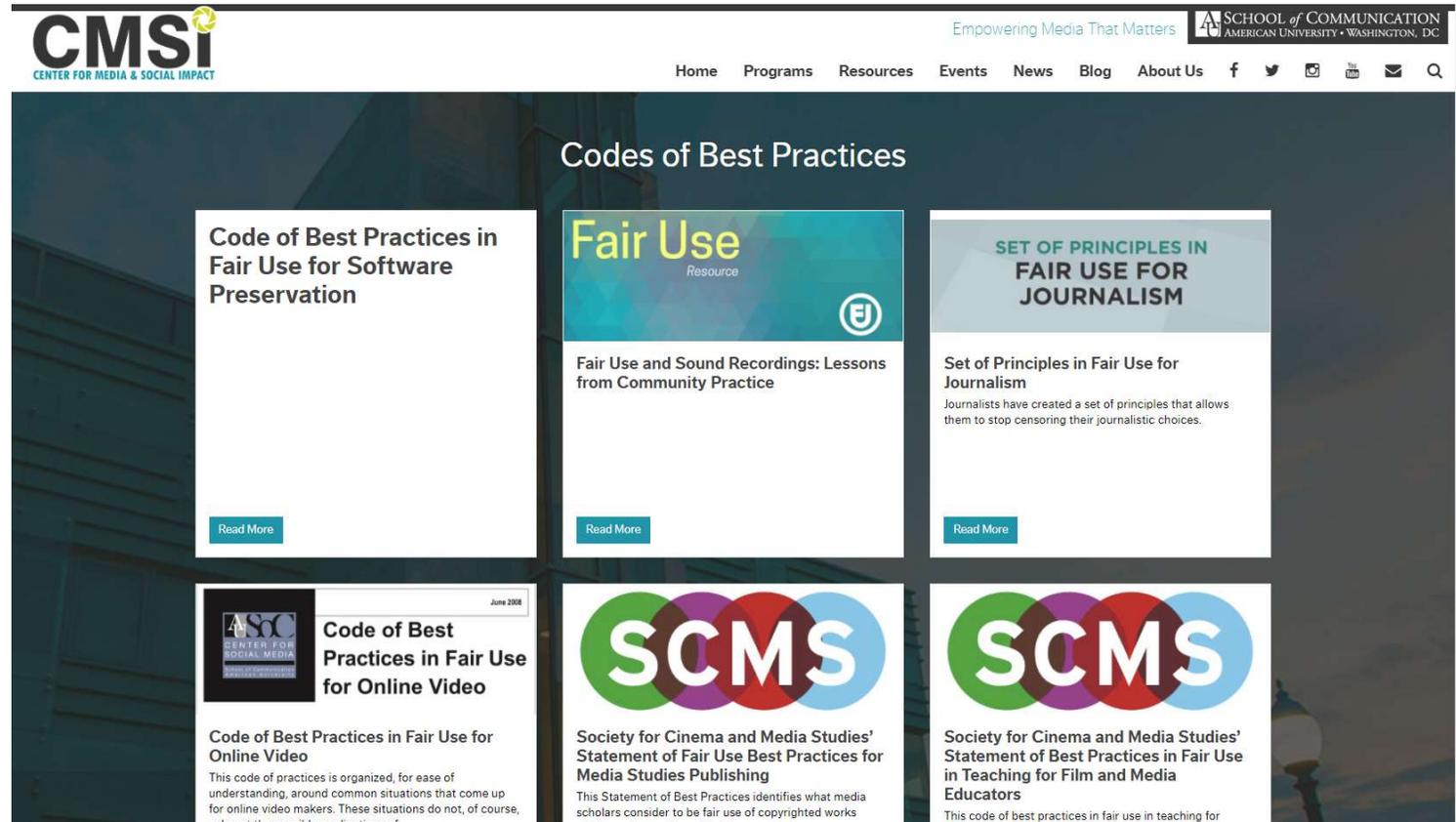
**Case study: fan fiction.**

[startrek.com/fan-films](http://startrek.com/fan-films) (*guidelines*)

[transformativeworks.org](http://transformativeworks.org) (*community organizing and advocacy*)

# Fair use: More on client counseling and risk assessment

- (1) the purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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American University Washington College of Law & AU Center for Media & Social Impact *Codes of Best Practices in Fair Use*, since 2006: 16 research-based documents summarizing creative community practices & principles re: re-use of copyrighted content, as guides for practice.

[cmsimpact.org/codes-of-best-practices/](https://cmsimpact.org/codes-of-best-practices/)

## The cutting edge:

Where copying things is inherent to the art / the culture / the technology, we run into conflicts among:

- (i) **intuitive expectations** in art and/or in business (“Copying is bad”),
- (ii) **what the people practicing the art** / the tech believe (“Copying is absolutely essential” or “copying is fair in context”), and
- (iii) **copyright law** (“when it comes to books, copying is bad. Usually. But sometimes it’s hard to tell. And beyond books, the theory of copyright makes a lot more sense than what people actually do when they make and sell stuff. So good luck with that.”)

# “Transformative” use & conceptual art

1. the purpose and character of the use,
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used and
4. the effect of the use upon the potential market for or value of the copyrighted work.



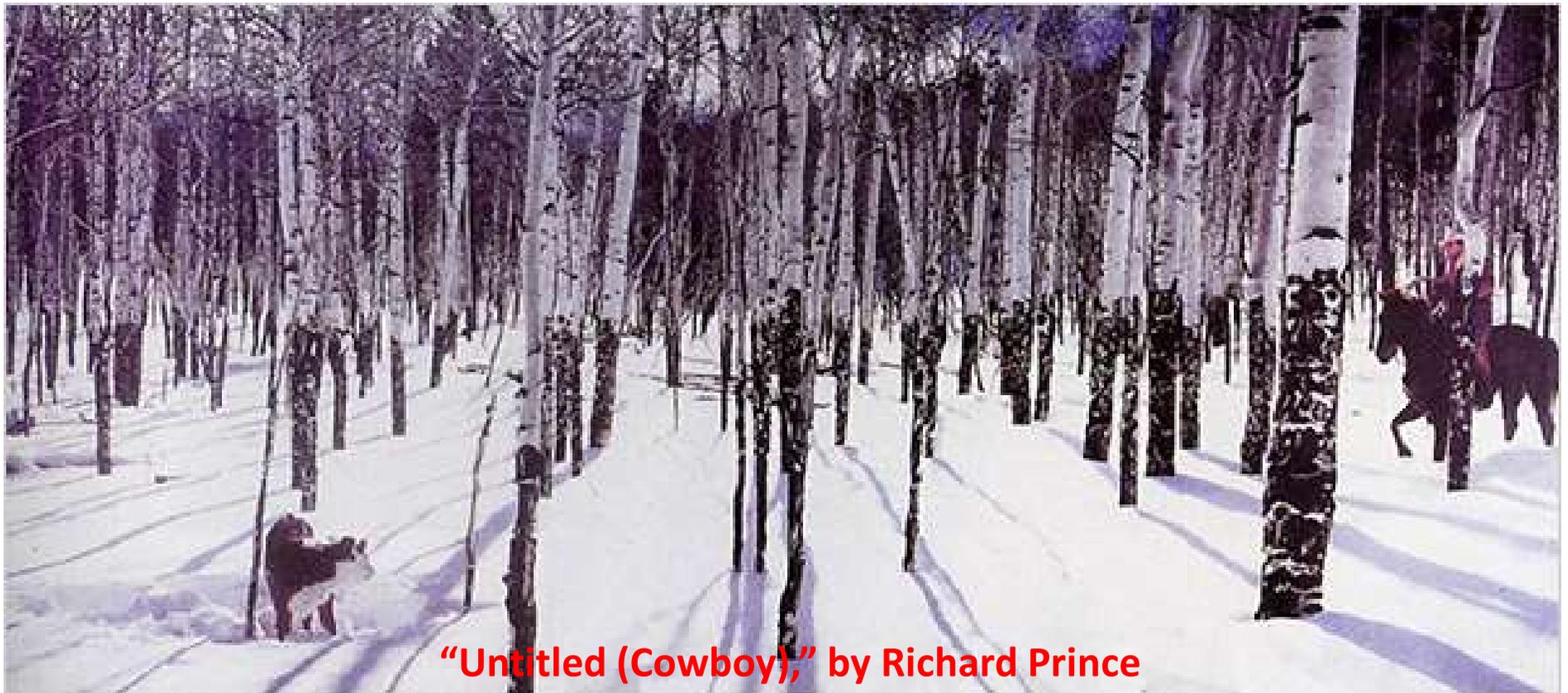
Photo by Jim Krantz (1998):  
“Calf Rescue,” for Marlboro



“Untitled (Cowboy),” by Richard Prince



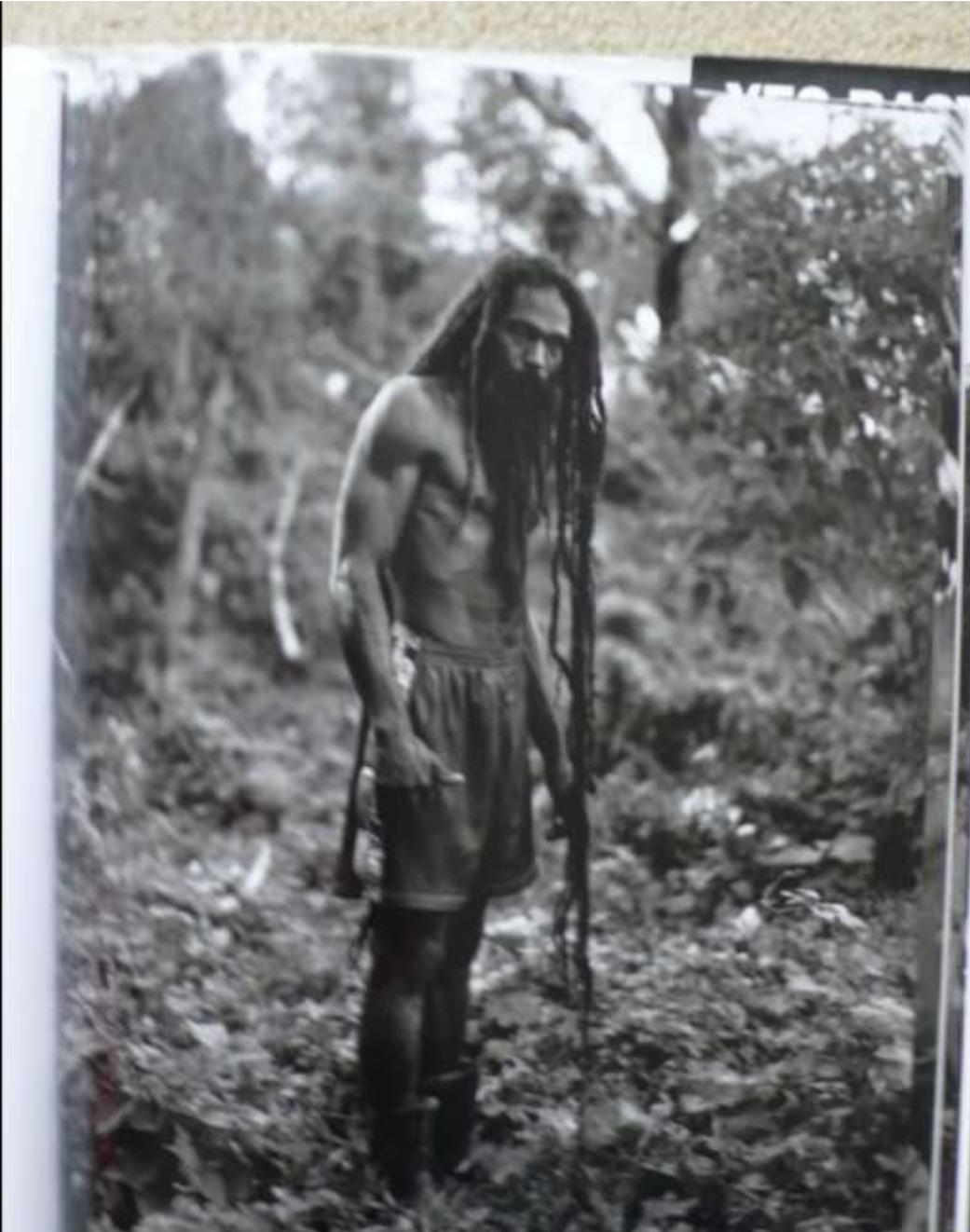
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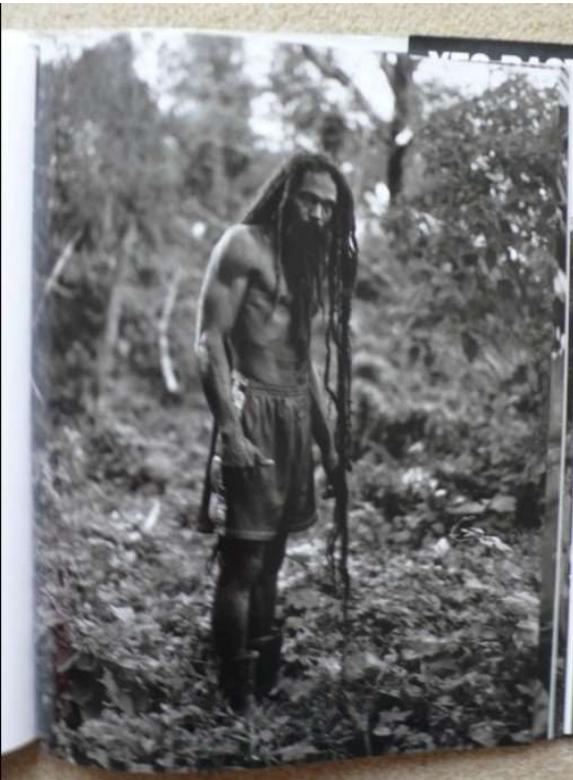


**“Transformative” to whom?**



Cariou v. Prince (2d Cir. 2013)

**“Transformative” to whom?**



Cariou v. Prince (2d Cir. 2013)

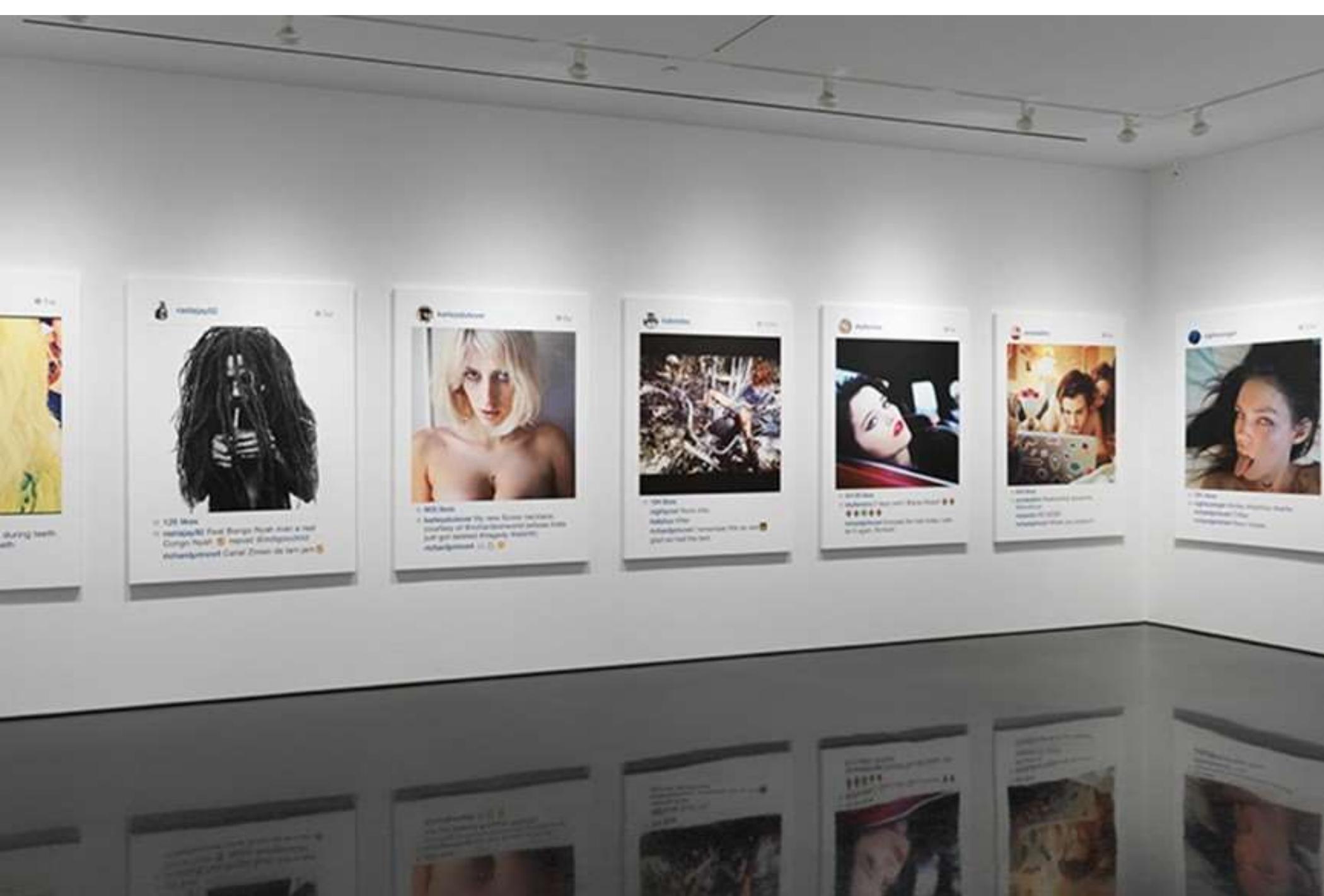


“Rastafarian Smoking a Joint, Jamaica,” by Donald Graham; posted to Instagram



Copied from Instagram and mounted by Richard Prince as part of the *New Portraits* exhibition (37 images, all copied from Instagram) at the Gagosian Gallery in New York

Graham v. Prince (filed Dec. 30, 2015)



Instagram) at the Sagasian Gallery in New York

Graham v. Prince (filed Dec. 30, 2015)

## Fair use: Mixing and matching different arguments

**Sega v. Accolade** (9<sup>th</sup> Cir. 1992) holds that copying for reverse engineering to access unprotected content may be fair use (nb.: why?)



**Sony v. Universal City Studios** (US 1984) holds that “time-shifting” may be fair use (nb.: why?)

**Now:** A digital TV provider wants to make and store full-length digital copies of copyrighted TV programming on behalf of its customers (i.e., “in the cloud”) and offer subscription access to 2 groups of customers:

**Customer group 1:** They want to engage in time-shifting. If the customer selects the “no ads” option, then the playback version omits the commercials included in the original performance; technology at the provider’s end deletes them. Is the provider engaged in fair use? The customer?

**Customer group 2:** They want to watch R-rated movies but without offensive language or images. If the customer selects the “G-rated” option, then the playback version omits that material. Is the provider engaged in fair use? The customer?

## Fair use: Some hypotheticals

**A documentary filmmaker wants to include the following in a film about the history of Pittsburgh:**

- (1) 10 seconds of the Bruce Springsteen song, *My Hometown*, as part of the soundtrack.**
- (2) 10 seconds of the Mr. (Fred) Rogers song, *It's Such a Good Feeling*, which was playing on the TV in the background of a scene filmed at a Squirrel Hill day care center.**
- (3) A photograph of the Hill District in its heyday, taken by the well-known Pittsburgh photographer Teeny Harris.**
- (4) A photograph of the South Side Steel Works, photographer unknown, from the University of Pittsburgh Digital Archive. A notice at the archive says: No use of these photographs is permitted without the permission of the copyright owner.**

## **Fair use: One key not-so-hypothetical**

**Google Book Search scans and copies the full text of in-copyright books to a database.**

**GBS users who search the database receive only short “snippets” of text in response to their queries – Google does not provide full text results.**

**Is GBS engaged in fair use?**



## **Fair use: The not-so-hypothetical**

**Oracle owns all copyright interests in JAVA, the software specification, language, and functions developed originally by Sun Microsystems. When Google wrote and implemented the Android Operating System (OS), Google wrote its own version of JAVA.**

**In order to allow software developers to write their own programs for Android, Google's implementation of JAVA used the same names, organization, and functionality as the JAVA APIs published by Oracle, or "Application Programming Interfaces."**

**APIs are software specifications (short sequences of computer code) that allow computer programs to communicate with each other.**

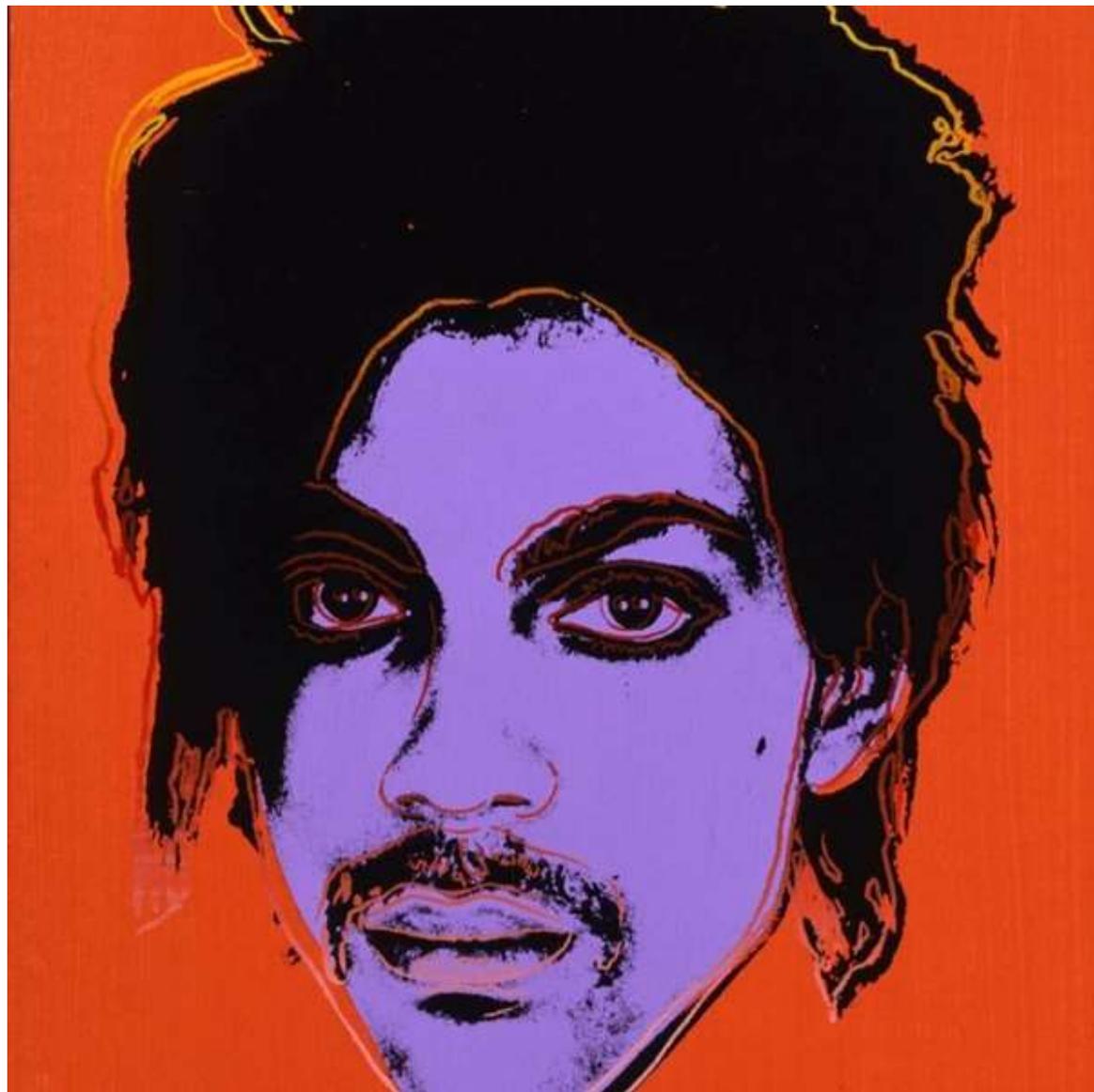
**It is uncontested that Google copied and used the JAVA APIs. The parties and the courts disagree as to whether the APIs are protected by copyright at all, and (if they are) as to whether Google's use constitutes non-infringing fair use.**

**Is it?**





Photo of Prince by  
Lynn Goldsmith (1981)



Silk screen by Andy Warhol  
**Did Warhol appropriate protected  
expression? Transform the work? Harm  
the (or "a") market for Goldsmith's work?**



Better the sexual deprivation of Prince than the sexual deprivation of Michael Jackson, declares TRISTAN VON. Plus: a special portrait for beauty fans by ANNY WARBOL

A few days after Mary Lou Retton won a gold medal at the Los Angeles Olympics, she appeared on *The Tonight Show* with Prince, who was scheduled to perform. The audience asked the always-shy but now prominent athlete what she was the proud owner of a new car. "A John Deere tractor," she explained, with the most awkward smile in the world. Suddenly she was filled with shame. That American popular culture played a dirty trick on Mary Lou! In fact, if her behavior was as Prince's "Cotton Candy Lover," you see, it's a look of bewilderment and dirty condescension which Prince broadcast a few years ago.

"You're the kinda person / That makes me make me / You're from the south / You know I guess I mean to / I don't / You / I had a pocket full of bones / I mean and some of them were / That it was Sunday night / I guess that makes it dirty."

Who knows so much southern, and who does not, is not the point. The point is that except from Prince is no longer possible. Finally he has arrived. The solution is everywhere. The answer are good. His music is some of the highest and most beautiful music I will ever write. The music *Prince And The New Power Generation* is American, because to the *Music They Come*. The music are all the music more: jump, rock, heavy, urban, hybrid, soul, movement, change. There is even a message from Minneapolis, Minnesota. There comes another night but tonight, tonight the redoubtable American boy.

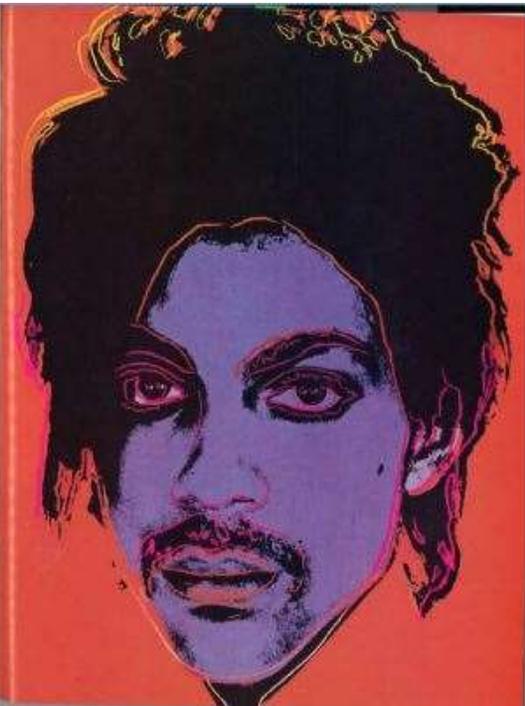
"Well, now again / Look again / "That's right," he says here / off. The same again. He dresses in a dirty, in a small in gloves and in the suit a long hair purple, dark, in a 'slipping black, colorful, and a white. He gives up the look of Hollywood, in already ready on a bed. He sings, in a kind of 1980s, in the most recent album. "I'm gonna be your lover / I'm gonna be the only one that makes you come / "That's right," sexual condescension ("That's not your underwear") / "That's it's better with a man," sexual condescension ("What you're from here? / I had to be

you were all my children"), and sexual condescension ("I never was the kind to make a love / When he was there / I thought because the rest of it"). There are also no more than, but of desire and courage to somebody's embrace, kissing, and kissing on the lips that are Prince's. Until the condescension completely with what used to be called, when Michael died it at the end of *The Love of Prince and Time*, an automatic movement. Indeed, he looks rather like a lion—1980s-style, in his skin, something like—until you see the eyes, and the message that has not grown in, and the girl. They are still and they are gone.

In the same manner with the beauty of American popular culture: "What was that? That's right. There will be hell to pay / and the reputation / sexual night here / a point to have / the prince have already begun / "That's right," who generally find out about the last time. There are opportunities about marriage. Prince, it is said, looks so much. The choice he does, the choice with his condescension is primarily an expression of anger. In his music, women are not against their will. In his music, they are broken and used over the truth. (This is not the *Message of Mary Tyler Moore*.) There is no doubt, it is the picture of culture that you must, that the music is not a perfect one for the great era of American music that is open to. The music is a picture of anger that has become a picture on the back of a car in *Prince and the New Power Generation*, in the music and the music of Prince.

He has a picture, he has a picture and there is no need for pictures. Anyway, the girl is plastic is frequently not just. One woman's condescension was the image of another woman's desire. And there are two kinds of things for those who like there, too. There is a mixture of political condescension to desire. Before the love that the love of Prince the sexual deprivation of Prince. The sexual deprivation of Michael Jackson, Prince will never that has among parents. The single-melodious show us music that he is serious about. (Continued on page 120)

# PURPLE FAME



SPECIAL COMMEMORATIVE EDITION

THE GENIUS OF

# PRINCE

PRINCE ROGERS NELSON 1958-2016

RARE INTERVIEWS  
DEEP INSIDE PAISLEY PARK  
THE ORIGIN OF ♪  
HIS GREATEST PERFORMANCES

CONDÉ NAST SPECIAL EDITIONS



**AWF-2001 (Ex. 48)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches

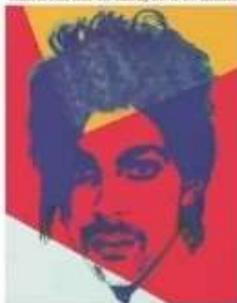


**AWF-2002 (Ex. 49)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-1996 (Ex. 43)**

**AWF-1992 (Ex. 39)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-1994 (Ex. 41)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches

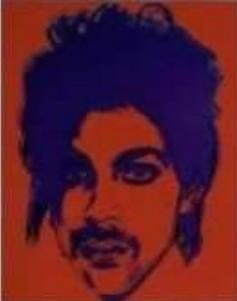


**AWF-1990 (Ex. 45)**

**AWF-1993 (Ex. 40)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-2003 (Ex. 50)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-2004 (Ex. 51)**

**AWF-1995 (Ex. 42)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-1997 (Ex. 44)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-2005 (Ex. 52)**

**AWF-1996 (Ex. 43)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-1990 (Ex. 45)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-2004 (Ex. 51)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-2005 (Ex. 52)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-1998 (Ex. 47)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-2009 (Ex. 47)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-2006 (Ex. 53)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



**AWF-2007 (Ex. 54)**  
Andy Warhol, Prince, 1984, acrylic and silkscreen ink on linen, 20 x 16 inches



# The End

