

Copyright Law

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Topics:

- Copyright as a Set of Limited Rights
- Fair Use
- Section 107 of the Copyright Act

Key moments in copyright history and policy

Mid-1400s: Invention of movable type and the printing press in Europe

1710: Statute of Anne, in England (the first modern © statute)

1787: Constitution of the United States: “authors” “writings” “limited times”

1790: First U.S. © statute: “maps, charts, and books”; “printing, reprinting, vending”

1841: First modern-style “fair use” judicial opinion: *Folsom v Marsh*

1886: Berne Convention for the Protection of Literary and Artistic Works accepted (U.S. is not a party)

1909: First comprehensive revision of the U.S. copyright statute

1976: Second comprehensive revision of the U.S. copyright statute (takes effect in 1978); fair use becomes part of the statute

1982: Hollywood lobbyist Jack Valenti argues “the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone”

1989: U.S. accedes to the Berne Convention

1991: Al Gore invents the Internet (*kidding, sort of*)

Copyright and Artificial Intelligence



Identifying and analyzing copyright problems

History/theory [*economics of markets; limited protection for publishers from competition that harms \$\$\$; adapt to changing media & technologies; be careful with rhetoric of individual or heroic creativity/originality and rhetoric of piracy*]



Policy [*provide incentives to create and distribute original work; discourage free riding; enable access, borrowing, and building on prior work; support cultural, expressive “progress”*]



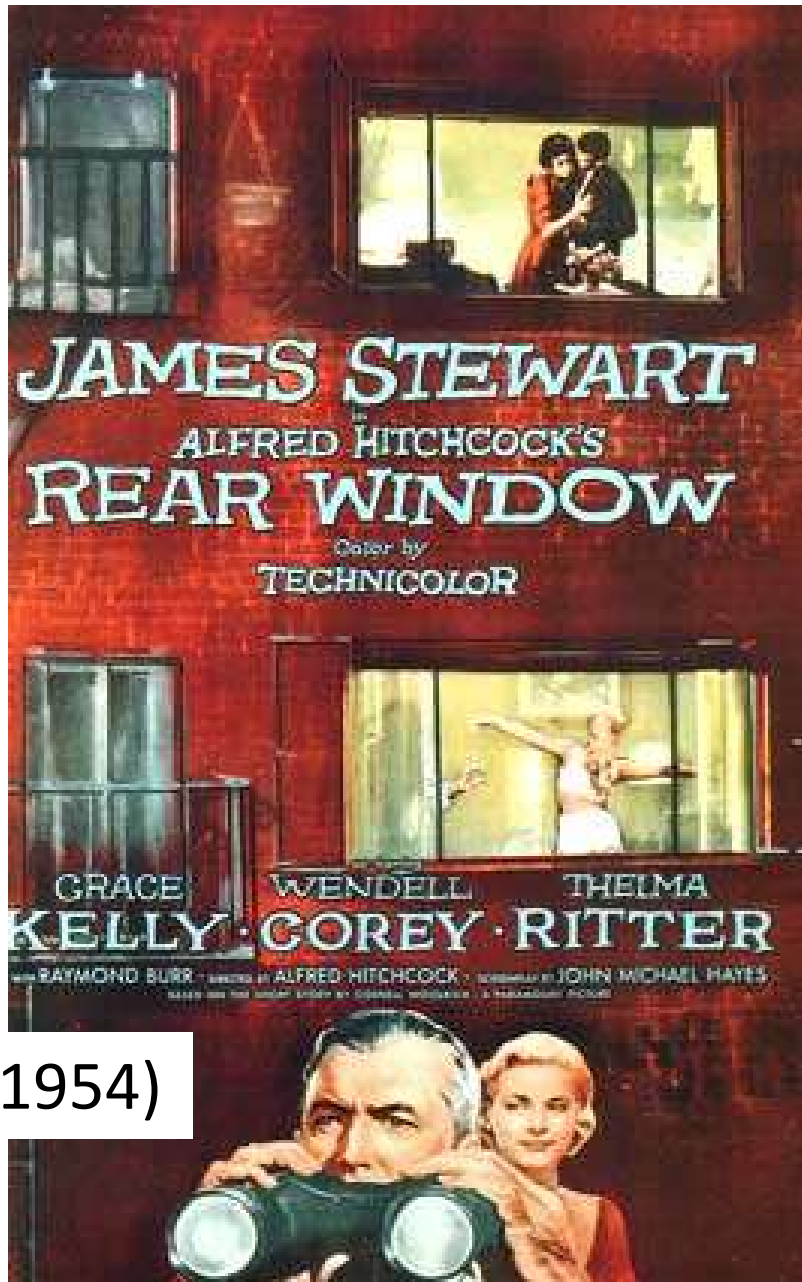
Styles/types of argument using all three [*consider both micro and macro perspectives: equities between parties; social impacts*]



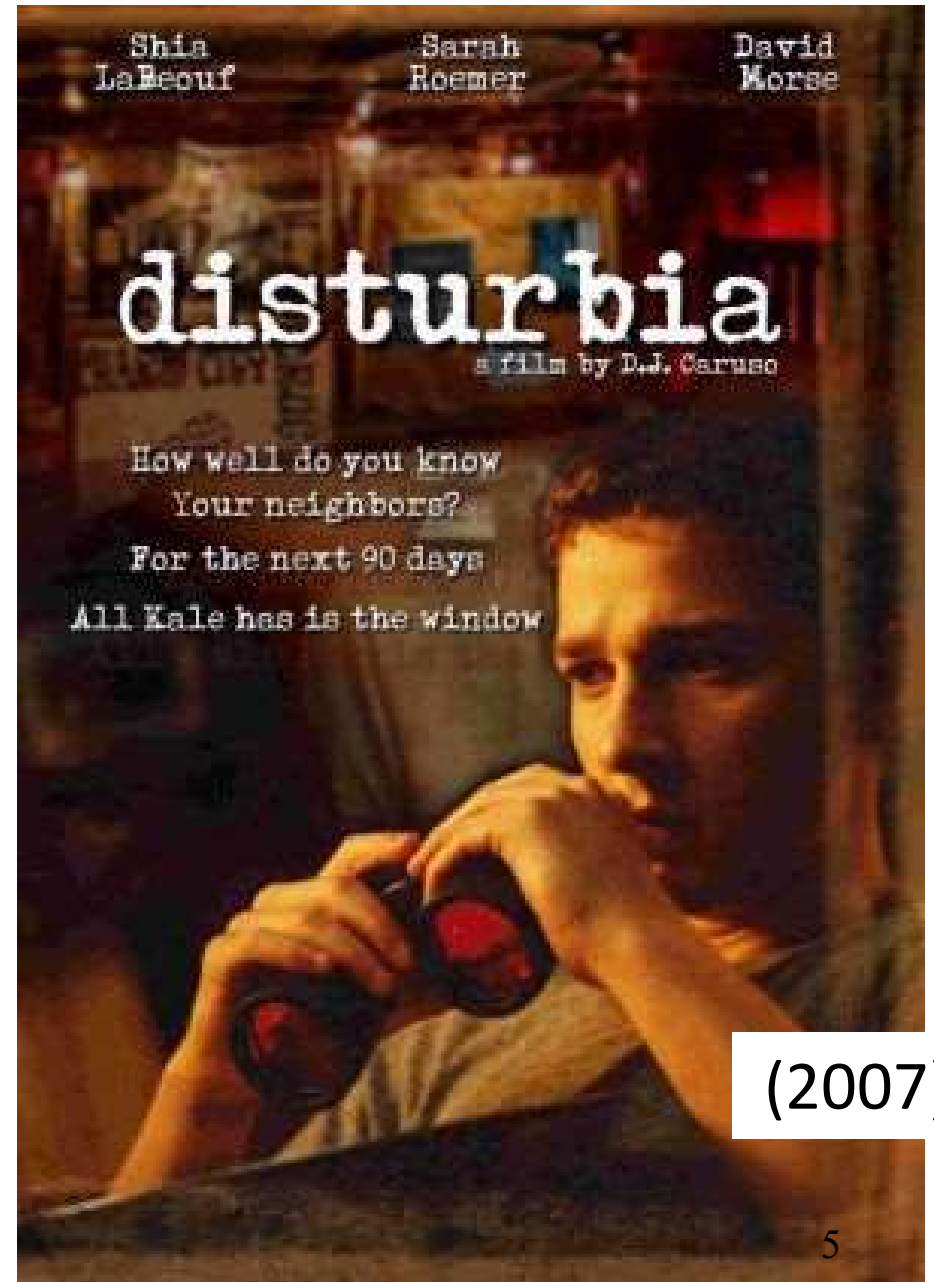
Tools/doctrine [*statute, case law, interpretive techniques*]

Copyright Calisthenics

Did the producers of *Disturbia* appropriate any “thing” that belonged to the producers of *Rear Window*? Did the defendants interfere with any protected interest of the plaintiff? Why? Why not?



v.



Copyright Calisthenics

Did the accused engage in improper appropriation – a/k/a infringement?

Consider different “patterns of generality,” or “levels of abstraction.”

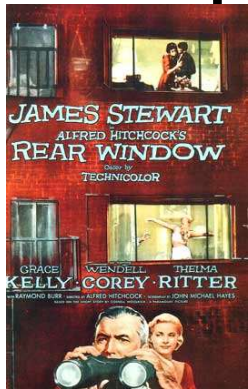
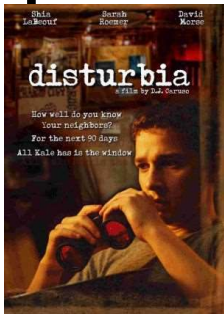
[1] Both are stories about voyeurism. **Is that the right level of abstraction? If so, the defendant infringed.**

[2] In both, a man trapped at home by circumstance happens to observe suspicious goings-on at neighbor’s place. The man’s romantic interests complicate matters. **Is that the right level of abstraction? If so, then the defendant infringed.**

[3] In both, a man victimized by an automobile accident uses binoculars to spy on creepy neighbor, whose comings and goings cast suspicion on otherwise normal behavior; blonde girlfriend is enlisted to investigate; in a chilling climax the neighbor is revealed to be a murderer and is arrested. **Is that the right level of abstraction? If so, the defendant infringed.**

[4] In the original, an older man immobilized with leg broken in auto racing accident uses binoculars to observe neighbors in a New York apartment complex; believes that a neighbor has murdered the neighbor’s wife; enlists glamorous girlfriend to investigate. The neighbor is arrested as he confronts the voyeur. In the update, a boy sentenced to house arrest after classroom outburst following father’s death in car accident uses binoculars to observe “normal” neighbor in suburban house-next-door and develops belief in neighbor’s murderous past. Neighbor kidnaps the boy’s mother; in a chilling climax, the boy and his girlfriend rescue the mother and kill the neighbor. **Is that the right level of abstraction? If so, then the defendant did not infringe.**

Idea



Expression

Copyright Calisthenics

Did the accused engage in improper appropriation – a/k/a infringement?

Consider the economic interests at stake.

[1] The classic film “Rear Window” was adapted from a short story published in a 10-cent “Detective” magazine in 1942, titled “It Had to be Murder.” The author was Cornell Woolrich.

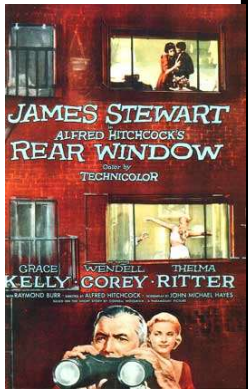
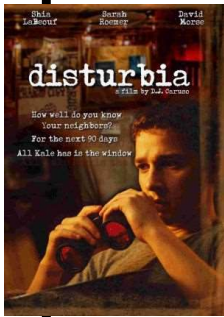
[2] Woolrich sold the right to adapt the story into a movie to Hitchcock and Jimmy Stewart, but he retained the copyright itself. The copyright is still in effect (both as of the date of production of “Disturbia,” and as of the present day). It is no longer owned by Woolrich’s heirs. It is now owned by a Hollywood agency whose business consists in part of licensing older copyrights for present purposes. (Is this a valid business model? Or a hold-up game?)

[3] Woolrich himself got a reasonable amount of money by selling the movie rights, but no movie profits. Stewart and Hitchcock made much more.

[4] Stewart and Hitchcock made a film that is regarded as one of the very best of the 20th century. They made significant creative contributions of their own, changing the story (adding the girlfriend character, played by Grace Kelly) as well as producing the visuals.

[5] Did the release of *Disturbia* harm the legitimate economic interests of either the owners of the © in the short story, or the owners of the © in *Rear Window*?

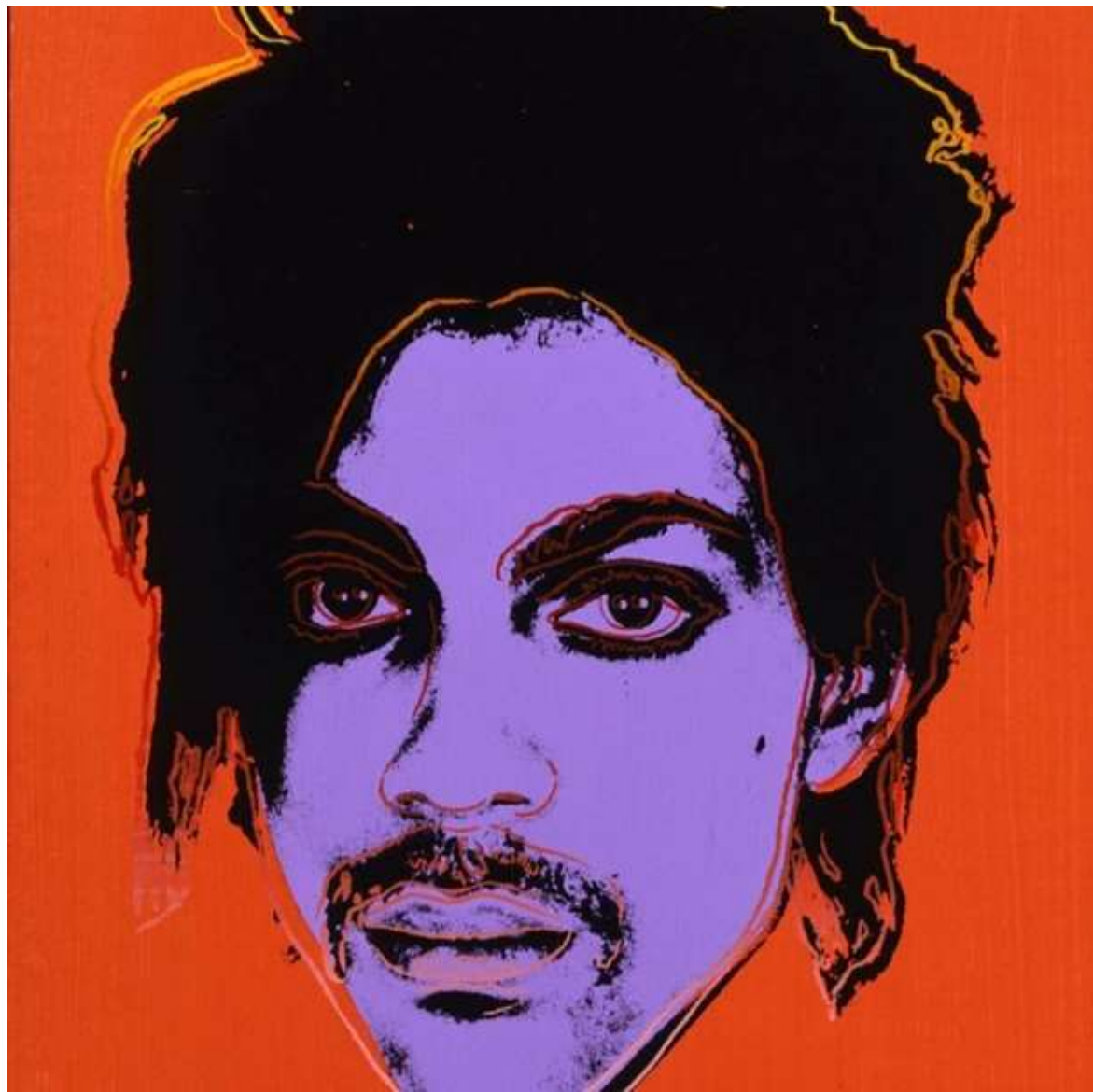
The outcome of this dispute is less important than its illustration of the need always to balance overlapping © interests in a thoughtful way.



Onward



Photo of Prince by Lynn Goldsmith
(1981)

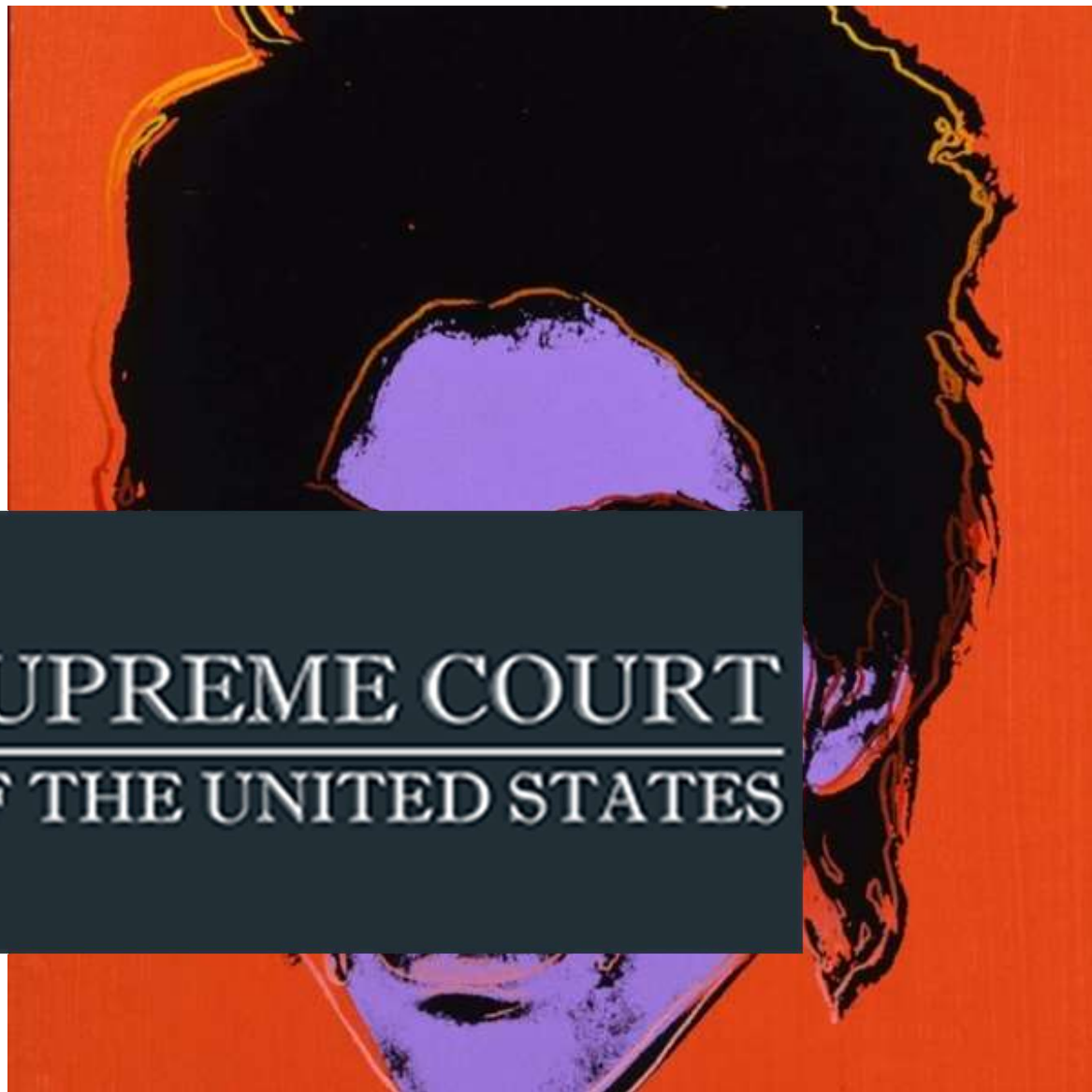


Silk screen by Andy Warhol

Did Warhol appropriate protected expression? Transform the work? Harm the [a]market for Goldsmith's work?



Photo of Prince by Lynn Goldsmith
(1981)



 SUPREME COURT
OF THE UNITED STATES

Silk screen by Andy Warhol
Did Warhol appropriate protected expression? Transform the work? Harm the [a]market for Goldsmith's work?

Purposes of copyright: fair use

17 U.S.C. § 107. - Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, **the fair use of a copyrighted work**, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, **is not an infringement of copyright**. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

- (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.

Purposes of copyright: fair use

Public policies: Why fair use? = Why copyright?

- (i) ©: Private incentives to create / distribute needed
Fair use: creators' incentives are not needed / not harmed ; “markets” that © enables do not work [scale, cost issues] [FOCUS ON FACTOR 4]
- (ii) ©: Public benefit from © protection exceeds harm to creative possibilities caused by © protection
Fair use: Public benefit from no © protection exceeds harm to creative possibilities caused by unauthorized use
[FOCUS ON BALANCE AMONG ALL FACTORS]
- (iii) ©: Copyright protection facilitates organization of firms, enterprises, industries, markets, and communities that support creative output
Fair use: *Absence of © protection promotes firms, industries, and communities that support creative output [patterns or customs]*
[FOCUS ON “PROGRESS”]
- (iv) ©: Creator has engaged in expressively valuable Lockean “labor” / effort that justifies grant or recognition of property (copyright) rights
Fair use: Accused infringer has engaged in “transformative” use (effort)
[FOCUS ON FACTOR 1]

Purposes of copyright: fair use

Public policies: Why fair use? = Why copyright?

(v) ©: Copyright permits author/owner to control uses & meanings of the work

Fair use: The law discourages © control intended to censor unpleasant or disruptive meanings

[FOCUS ON FIRST AMENDMENT / FREE EXPRESSION CONSIDERATIONS]

(vi) ©: Copyright permits author/owner to monetize all uses of the work and maximize economic returns, supporting the incentive rationale

Fair use: Efforts to monetize the work at micro levels impose privacy harms, interfere with traditionally personal uses / consumption of works, and impose harmful barriers to access to knowledge / culture

[FOCUS ON COMPETITIVE v. NONCOMPETITIVE CONSUMPTION OF WORKS]

In sum:

Fair use is a statutory interpretation that is suffused with multiple layers of unavoidable public policy questions ... problems ... implications.

Fair use: Leading Supreme Court cases



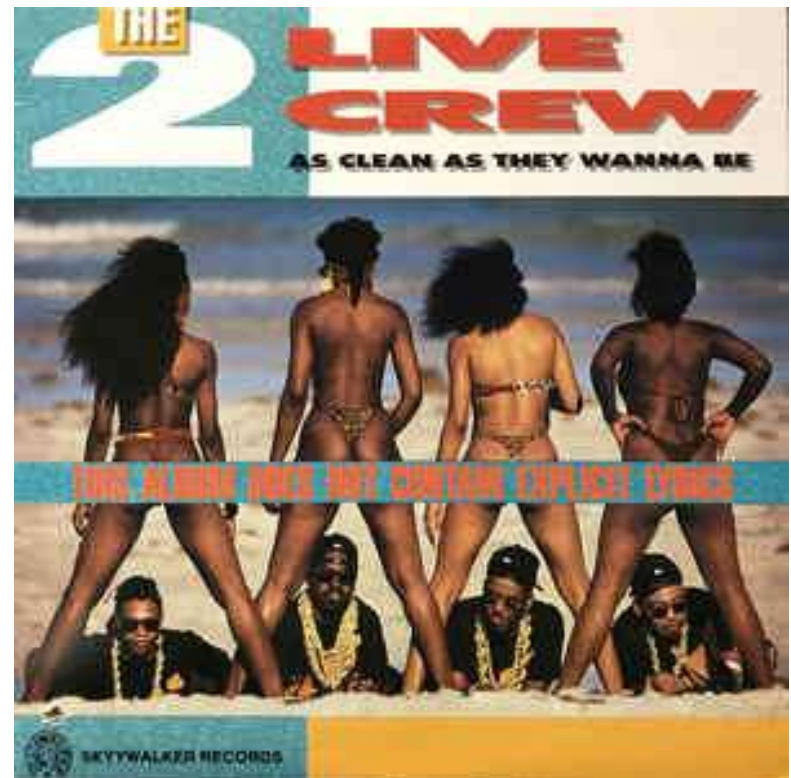
Harper & Row Publishers v. Nation Enterprises (U.S. 1985)

The fair use argument by The Nation is rejected. **Why, precisely?**

Campbell v. Acuff-Rose Music (U.S. 1994)

The fair use argument by 2 Live Crew is accepted (mostly; the parties later settled the case).

Why, precisely?

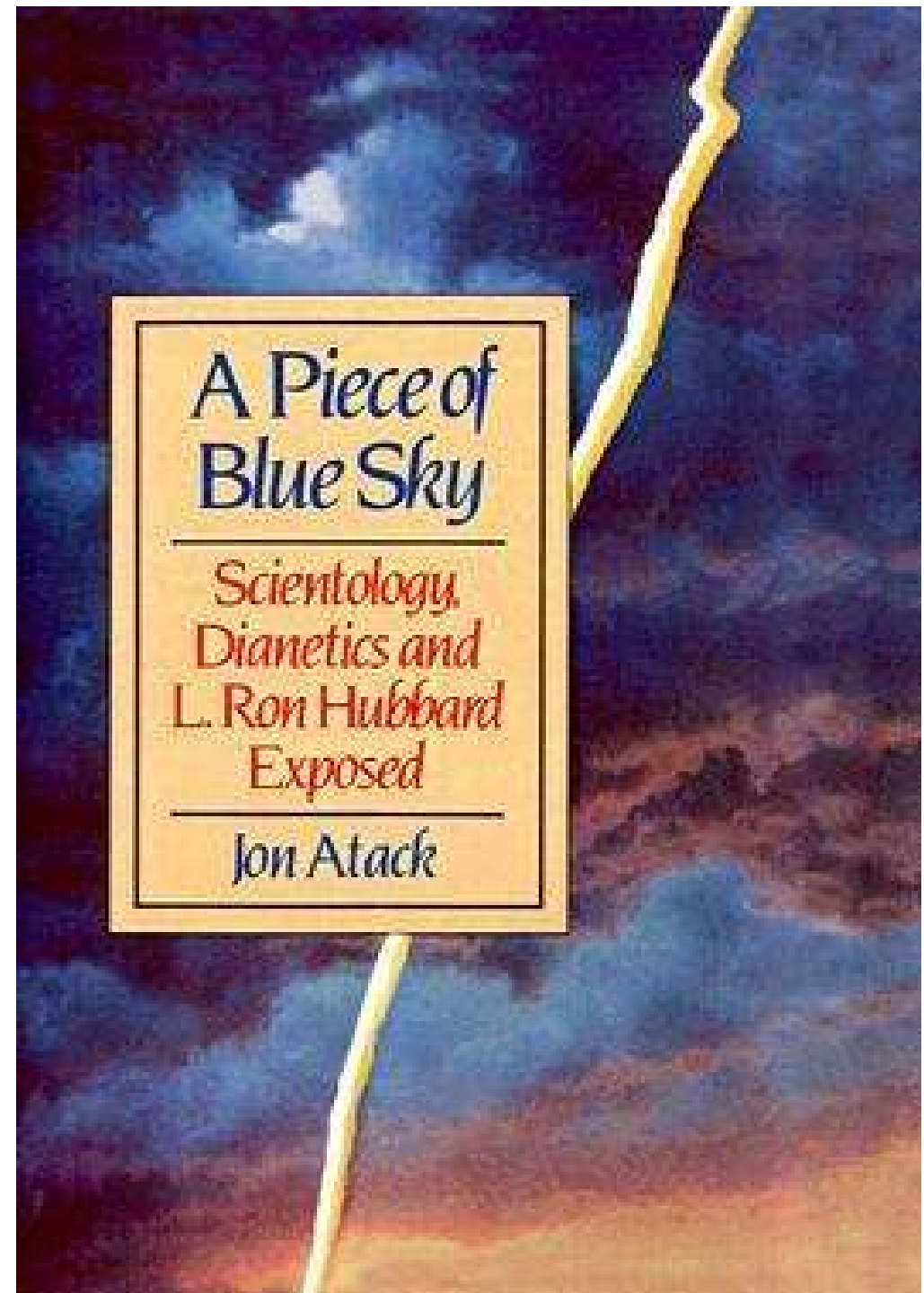
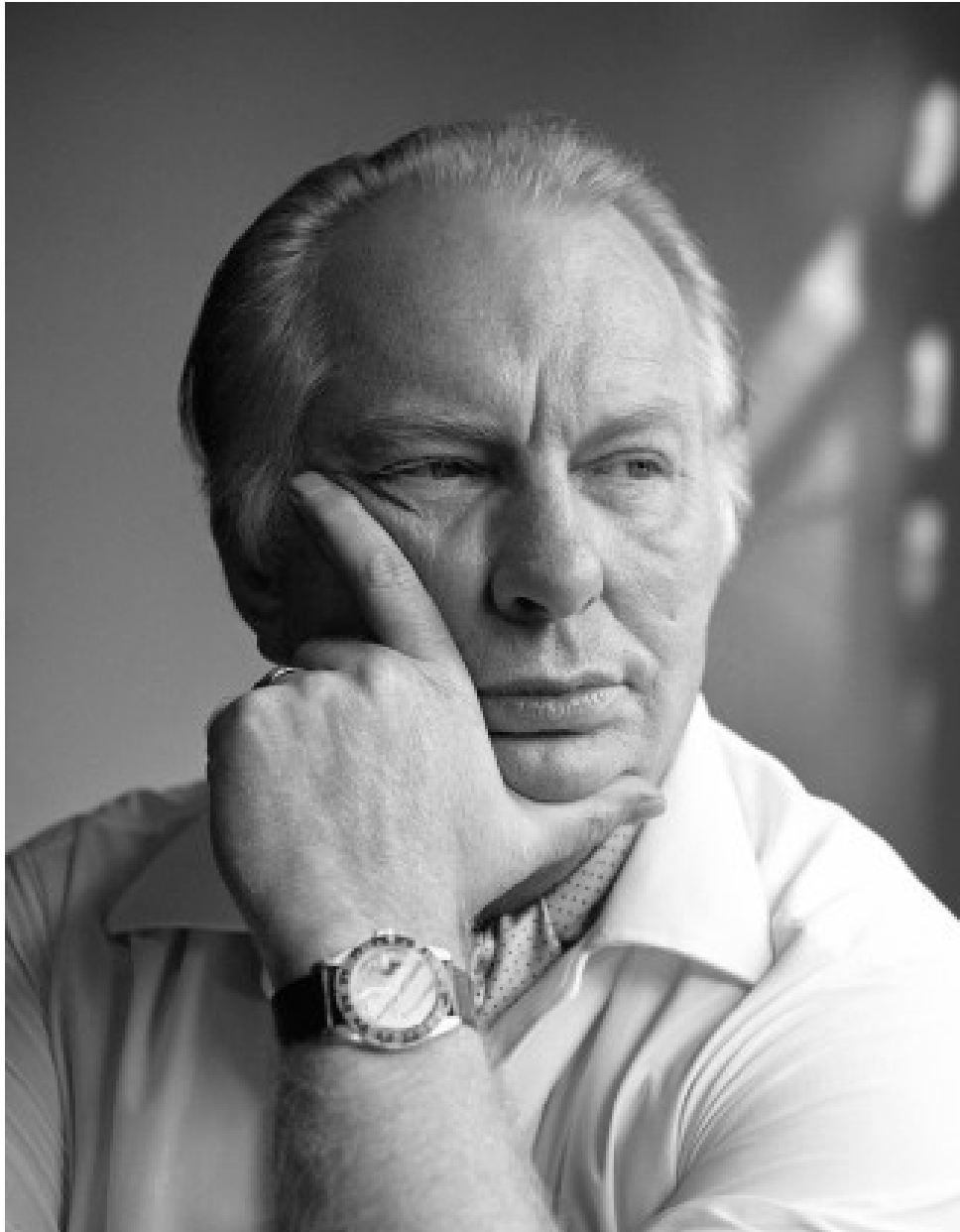


2LC



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**Fair use: Purpose and character
(factor one) illustrated**



New Era Publications Int'l v. Carol Pub. Group (2d Cir. 1990) (note: pre-Campbell)

Fair use: Which factors (should) matter? / textual examples

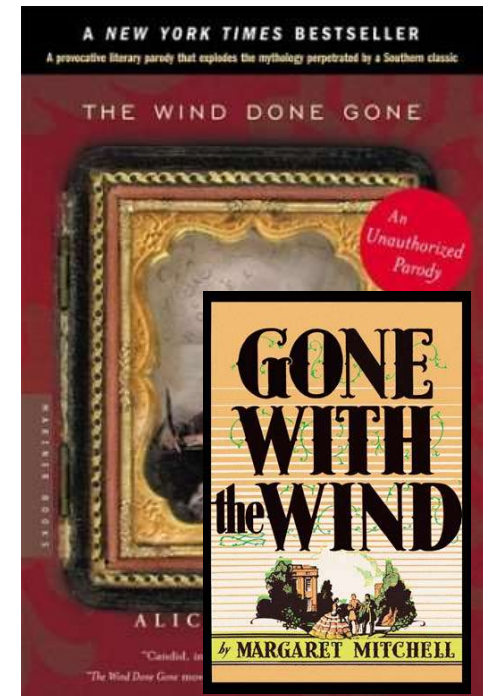
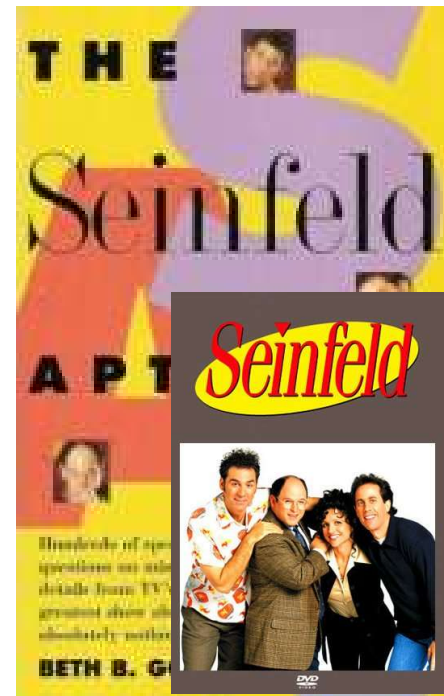
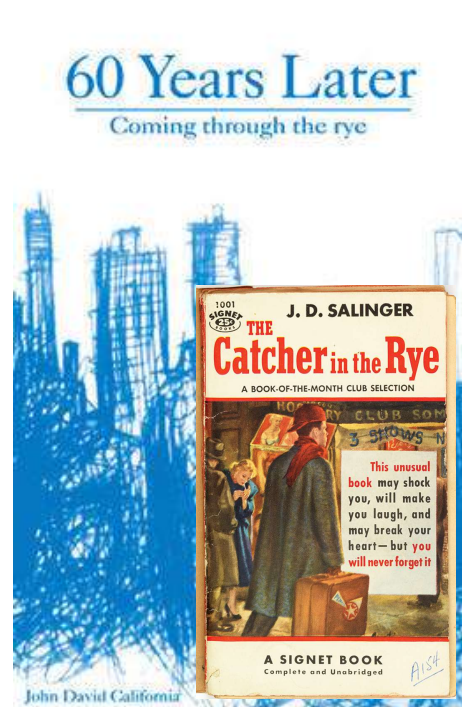
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(2) the nature of the copyrighted work;

(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 End

