

Copyright Law

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Topics:

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

Identifying and analyzing copyright problems

History and 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]*

Key moments in copyright history and policy: fair use in context

- 1400s:** Invention of movable type and the printing press in Europe
- 1710:** Statute of Anne, in England (the first modern © statute)
Builds on history of guild-based “regulation” of publisher/printer competition. “Authors” earn copyright, but authorship and originality are rhetorical sideshows.
- 1787:** Constitution of the United States: “authors” “writings” “limited times” “science.
The S of A is an inspiration; the US seems to take authors and authorship seriously, but there is little publishing/printing business in the US aside from (i) religious tracts; (ii) government printing; and (iii) newspapers.
- 1790:** First U.S. © statute: “maps, charts, and books”; “printing, reprinting, vending”
- 1841:** First modern-style “fair use” judicial opinion: *Folsom v Marsh*
F v M is the origin of the modern 4 factor statute. Conditions differ: © subject matter was narrow. “Substantial similarity” as an infringement test mostly did not exist. Proof of infringement usually required literal copying.
- 1886:** Berne Convention for the Protection of Literary and Artistic Works accepted
U.S. is not a party; as a net importer of printed material (the US is a pirate nation), it has little incentive to sign on to international copyright rules.
- 1909:** First comprehensive revision of the U.S. copyright statute
Congress confirms expansion of © subject matter (music, photography) and modest expansion of list of legal exclusivities; fair use remains a judicial creature.
- 1976:** Second comprehensive revision of the U.S. copyright statute (takes effect in 1978);
© subject matter expands again (software); fair use becomes part of the statute; during the 20th c, “substantial similarity” has become an accepted part of © infringement litigation. Copyright is still significantly a form of “regulation” of publisher/printer competition. Individual authors, readers, users matter relatively little.

Key moments in copyright history and policy: fair use in context

Early 1980s: The Betamax and other VTRs become accessible to home purchasers. Home taping of TV broadcasts starts to take off; Hollywood panics (sort of). Copyright becomes a national conversation rather than only an industry issue.

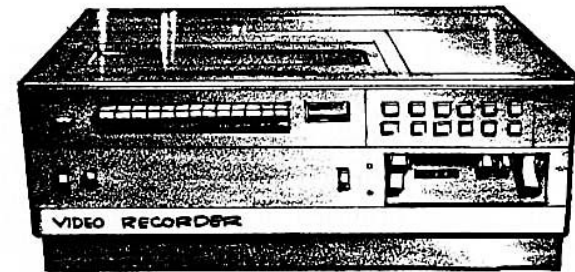
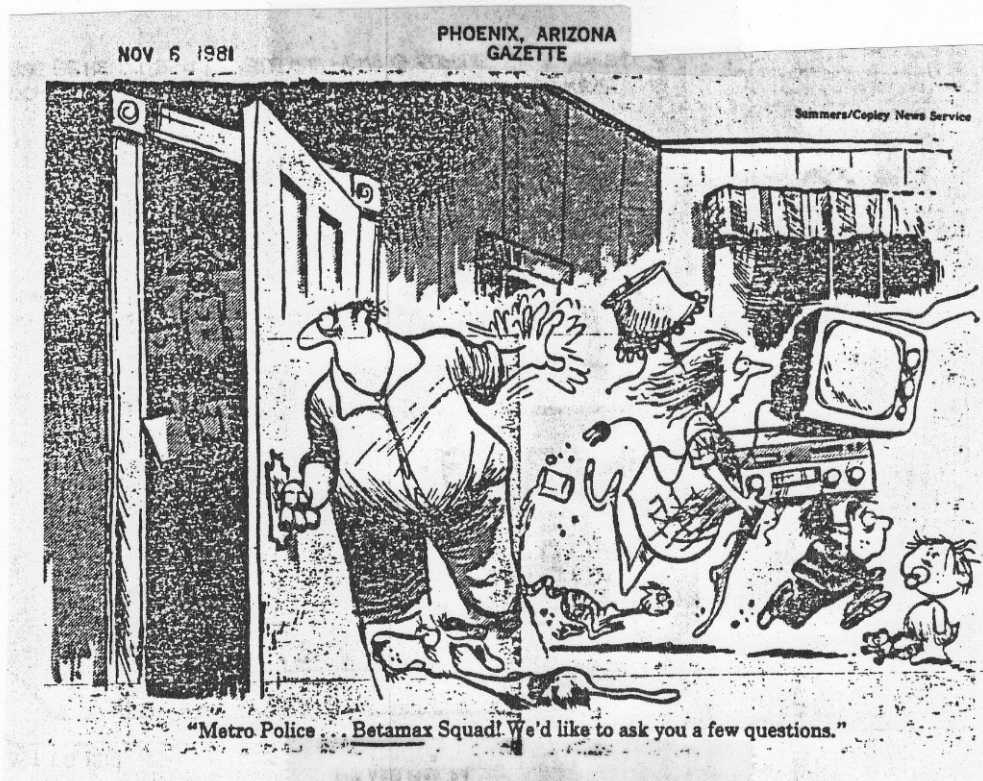
Hollywood lobbyist Jack Valenti argues “the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone”

1989: U.S. accedes to the Berne Convention

The U.S. has become a producing, exporting nation.

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

Software only works when it is copied, and when it copies data. Everyone is an author; everyone is an infringer. All day, all the time. Fair use, anyone?

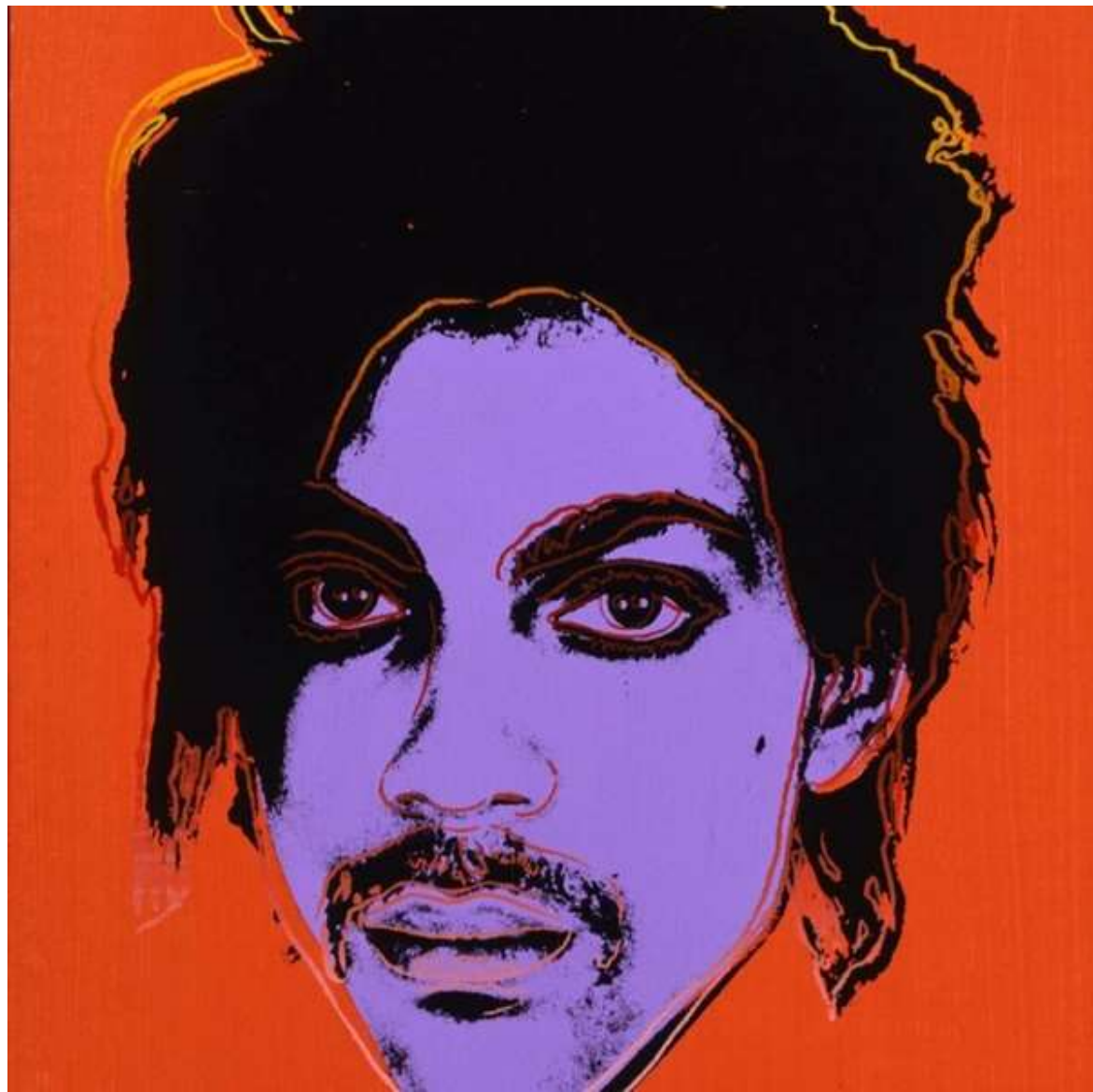


ON WHICH ITEM HAVE THE COURTS RULED THAT MANUFACTURERS AND RETAILERS BE HELD RESPONSIBLE FOR HAVING SUPPLIED THE EQUIPMENT?
102741

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?

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.

How to read the text of the Copyright Act: Keep in mind ©'s purposes

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]

How to read the text of the Copyright Act: Keep in mind ©'s purposes

Public policies: Why fair use? = Why copyright? (more!)

(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 for ©

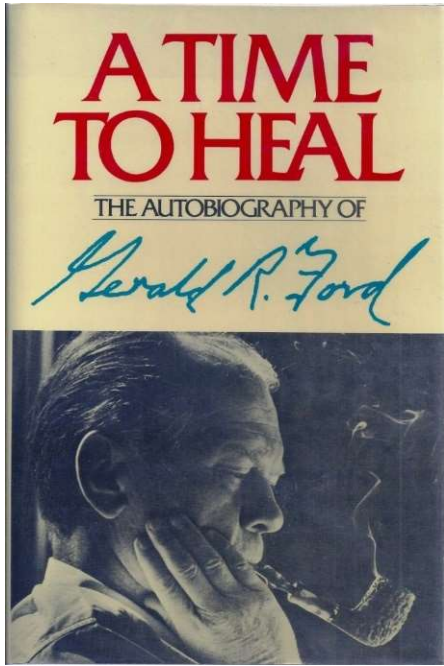
Fair use: Efforts to monetize the work at micro levels impose privacy harms, interfere with traditionally personal uses / consumption of works; impose harmful barriers to access to knowledge / culture; interfere with non-© market “progress” (e.g., © shouldn't stand in the way of producing more useful technology)

[FOCUS ON COMPETITIVE v. NONCOMPETITIVE CONSUMPTION OF WORKS]

In sum:

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

Fair use: Leading Supreme Court cases – fair use as cultural progress



The Nation.

THE FORD MEMOIRS BEHIND THE NIXON PARDON

In his memoirs, *A Time to Heal*, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Nelson Rockefeller for Vice President, and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in *Time* in mid-April and in *The Reader's Digest* thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Ford was deeply hurt by Haig's revelation.
(Continued on Page 367)

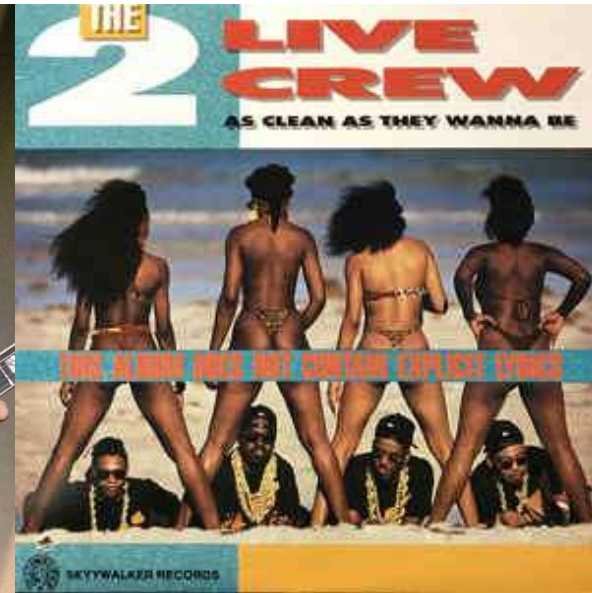
Harper & Row Publishers v. Nation Enterprises (U.S. 1985)

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?

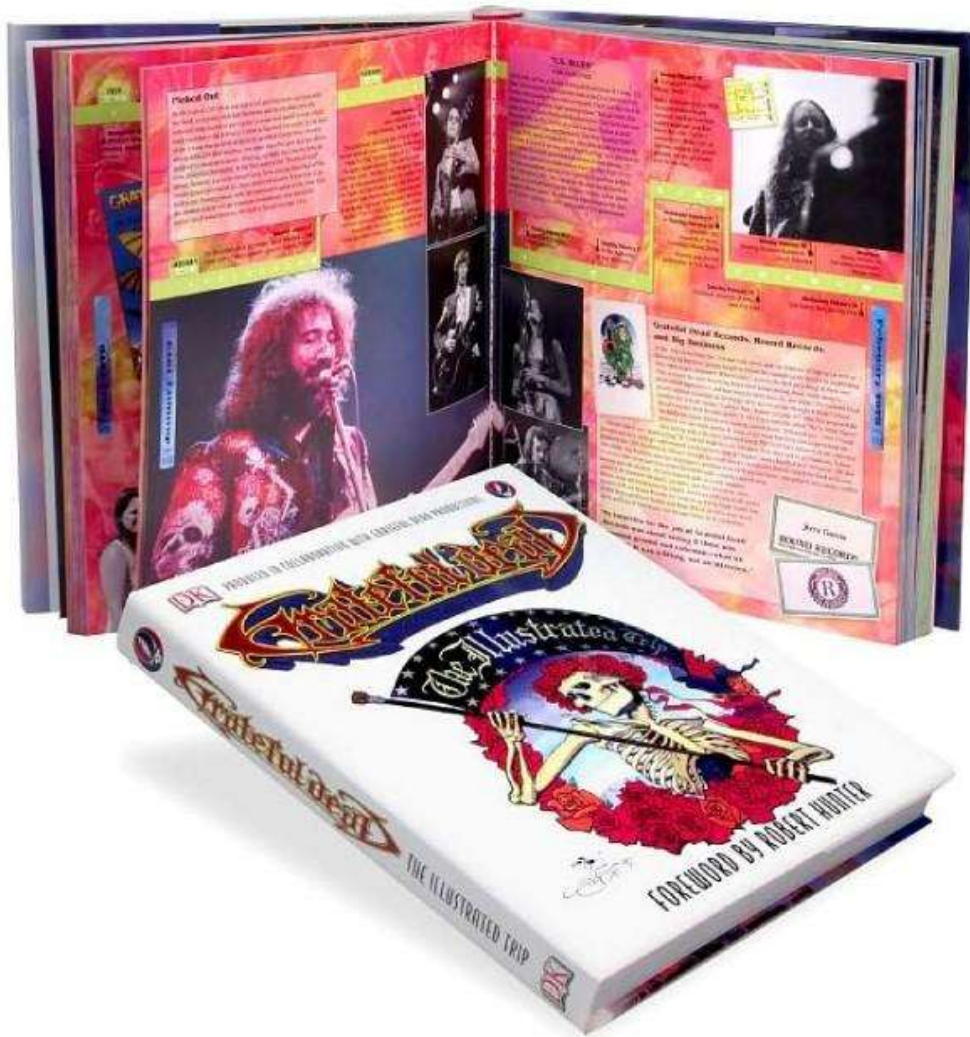


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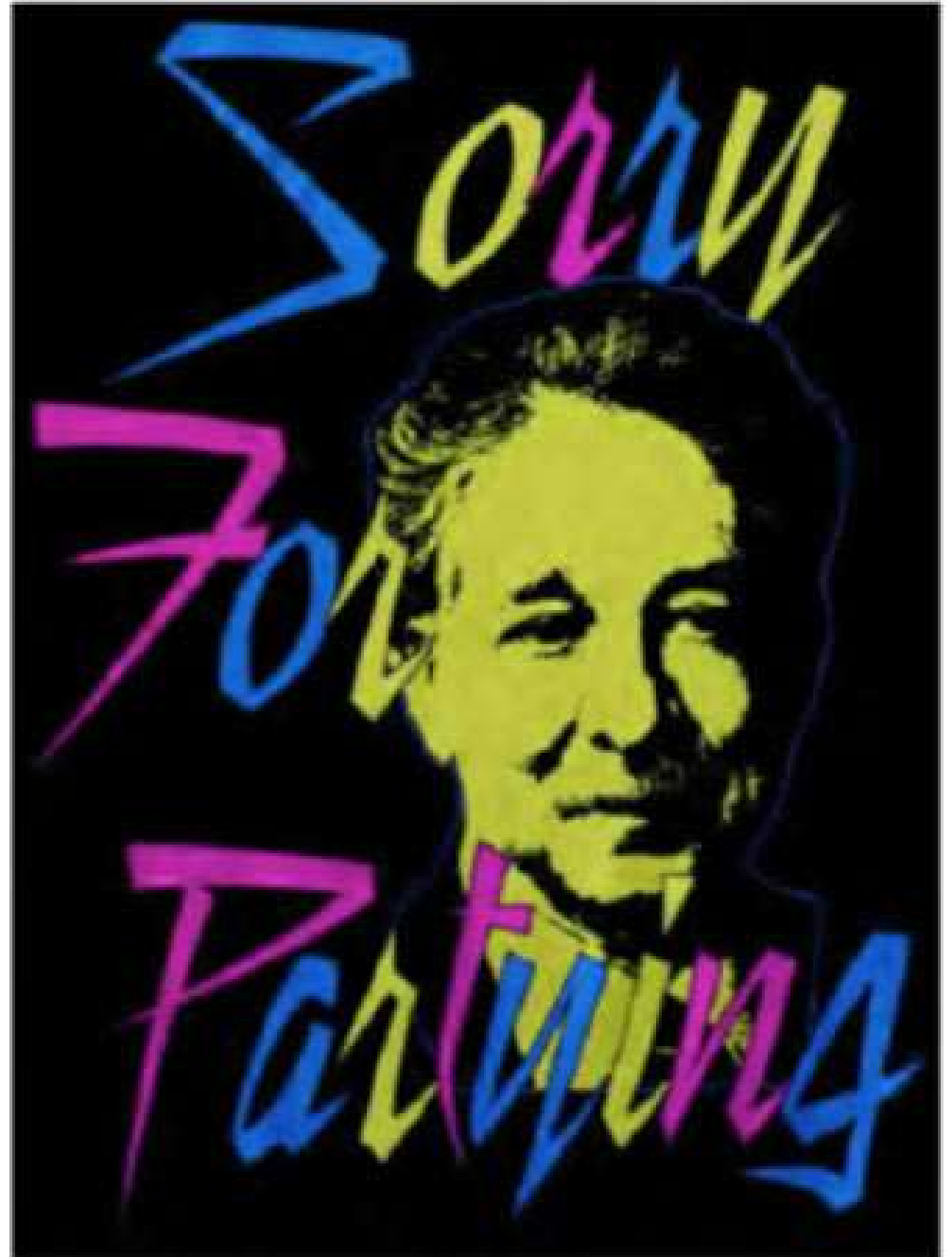
Fair use: Effect of the use on the market for the work (factor four)



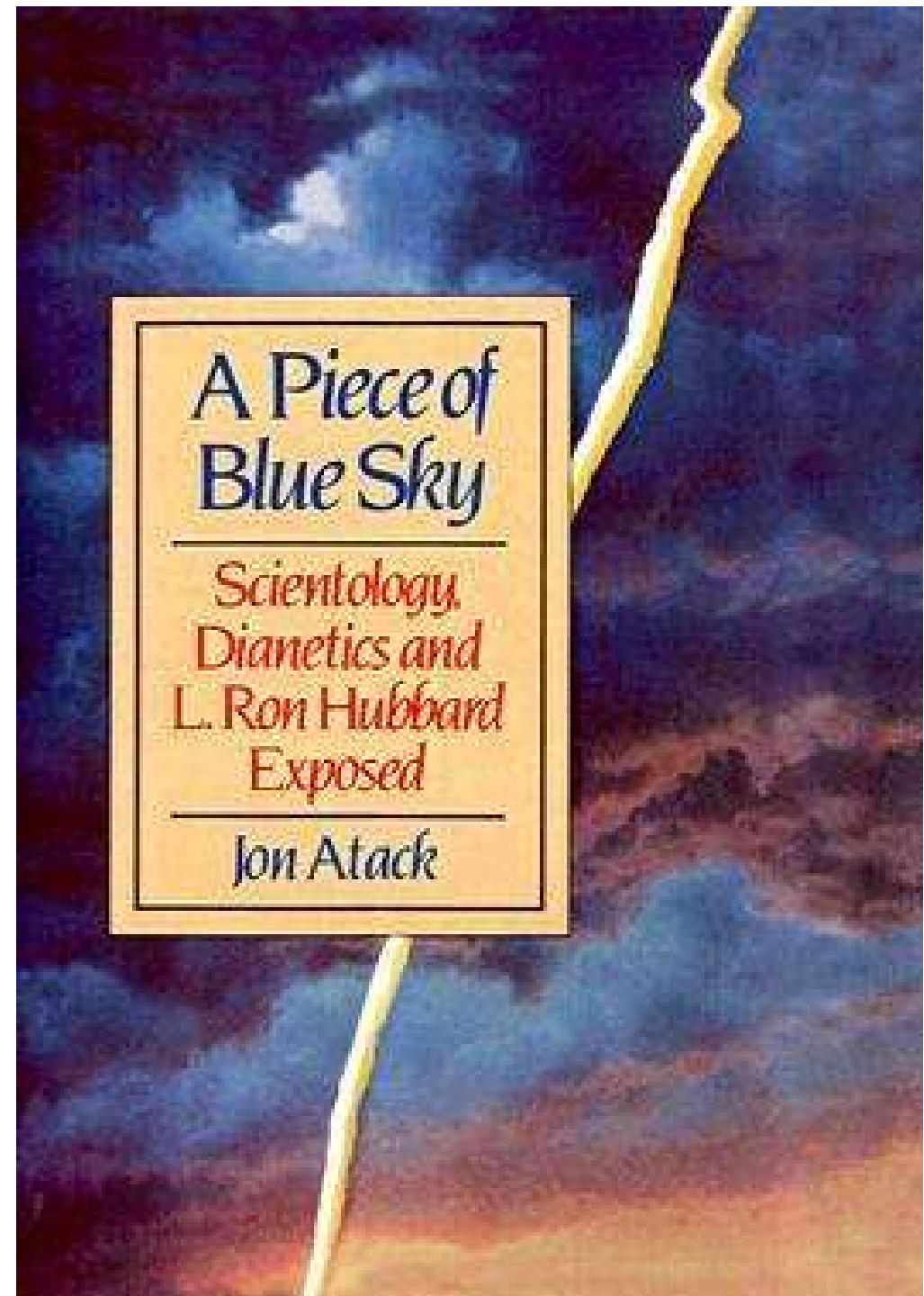
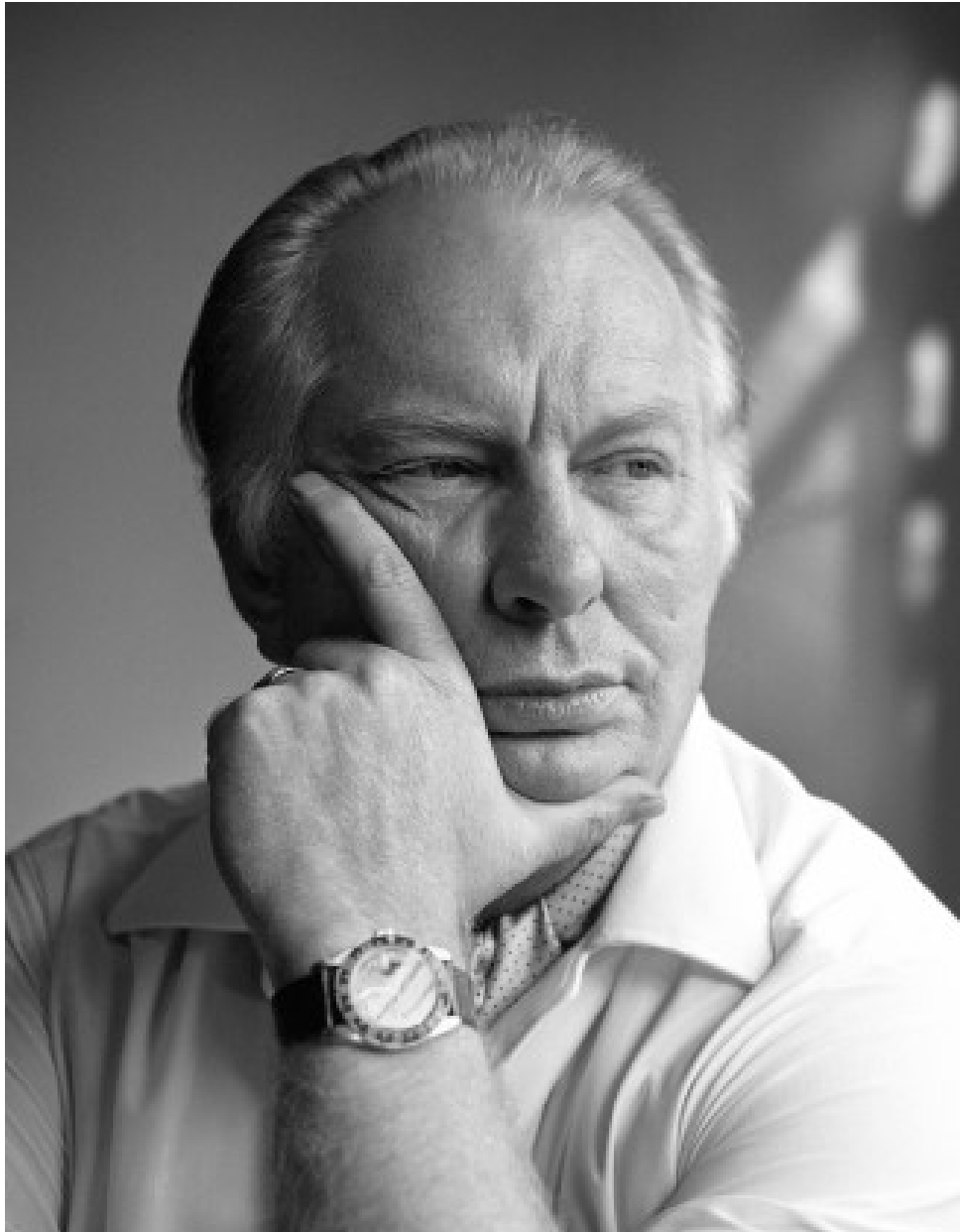
Bill Graham Archives v. Dorling Kindersley Ltd. (2d Cir. 2006): negotiations failed. Should DK release the book anyway?

Fair use: Effect of the use on the market for the work (factor four)

Kienitz v. Scornie Nation LLC (7th Cir. 2014): why does the deft win?



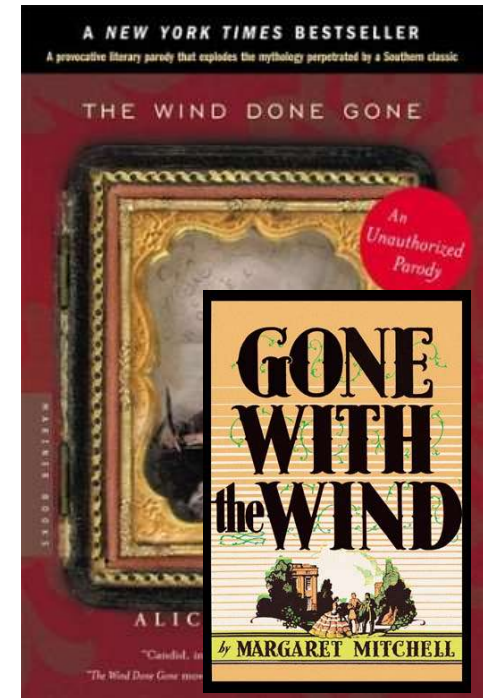
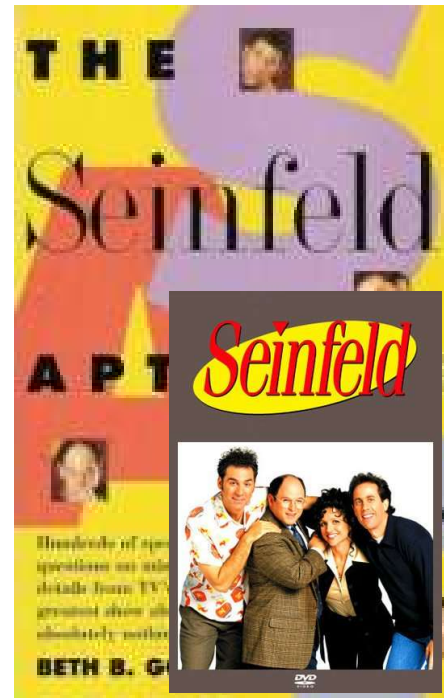
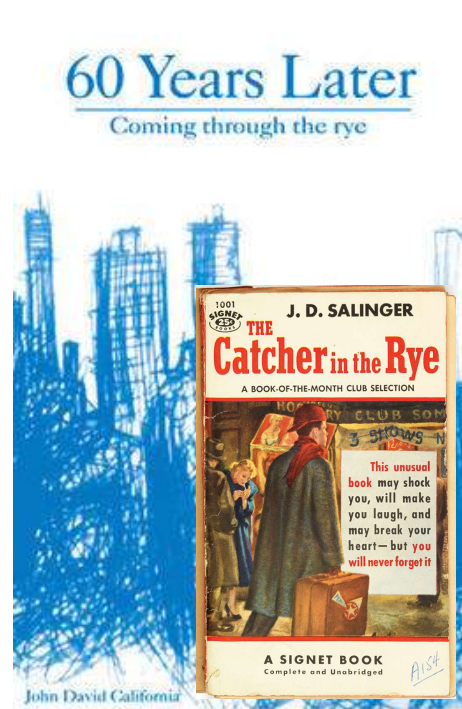
**Fair use: Purpose and character
(factor one) illustrated**



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

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

- (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 End

