



Program Title _____

Date Presented _____ Inn Year _____

Presenting Inn _____ Inn Number _____

Inn City _____ Inn State _____

Contact Person _____ Phone _____

E-mail Address _____

Please consider this program for the Program Awards: Yes No This program is being submitted for Achieving Excellence: Yes No

Program Summary:

Indicate the legal focus and be concise and detailed in summarizing the content and setup of your program. Please attach additional sheets if necessary.

Program Materials:

The following materials checklist is intended to insure that all the materials that are required to restage the program are included in the materials submitted to the Foundation office. **Please check all that apply and include a copy of any of the existing materials with your program submission:**

Script	Articles	Citations of Law	Legal Documents	Fact Pattern	List of Questions	Handouts
PowerPoint Presentation	CD	DVD	Other Media (Please specify) _____			

Specific Information Regarding the Program:

Number of participants required for the program _____ Has this program been approved for CLE? Yes No

Which state's CLE? _____ How many hours? _____

Recommended Physical Setup and Special Equipment:

i.e., VCR and TV, black board with chalk, easel for diagrams, etc. When submitting video, please indicate the length of all videos. i.e., 30 or 60 min.

Comments:

Clarify the procedure, suggest additional ways of performing the same demonstration, or comment on Inn members' response regarding the demonstration.

Program Submission Form

Roles:

List the exact roles used in the demonstration and indicate their membership category; *i.e.*, Pupil, Associate, Barrister or Master of the Bench.

Role	Membership Category

Agenda of Program:

List the segments and scenes of the demonstration and the approximate time each step took; *i.e.*, "Introduction by judge (10 minutes)."

Item	Time

Program Awards: *Please complete this section only if the program is being submitted for consideration in the Program Awards.*

Describe how your program fits the Program Awards Criteria:

Relevance: How did the program promote or incorporate elements of our mission? (*Fostering Excellence in Professionalism, Ethics, Civility, and Legal Skills*)

Entertaining: How was the program captivating or fun? _____

Creative and Innovative: How did the program present legal issues in a new way? _____

Educational: How was the program interesting and challenging to all members? The second act had an audience participation piece,

Easily Replicated: Can the program be replicated easily by another Inn? Yes No This program is: Original Replicated

Questions:

Please contact Christina Hartle at (703) 684-3590 ext 105 or by e-mail at chartle@innsofcourt.org.

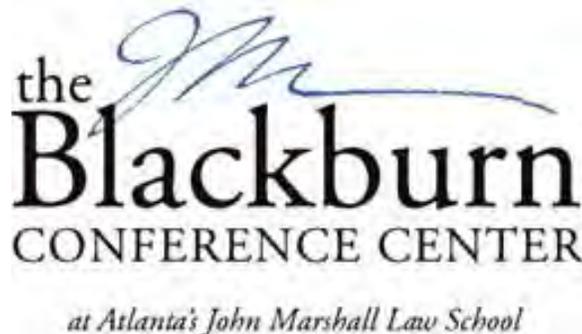
Please include ALL program materials. The committee will not evaluate incomplete program submissions.

Atlanta IP Inn of Court

Program Materials for Copyright Quiz Bowl

Presented on April 16, 2013

Special Thanks to Our Host



Program Summary:

This was a scripted program summarizing historical and recent cases on Copyright. It was set up as a quiz show with pro-copyright figures on one side and anti-copyright figures on the other. Questions would be asked about cases and principals and each side could buzz in with funny answers, but eventually get to the right answer

The three acts involved general Copyright law questions, a round for fair use questions, and a round for historical copyright cases in the Atlanta area. The second round allowed the audience to vote by texting answers to the Poll4.com system and display the audience's answer as to what is fair use or not.



Setup:

You will need a 5 or 6 actors in two teams plus 1 or 2 narrators. Best to pick a professor or character that would be pro or anti copyright. You will need an overhead projector for the slides, some sort of sound effects (e.g., smartphone) that the actors can hit to have a “buzz in”, a subscription to poll4.com or some other type of voting software if you want audience participate. The actors in the skit dressed up as the character they were supposed to be.



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quiz bowl

PRESENTED BY THE
ATLANTA IP
AMERICAN INN OF COURT
PUPILAGE GROUP 6

APRIL 17, 2013

Roles

H1: Host 1 (Kelly)
H2: Host 2 (Chittam)
RL: Rodgers Lunsford

Anti-Copyright Team (Team “Free Copies”)

SP: Sean Parker (Chris K.)
LL: Lawrence Lessig (Richard)
EH: Ed Helms (Chris H.)

Pro-Copyright Team (Team “No Copies”)

LS: Law student (Evita)
C: Captain (Doug)
Cabbage Patch Doll (“Tallulah Mae”)

Opening Round

H1: [Good evening, thanks, etc.] Our skit tonight will be a game show focusing on copyright law. Chittam Thakore and I will be your hosts, with special guest appearances from Rodgers Lunsford. Please help us to welcome the contestants as they introduce themselves. First, let’s hear from Team “Free Copies.”

SP: I’m Sean Parker. I am a serial entrepreneur well known for being the first president of Facebook, and I was recently portrayed by Justin Timberlake as a less good looking version of myself in the movie *The Social Network*. I am also widely known for co-founding the file-sharing service Napster, a venture almost entirely based on a complete and total disregard for any and all United States copyright laws. In my spare time, I enjoy being filthy rich and parking my Ferrari in front of sororities at Stanford University.

EH: I’m Ed Helms. Born right here in Atlanta, Georgia and the son of a prominent attorney that practiced for more than forty years in this fair city. I’m better known as Andy from *The Office* and I’m featured in a movie series about hangovers that was sued by Mike Tyson, who claimed my AWESOME face tattoo infringed his copyright—whatever.

LL: I’m Lawrence Lessig. I’m a law professor at Harvard Law School and the founding board member of Creative Commons. Like me, both entities share the philosophy of reducing the legal restrictions on intellectual property, thus creating a Utopian, Socialistic state. I know this philosophy is right because I am smarter than you.

H1: Thank you. And now, team “No Copies.”

C: My name is Thurston Howellberg V, grandson of The Millionaire—and his wife. After a delayed return from a three-hour tour—yes, a three-hour tour—in 1967, my grandfather partnered with the Skipper’s brother, Warren Buffett, and began investing in such

companies as Coca-Cola and GE. Blessed with this family wealth, I, too, began investing a number of years ago, in such companies as Webvan, Pets.com and eToys—ventures all doomed thanks, of course, to inadequate intellectual property protection. Fortunately, Granddaddy and Lovey took good care of me, and today I am enjoying my retirement, mostly aboard my nautical fleet, including the S.S. Marybeth, named after my hero, Marybeth Peters, who spent almost 45 years in the U.S. Copyright Office, including 17 as the Register of Copyrights. Ahhh, Marybeth...

H1: Welcome aboard.

LS: Hello my name is Evita Jantarawergul, a third year law student at John Marshall, who has discovered the most efficient daily schedule—by allocating 2.6 hours to sleep, 55 minutes to eating, 42 minutes for travel, 22 minutes on personal hygiene and 1.6 hours to communicating with others; I can maximize the study of law to 18.49 hours per day. I am also being considered for a spokesperson position with 5 Hour Energy drink.

H1: And lastly for Team “No Copies,” we have Tallulah Mae. We’ve been advised that it’s her naptime, so she might be quiet.

H2: All right, welcome contestants. As you know, [intro. to copyright law basics, with slides]

H2: Our Copyright Quiz Bowl tonight will have three rounds. We’ll get started with some basic questions on recent developments in copyright law. Our second round will be a fair use lightning round. And our third and final round will involve questions on several well-known Georgia copyright cases. So let’s get started.

H1: Our first questions on recent copyright developments come to us from a “textbook” copyright case—in that it is a copyright case about textbooks. Supap Kirtsaeng helped to finance his doctorate in mathematics at the University of Southern California by having friends and family send him textbooks they purchased in Thailand for him to resell in the United States through eBay, where Kirtsaeng sold the books for \$1.2M, so that’s about 10 books. These books were lawfully purchased in Thailand, but John Wiley & Sons sued Kirtsaeng for copyright infringement.

Q1

H1: First question: for 5 points, what important question was raised by the case, which was just decided by the Supreme Court on March 19th? (*Kirtsaeng d/b/a Bluechristine99 v. John Wiley & Sons Inc.*, U.S., No. 11-697, 3/19/13).

SP: Um, who cares? \$1.2M isn’t cool anymore. You know what’s cool? A BILLION DOLLARS.

H1: No, but thanks for that.

EH: Why didn't I think of doing this before Kirtsaeng did?

H1: No. But that's a good question too.

LL: Does the first sale doctrine allow the importation into the United States of copies of works legally manufactured and sold overseas?

H1: Correct.

Q2

H1: And for 5 more points, what is the "first sale" doctrine?

EH: That's easy. The first doctrine of sales is ABC: always be closing.

H1: Incorrect. The question is: what is the first sale doctrine, not the first doctrine of sales.

C: The first sail doctrine says that you should never ride on a boat the first time it sails. Just look at what happened to the Titanic.

H1: Wrong again.

LS: The first sale doctrine provides that the owner of a particular copy, lawfully made under the Copyright Act, of a copyrighted work is entitled, without the authority of the copyright owner, to sell or otherwise dispose of that copy. (§ 109(a); *see also Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908)).

H1: Correct.

Q3

H1: OK. And for 10 points, how did the Supreme Court rule: was Kirtsaeng's importation and resale of copies of textbooks legally manufactured and sold overseas permissible under the first sale doctrine?

LL: Yes. While the Supreme Court had previously split 4-4 on the applicability of the first sale doctrine to goods manufactured and first sold overseas in a similar case in 2012, *Costco v. Omega*, the Court this time held 6-3 (with Justices Ginsburg and Kennedy dissenting and Justice Scalia dissenting in part) that the first sale doctrine does apply to copies of works legally manufactured and sold overseas and imported into the United

States without the permission of the copyright holder. (*Kirtsaeng d/b/a Bluechristine99 v. John Wiley & Sons Inc.*, U.S., No. 11-697, 3/19/13)

H1: Correct.

H2: OK. Our second group of questions on recent copyright developments comes to us from the Ninth Circuit case of *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, No. 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013). There, the Ninth Circuit held that Veoh Networks – a video sharing site that had been sued for direct and secondary copyright infringement by Universal Music Group – was protected under a DMCA safe harbor that limits the liability of Internet Service Providers, or ISPs, where the copyright infringement occurs “by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” 17 U.S.C. § 512(c)(1).

Q4

Alright contestants: for 5 points, DMCA is an acronym for what federal statute?

C: The “Don’t Mess with Copyright Act”.

H2: No.

SP: Do Make Copies Anytime.

H2: No.

LS: The Digital Millennium Copyright Act.

H2: Yes, signed into law in 1998 by President Clinton. (Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998); 17 U.S.C. §§ 1201-05).

Q5

H2: And for 5 more points, what is a DMCA “safe harbor.”

C: That’s easy. Any harbor where all of the boats have completed their “first sail.”

H2: No.

LL: The DMCA provides four limitations on liability, or “safe harbors,” for ISPs: 1) a safe harbor for transitory digital network communications; 2) a safe harbor for system

caching; 3) a safe harbor for instances where information is stored on an ISP's system or network at the direction of users; and 4) a safe harbor for instances where an ISP refers or links users to an online location that contains infringing material or activity. The requirements for ISPs to qualify for each of these safe harbors are different, and are outlined in the DMCA at 17 U.S.C. § 512(a)-(d). But the basic point is that if the ISP meets the requirements, it can limit its secondary liability for the infringement of its users.

H2: Correct.

Q6

H2: And the DMCA safe harbor at issue in the UMG case was the 512(c) safe harbor that limits the liability of ISPs for copyright infringement that occurs “by reason of the storage at the direction of a user.” So for 10 points, why did the Ninth Circuit conclude that the infringement in the UMG case occurred “by reason of the storage at the direction of a user”?

EH: Ummm ... because the user directed the storage??

H2: Can you be more specific, please?

EH: Ummm ... no.

LL: Veoh only provides an automated process for making files accessible and the automated process is initiated by its users.

EH: Wait ... you stole my answer!

H2: That's right, contestants, the Ninth Circuit held that “the access-facilitating processes that automatically occur when a user uploads a video to Veoh” fall into the DMCA safe harbor. (*UMG Recordings, Inc. v. Shelter Capital Partners LLC*, No. 09-55902, 2013 WL 1092793 (9thCir. Mar. 14, 2013)).

H1: OK. We'll stay in the Ninth Circuit for another case dealing with vicarious and contributory liability. In *Luvdarts, LLC v. AT&T Mobility, LLC*, the plaintiffs, which published and distributed mobile multimedia content (namely games, greeting card messages, ads, coupons, and other content), sued mobile wireless carriers AT&T, Verizon, Sprint, and T-Mobile, arguing that the carriers should be vicariously and contributorily liable for the copyright infringement that took place on their MMS networks. Specifically, while the plaintiffs conceded that the carriers did not have any way of supervising the use of their MMS networks for copyright infringement, they argued that the carriers could “establish a system” to do so. Moreover, the plaintiffs had

sent the carriers a 150-page list of all of the plaintiffs' titles that were protected by copyright, and had demanded "accountability" from the carriers for the unauthorized distribution of those titles.

Q7

H1: First question contestants: for 5 points, what is MMS?

EH: M&Ms are little chocolate candies. You can also get them with peanuts.

H1: No, not M&Ms; MMS.

C: Her Majesty's Ship. Preferably one in a safe harbor.

H1: No. That is HMS.

LS: MMS stands for Multimedia Messaging Service. It is the standard way to send messages that include multimedia content to and from mobile phones. It is an extension of basic SMS, or Short Message Service, which allows exchange of text messages, but only up to 160 characters in length.

H1: Correct.

Q8

H1: OK. Next question. The plaintiffs in *Luvdarts* claimed that AT&T, Verizon, Sprint, and T-Mobile should be "vicariously" and "contributorily" liable for copyright infringement taking place on their MMS networks. For 5 points, what are the tests for "vicarious" and "contributory" liability under copyright law?

EH: When an employee is on a frolic and not a detour!

H1: Anyone else?

LL: "Vicarious" liability attaches if the defendant has both: 1) the right and ability to supervise the infringing activity; and 2) a direct financial interest in the activity. "Contributory" liability attaches if the defendant both: 1) knows of the direct infringement; and 2) either induces, causes, or materially contributes to it.

H1: Absolutely right.

Q9

- H1: Final question: for 10 points, did the Ninth Circuit rule for the plaintiffs or the carriers on the vicarious and contributory infringement claims in *Luvdarts*?
- C: AT&T should win. I love their “It’s Not Complicated” commercials with the kids sitting in a circle. The Sprint commercials with Kevin Durant are pretty funny. I don’t understand the T-Mobile commercials: there’s a helicopter, and a motorcycle...
- H1: Was that an answer? I’m just going to subtract 10 points.
- LS: The Ninth Circuit ruled for the carriers and affirmed the dismissal of the plaintiffs’ complaint. On vicarious liability, the court said that an allegation that the carriers *could build* a system that would give them the right and ability to supervise the infringing activity was insufficient; rather, the test is that the “right and ability” to supervise must be evaluated based on the networks’ “current architecture.” And on contributory infringement, the court concluded that the 150-page generalized notice that the plaintiffs sent was not sufficient to give the carriers knowledge of the infringements. (*Luvdarts, LLC v. AT & T Mobility, LLC*, No. 11-55497, 2013 WL 1192950 (9th Cir. Mar. 25, 2013)).
- H1: Correct. Well done.
- H2: For our final group of questions on recent copyright developments, we’ll head to the Seventh Circuit. In *Flava Works, Inc. v. Gunter*
- SP: “Yeeaaaaah booooy!” “Flavor Flav!”
- H2: Uhhh, Flavor Flav has nothing to do with this case. But thanks for that. I’ll give you 1/2 a point and a giant clock.
- SP: Sorry.
- H2: Anyways. In *Flava Works, Inc. v. Gunter* the Seventh Circuit addressed the contributory liability of myVidster, an online social bookmarking service that allowed users to embed videos that infringed Flava’s copyrights. Specifically, myVidster’s users would find videos on the Internet and “bookmark” them on myVidster’s website to make them available to other myVidster users. After receiving the bookmark, myVidster would automatically request the video’s embed code from the server hosting it, which would enable myVidster users to watch the video from myVidster’s site. In Flava’s case, some of those videos were videos that Flava’s users had improperly uploaded; Flava was upset by the fact that visitors to myVidster could then watch the videos while circumventing

Flava's paywall. (*Flava Works, Inc. v. Gunter*, No. 11-3190, 2012 WL 3124826 (7th Cir. Aug. 2, 2012)).

Q10

H2: First question. For 5 points, what does it mean to embed a video?

EH: To watch a movie, while in your bed. That's an in-bed video.

H2: No.

LL: To embed a video means to embed, or place, a video within the HTML code of the page you are posting on. So in this case, when a video was bookmarked on myVidster, myVidster would request the video's embed code from the server hosting it and then create a page around the video: myVidster users could click on a thumbnail of the video's opening screen shot, which would then connect the user's computer to the server hosting the video, and allow the users to watch the video. So while it would appear to the user that they were watching the video on myVidster's website, myVidster was not actually hosting the content (the way that say, YouTube does).

Q11

H2: Correct. And for 5 more points, who can tell me what a "paywall" is?

C: An embankment to prevent erosion of a shoreline. Like you might find in a safe harbor.

H2: No. That's a seawall.

LS: A paywall is a system that prevents Internet users from accessing content without a paid subscription. Interestingly, it appears that *Flava Works* is the first appellate opinion to use the term "paywall."

Q12

H2: Correct. Final question. For 10 points, what did the Seventh Circuit hold in *Flava Works*: was myVidster liable for contributory infringement by virtue of having allowed its users to view embedded content that was hosted on other servers?

SP: Who cares? Why don't we talk instead about how they clearly ripped off their name from Napster?!

H2: Incorrect, again.

- LS: No: the Seventh Circuit held that myVidster was not liable for contributory infringement. The structure of how embedding works appears to have been key here: the court suggested that the only actual infringement was done by the Flava users who had improperly uploaded the video in the first instance (which had later been “bookmarked” by myVidster users, and then viewed by other myVidster users). But myVidster had no relationship with those initial uploaders, and had done nothing to encourage or contribute to *that* conduct. Moreover, the myVidster site was designed in such a way that it made no “copy” of the videos (save for an archival feature that myVidster had since disabled, and that the Seventh Circuit said would in fact infringe Flava’s copyrights directly). Therefore, because myVidster had not contributed significantly to the infringement of Flava’s copyrights, the Seventh Circuit vacated the district court’s preliminary injunction.
- H2: Absolutely correct, yet again. And with that, we have (mercifully) completed Round One.

Fair Use “Lightning” Round

- H1: It’s time for our fair use lightning round. All questions will be worth 10 points. The answers to each of the following questions will be yes or no, and our teams would like to use a “life line” for this round and poll the audience for this portion of the game. After each question and the visual clues that go along with them, we ask the audience to enter, via text to the numbers we will display, yes, if you think the defense of fair use applies or no, if you think it does not. Each team will then decide whether they agree with the audience.
- H2: To assist you in voting, one of our experts, Rodgers Lunsford, will first provide you with a short refresher course on fair use.
- RL: “The doctrine of fair use has been called . . . ‘the most troublesome in the whole law of copyright.’” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 475, 104 S. Ct. 774, 805 (1984) (J. Blackmun, dissenting).

The test to be employed by the courts in applying the fair use doctrine was set forth by Justice Story in *Folsom v. Marsh*, 9 F.Cas. 342 (No. 4,901) (CDD Mass. 1841) and has since been codified as 17 U.S.C. § 107, which provides:

[T]he fair use of a copyrighted work . . . for purposes such as:

- criticism,
- comment,
- news reporting,
- teaching (including multiple copies for classroom work),
- 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 application of the fair use doctrine, however, “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for a case-by-case analysis.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S. Ct. 1164, 1170 (1984).

H2: Thank you, Rodgers. So let’s look at some of those cases now.

Q13

H1: First question. In 1983, Hustler magazine published a parody of an advertisement for Campari liquor that portrayed televangelist Jerry Falwell’s “first time” as involving not only Campari but a sexual experience—with his mother, in an outhouse—and a fictitious interview replete with scatological humor. In response, Falwell not only sued Larry Flynt for defamation but also sent out hundreds of thousands of copies of the one-page ad to members of the Moral Majority asking for contributions to fund his lawsuit and television network. He also held up copies of the ad during his sermons. Falwell’s copying did not diminish the sales of the magazine because the magazine was already off the market and would not adversely impact the marketability of back issues, but his activities brought in nearly \$750,000 in donations. Is Falwell’s copying and displaying of the Hustler ad fair use?

H1: Yes. Team “Free Copies” is correct. (*Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526 (C.D. Cal. 1985)).

Q14

H2: In 1994, Carol Publishing Group published *The Seinfeld Aptitude Test (The SAT)*, a book containing trivia questions about the events and characters depicted in the popular television series *Seinfeld*, produced and owned by Castle Rock. The book drew from 84

of the 86 Seinfeld episodes that had been broadcast as of the time the book was published. Every question and correct answer has as its source a fictional moment in a Seinfeld episode. Forty-one questions and/or answers contain dialogue directly from Seinfeld. The name “Seinfeld” appears prominently on the front and back covers of The SAT, and pictures of the principal actors in Seinfeld appear on the cover and on several pages of the book. There was no evidence that The SAT’s publication diminished *Seinfeld*’s profitability, and in fact *Seinfeld*’s audience grew after The SAT was first published. However, Castle Rock claimed that the book affected Castle Rock’s right to make derivative works such as trivia books. Does The Seinfeld Aptitude Test constitute fair use of the Seinfeld television series?

H2: No. Team “No Copies” is correct. (*Castle Rock Entertainment, Inc. v. Carol Publ. Group*, 150 F.3d 132 (2d Cir. 1998)).

Q15

H1: A respected literary writer wrote a biography of American novelist J.D. Salinger that contained unpublished letters written between Salinger and his friends and colleagues. The letters were the “backbone” of the biography which contained 59 instances of quoting or close paraphrasing from 44 unpublished letters. The letters were available to the public at a university library; however, Salinger—who shunned all publicity—had never authorized reproduction of the letters. Does the use of Salinger’s unpublished letters in the biography constitute fair use?

H1: No. Team “No Copies” is correct. (*Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987)).

Q16

H2: Another Salinger case. In 2009, Fredrik Colting, under the pseudonym John David California, published *60 Years Later: Coming Through the Rye*, a novel detailing the life of a character named “Mr. C.” J.D. Salinger filed suit for copyright infringement alleging Mr. C resembled Salinger’s main character Holden Caulfield in *The Catcher in the Rye*. After suit was filed, Colting alleged the character was a parody. Although Mr. C was depicted older than Caulfield and in present day settings, he retained substantial character traits of Holden Caulfield. Does Mr. C constitute fair use of Salinger’s character?

H2: No. Team “No Copies” is correct. (*Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009)).

Q17

H1: In 1980, comedians on Saturday Night Live parodied the song “I Love New York,” a jingle featured in a 1977 television commercial created as part of an ad campaign to

revamp the then-bankrupt city of New York. In the SNL skit, fictitious politicians of the biblical City of Sodom discuss ways to change the reputation of their city including a massive tourism campaign featuring “citizens” singing the tune of “I Love New York” in reference to their city. In the skit, the words “I love” and four musical notes were taken from the original jingle, but the SNL version of the song did not compete with or detract from “I Love New York.” Does the SNL parody constitute fair use?

H1: Yes. Team “Free Copies” is correct. (*Elsmere Music, Inc. v. National Broadcasting Company*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff’d*, 623 F.2d 252 (2d Cir. 1980)).

Q18

H2: Turner Broadcasting produced a documentary entitled “Ali-The Whole Story,” a made-for-TV biography on Muhammad Ali. The biography featured approximately 41 seconds of clips from the 84-minute motion picture “We Were Kings.” The 41 seconds of clips were of historical footage and comprised less than 2% of the 94 minute “Ali” documentary. “We Were Kings”—a chronicle of Ali and George Foreman’s 1974 “rumble in the jungle” title fight—received praise at the Sundance Film Festival and was anticipated to be a great commercial success. Both works were scheduled to be released in 1996. Does Turner’s use of the film clips from “We Were Kings” constitute fair use?

H2: Yes. Team “Free Copies” is correct. (*Monster Communications, Inc. v. Turner Broadcasting Sys., Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996)).

Q19

H1: In 2003, Dorling Kindersley published a coffee table book entitled *Grateful Dead: The Illustrated Trip*, which told the story of the Grateful Dead through images. The book included seven images originally depicted on event posters held in copyright by counter-culture music promoter Bill Graham. The 480-page book contained over 2,000 images, displayed in chronological order, combined with commentary and original artwork. The images in the biography were reproduced 1/20 the size of the original poster images. Is the use of the poster images in the biography fair use?

H1: Yes. Team “Free Copies” is correct. (*Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006)).

Q20

H2: HBO Independent Productions produced the television sitcom “ROC.” In an episode of the show, a poster reproduction of “Church Picnic Story Quilt”—a work by successful contemporary artist Faith Ringgold—was used as major part of the thematic set decoration in a church hall. The poster was visible behind and between main characters in nine sequences for a total of 26.75 seconds. HBO aired the episode in 1992, and BET

aired the episode repeatedly between 1994 and 1995 when Ringgold noticed the image while watching TV. Does the use of the “Church Picnic Story Quilt” poster in the TV episode constitute fair use?

H2: No. Team “No Copies” is correct. (*Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997)).

Q21

H1: In 2002, The Postal Service decided to issue a 37-cent stamp commemorating the 50th Anniversary of the armistice of the Korean War. The Postal Service selected a picture of the National Korean War Veteran’s Memorial taken by a photographer named John Alli and paid him \$1,500 for its use. The Veteran’s Memorial—consisting of 19 stainless steel statues and located at the National Mall in Washington, D.C.—was held in copyright by its sculptor, Mr. Gaylord, who was not contacted regarding the stamp. Alli’s photograph creatively depicted 14 of the 19 statues in the snow. Does the stamp constitute fair use of the memorial?

H1: No. Team “No Copies” is correct. (*Gaylord v. U.S.*, 595 F.3d 1364 (Fed. Cir. 2010)).

Q22

H2: In 1989, the rap group 2 Live Crew released a song entitled “Pretty Woman,” a parody of Roy Orbison’s song “Oh, Pretty Woman.” The parody borrowed the characteristic opening bass riff and lyrics from the first line of Orbison’s song. The rest of the song utilized different words and melodies.

[Play excerpts from songs]

The parody sold a quarter of a million copies in the first year. Does this use constitute fair use?

H2: Yes. This is a trick question. The Supreme Court ruled in favor of the defendants, that it could be fair use as a parody, but remanded the case for further findings on fair use factors, including harm to the potential market for other non-parody, rap versions of “Oh, Pretty Woman.” The parties ultimately settled, so we’ll give both teams credit for this one. (*Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)).

Q23

H1: In 1991, a portrait of a pregnant Demi Moore—taken by well-known photographer Annie Leibovitz—appeared on the cover of *Vanity Fair*. In 1994, in connection with its forthcoming release of the motion picture *Naked Gun 33 1/3: The Final Insult*,

Paramount Pictures ran a magazine ad campaign parodying the Leibovitz portrait. In the Paramount campaign, the head of Leslie Nielsen was superimposed onto the body of a nude model photographed in the same posture as the Leibovitz photograph. Does the Paramount ad constitute fair use of the Leibovitz photograph?

H1: Yes. Team “Free Copies” is correct. (*Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998)).

Q24

H2: In 1995, Penguin Books published *The Cat NOT in the Hat! A Parody by Dr. Juice*, a rhyming summary of highlights from the O.J. Simpson double murder trial. The book mimicked the style of Dr. Seuss’s *The Cat in the Hat*, illustrating Simpson wearing the characteristic shabby red and white stove-pipe hat worn by Dr. Seuss’s Cat a total of 13 times. The text also used the same typeface, poetic meter, whimsical style and visual style as Seuss’ work. Does *The Cat NOT in the Hat!* constitute fair use of Dr. Seuss’ *The Cat in the Hat*?

H2: No. Team “No Copies” is correct. (*Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997)).

Q25

H1: In 1976, a humorous illustration by Saul Steinberg depicting “a parochial New Yorker’s view of the world” appeared on the cover of *The New Yorker* magazine. Subsequently, Columbia Pictures released an ad campaign for the film *Moscow on the Hudson* featuring a scene similar to Steinberg’s work. Does this constitute fair use?

H1: No. Team “No Copies” is correct. (*Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987)).

Q26

H2: In 1995, Arnie Lerma acquired and copied copyrighted sacred documents belonging to the Church of Scientology. Lerma then uploaded the documents in their entirety to the Internet. Lerma asserted that he merely gathered the information like a news reporter and then published it on the Internet to unveil for the Internet community the “foibles” of Scientology in the same spirit of the modern news exposé. Does this constitute fair use?

H2: No. Team “No Copies” is correct. (*Religious Technology Center v. Lerma*, 40 U.S.P.Q. 2d 1569 (E.D. Va. 1996)).

Q27

- H1: Subsequent to Lerma’s posting, *The Washington Post* published a news article entitled “Church in Cyberspace: Its Sacred Writ is on the Net. Its Lawyers are on the Case.” The article discussed Lerma’s litigation involving the Church of Scientology, as well the history of Scientology litigation against its critics and the growing use of the Internet by Scientology dissidents. The article included three quotations from three Church of Scientology documents posted on the internet by Lerma. The quoted material totaled 46 words. Do the quotations in the *Washington Post* news article constitute fair use of the Church documents?
- H1: Yes. Team “Free Copies” is correct. (*Religious Technology Center v. Pagliarina*, 908 F. Supp. 1353 (E.D. Va. 1995)). And that completes our segment on fair use.
- H2: But before we move on to our next round, our expert, Rodgers, will again provide some additional insight and critical commentary on fair use.
- RL: [Comments on transformative use]

Greatest Hits of Atlanta IP

- H1: We’ve saved the best for our final round. We are the Atlanta IP Inn of Court after all and many of our very own members have participated in important copyright disputes coming right out of Atlanta. This round will highlight some of those cases.

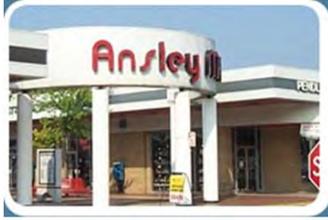
Q28

This question requires that you identify a pair of cases based on a series of visual hints.

Here’s the first visual clue:



Here’s another visual clue:



And one more:



H1: That should be enough. Okay. So here is the question. To what cases do these images relate?

[Panels affect *Dumb and Dumber* style]

C: Hmm. A statue of a lady, a shopping mall and a church. It's a miracle. Visitation by the Blessed Virgin at Ansley Mall?

H1: This is about copyright law.

LS: I got it. It's obvious. The statue is of Queen somebody. That signifies the Law courts. The baptismal font is a church thing, obviously signifying the Equity courts. Chancery stuff. "Ansley", as in "Mall," is obviously code for commerce. As a combination, this symbolizes the 3 pillars of society-Government, Church and Commerce.

H2: Interesting, but you all need some more clues. Maybe these two images will help:



EH: Easy. *Marbury v. Madison*.

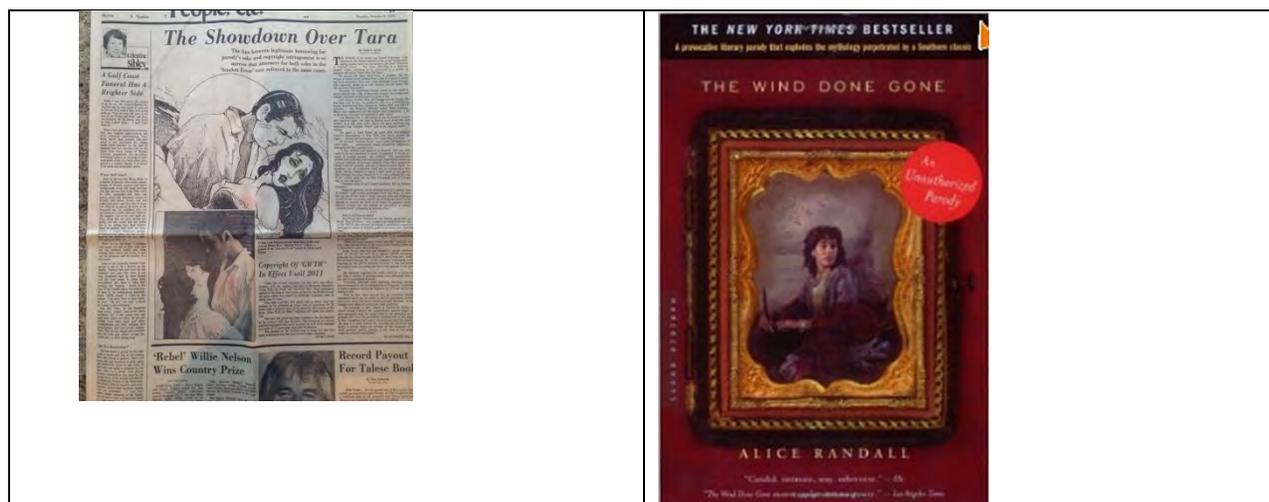
H1: I am going to assume that was an involuntary reflex and re-open the floor for answers.

SP: *A&M Records v. Napster*.

H2: What in the world does the *Napster* case have to do with those images???

SP: That opinion stunk.

H1: You're hopeless. Maybe these images will help:



H1: Anyone?

LL: The "Scarlett Fever" case. *MGM v. Showcase Atlanta*. Orinda Evans 1980. Rogers Lunsford for Margaret Mitchell Estate. Tony Askew for Showcase.

LS: And the *Wind Done Gone* case. *Suntrust v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001). Miles Alexander and Joe Beck for the defendant parody author.

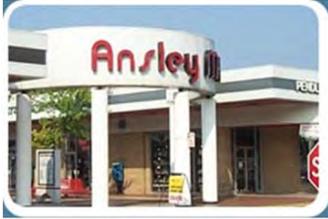
H1: Now, for 5 points, explain the significance of the previous clues.



LL: Now I get it. That's Queen Anne, as in *The Statute of Anne*. Judge Birch wrote extensively about the *Statute of Anne*, with citations to Professor L. Ray Patterson, in the

11th Circuit's *Wind Done Gone Decision*. The Statute of Anne gave copyright to authors (and took it away from publishers), required the book be original and limited the copyright to a term of years (rather than granting perpetual protection).

H2: What about the Ansley Mall photo?



C: Ansley Mall? I believe that was a character name in the “Scarlett Fever” play at issue in *Showcase Atlanta*. A play on “Ashley Wilkes.”



H2: Yes, and this image?

LS: Pat Conroy submitted a declaration in the WDG case describing himself as “Atlanta-born and Atlanta-shaped and baptized in downtown Atlanta . . . at the same font where Margaret Mitchell was christened forty-six years earlier.” The image is a photograph of the Baptismal Font at Sacred Heart Catholic Church on Peachtree.



EH: Julia Roberts was also baptized there!



H2: And these images?



SP: Pork is a character in GWTW!

C: Garlic is a character in WDG!

H1: Yes. Now, these two cases ended differently. In *MGM v. Showcase Atlanta*, Judge Evans enjoined the production of “Scarlett Fever”; in WDG, Judge Pannell similarly enjoined WDG, but the 11th Circuit reversed. What explains the difference?

EH: Well, I know this. I’ve seen Judges Pannell and Evans at Pitty Pat’s Porch many times. I’m just sayin’.

C: I saw them throw Judge Birch out of Pitty Pat’s.

LL: A critical difference was this. In *Showcase*, the play did not make sufficient critical commentary about GWTW, but instead used it as a platform for comedy. By contrast, WDG aimed directly at GWTW. That’s why the Pat Conroy declaration was so important. He testified (via declaration) that the Margaret Mitchell estate had asked him to write a sequel to GWTW, but that he had refused because the estate imposed a condition that he not mention “miscegenation or homosexuality.” This fact served as a factual premise for the 11th Circuit panel, including Judge Birch, to highlight Randall’s incorporation of both into her work: Ashley Wilkes



with a male lover in WDG and Cynara, the protagonist WDG, is Scarlett’s half-sister, the daughter of Scarlett’s father and Mammy.



H1: Yes, the take away is that if you are going to write a “parody” of a copyrighted work, aim directly at it.

One final note about this case, from our expert, Rodgers, again, who represented the plaintiffs in the “Scarlett Fever” case:

RL: To assist Judge Evans in deciding the preliminary injunction motion, the entire “Scarlett Fever” play was staged at Showcase Cabaret’s Ansley Mall location before not only Judge Evans, but many other judges and their clerks and, of course, the litigants. My clients would not let me laugh, but Judge Evans laughed a lot ...

Q29

H2: Let’s move to the next pair of cases, and, again, get things started with visual hints. Name the cases suggested by these two images:



H2: Okay, Cabbage Patch Kid? Still nothing? Really? Okay.

EH: *Marbury v. Madison*?

H1: Hopeless.

LS: I think you are referring to the Little People case and the Martin Luther King, Jr. case.

H2: Duh. I mean, yes, brilliant. The cases are *Estate of MLK v. CBS* and *OAA v. Toy Loft*. What legal issue links these two cases?

LL: Both cases discuss whether the works were published without notice under the 1909 Copyright Act and, thereby, forfeited copyright protection.

H2: Bingo. And what was the outcome?

LS: In the *MLK* case, Judge O’Kelly ruled that Reverend King forfeited his copyright to his “I have a Dream” speech by publishing it without notice, but, on appeal, the 11th Circuit reversed (2-1, Roney dissenting), holding that performance of a copyrighted work (in this case, delivering the famous speech) is not “general publication,” even if the audience is big. In this case, big meant “real big” since there were 200,000 people on the Mall that day and perhaps millions more listening live on radio and TV.

H2: The point?

SP: Size does not matter.

LS: In the *OAA v. Toy Loft* case, Judge Tidwell and the 11th Circuit both held that Xavier Roberts did not lose his copyright when in 1977, i.e., under the forfeiture provisions of the 1909 Act, he “made available for adoption” “experimental” hand crafted “Little People” *babies* ...

H1: Roberts has always said that “doll” is 4-letter word.

LS: Even though the copyright to the 1977 experimental “babies” may have been lost, the 1978 babies were different enough to support their own copyright and, thereby, the infringement action.

H1: Correct, and upon such distinctions, fortunes are built: 25 years and \$5 Billion plus later, CPK babies are still with us (gesturing toward CPK baby on Team “No Copies.”) Well, sort of.

H2: And the lawyers in those cases are well known to us. Miles Alexander and Joe Beck represented the MLK estate against CBS. Judge Birch (before he was appointed to the Eleventh Circuit) and Bill Needle represented OAA, with help from Professor Patterson.

Q30

H2: As some of you may know, many people consider Professor Patterson to have been the wizard behind the curtain for many copyright cases. This is well illustrated by our last case. Consider this clue:



H2: What’s the case?

EH: *Marbury v. Madison*.

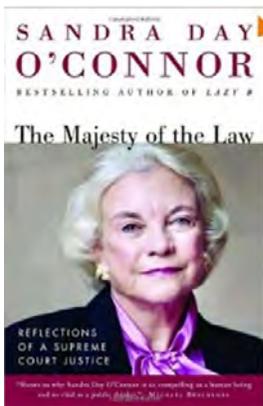
H2: Everyone. All together now.

All contestants: *Feist v. Rural Telephone!*

Westlaw
 111 U.S. 1282
 499 F.2d 122, 123 P.2d 466, 111 U.S. 1282, 49 Fed. Reg. 54,049 P.1111, 111 L.Ed.2d 618, 39 COLUW 4721, Page 1
 1984 Copyright, P. 200, 101, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

H1: Most of you know that Tony Askew was deeply involved in the *Feist* case, sheparding the briefing and appearing as second chair at the oral argument. But you may not know the true puppeteer secretly steering from afar.

Here is a clue. Who is this?



SP: Ruth Bader-Ginsburg!

All other characters simultaneously and urgently to the buzzer: Sandra day O'Connor!!

H2: Yes, Justice O'Connor, of course, wrote the opinion in *Feist*. Let's pose a real test. Who was the editor of "The Majesty of the law"? Panelists?

EH: Ansley Mall?

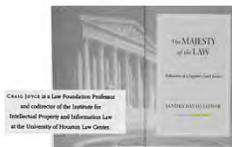
C: Julia Roberts??

LS: Professor Craig Joyce.

EH: How do you know that? Plant! Plant!

H2: How do you know that?

LS: I opened the book. (showing book to audience).



H2: Hmm. Anyway. Back to the case. Upon what authority did Justice O'Connor rely when she wrote the *Feist* opinion for the Court?

EH: *Marbury v. Madison*. [high five to SP]

LS: A law review article by Professors Patterson and Joyce.

EH: How did you know *that*?

LS: I looked at the next slide:



EH: So what?

C: Yeah, who cares about that?

LS: Tony Askew.

H2: Please explain.

LS: It's like the Da Vinci Code of copyright law. It's Tony Askew's grassy knoll theory. Tony lost the *Feist* case; he can't get over it. The citation to Patterson and Joyce explains everything. It's the missing link.

H1: Now I'm lost.

LS: Let me explain. Tony gave a guest lecture to our class. He asked the class. "Why did the Supreme Court grant cert. for this no-name case out of Kansas? It was plaintiff counsel's first deposition. 10 pages. There was no district court record. There wasn't even a 10th Circuit decision in *Feist*—just a *per curiam* affirmance.

UNITED STATES COURT OF APPEALS

Tenth Circuit

DECISIONS WITHOUT PUBLISHED OPINIONS

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
Rural Telephone Service Co., Inc. v. Feist Publications, Inc.	88-1679	3/9/90	AFFIRMED	D.Kan., 663 F.Supp. 214

EH: So what explains this?

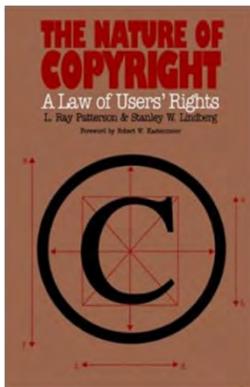
H1: I'm asking the questions. So...what *is* the explanation?

LL: The Wizard of Oz:



LL: Professor Lyman Ray Patterson, now deceased, was for several decades a professor of copyright law at Emory and UGA. He's the missing link in the whole story.

Tony says Patterson was always on the look out for cases to strengthen user rights:



Now here's the supposed link. Patterson knew Craig Joyce was a well-respected copyright scholar. Joyce was *also* well known to O'Connor; she set him up with a blind date with his future wife.



Then, lo and behold, O'Connor cites the Patterson and Joyce article *six times* in the *Feist* opinion!

All: Gasp!

LS: Voila. The conspiracy of scholarly copyright academics is complete. QED.

[Long pause]

SP: Tony is crazy.

C: He should have never taken that case; it was a sinking ship.

EH: He should have cited to *Marbury*.

[PAUSE. General agreement, head nods and murmurs of approval]

H2: They let him teach that stuff to students? Doesn't anyone supervise the adjuncts? Well, we have one last word from our group member Tony, remotely, as he is filing the GSU brief today. According to Tony, "the white pages *are* copyrightable!"

H1: That's the end of our program. We're just going to call it a tie. Thank you, contestants and audience.

The End

COPYRIGHT

quiz bowl

ATLANTA IP INN OF COURT
PUPILAGE GROUP 6
APRIL 17, 2013

Copyright Act

- 17 U.S.C. §§ 101 *et seq.*
- Stimulate artistic creativity for the public good
- Grant authors a limited monopoly over:
 - Original works of authorship
 - Fixed in any tangible medium of expression

Infringement

- Ownership of valid copyright
- Copying of original, constituent elements of the work
 - Direct evidence
 - Proof of access and probative similarity



First Sale

Kirtsaeng v. John Wiley & Sons Inc., 133 S.
Ct. 1351 (U.S. 2013)



First Sale

17 U.S.C. § 109(a)

Bobbs-Merrill Co. v. Straus, 210 U.S. 339
(1908)



First Sale

Kirtsaeng v. John Wiley & Sons Inc., 133 S.
Ct. 1351 (U.S. 2013)



DMCA Safe Harbor

UMG Recordings, Inc. v. Shelter Capital
Partners LLC, 09-55902, 2013 WL
1092793 (9th Cir. Mar. 14, 2013)

17 U.S.C. § 512(a)–(d)



DMCA

**17 U.S.C. §§ 512, 1201–05, 1301 1332;
28 U.S.C. § 4001**



DMCA Safe Harbor

UMG Recordings, Inc. v. Shelter Capital Partners LLC, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)

17 U.S.C. § 512(a)–(d)



Liability

Luvdarts, LLC v. AT&T Mobility, LLC, 710
F.3d 1068 (9th Cir. 2013)



Liability

**Flava Works, Inc. v. Gunter, 689 F.3d 754
(7th Cir. 2012)**

Fair Use

17 U.S.C. § 107

- (1) Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) Nature of the copyrighted work;
- (3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- (4) Effect of the use upon the potential market for or value of the work.

HUSTLER



Flynt (left) and Falwell (right) on "Larry King Live," 1997

Jerry Falwell talks about his first time.



INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a

lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?

© 1997 Imported by Campari, U.S.A. New York, NY. All rights reserved. Campari, U.S.A.

FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

\$100 donation.

INTERVIEWER: Campari in the crapper with Mom... how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure...

Campari, like all liquor, was made to mix you up. It's a light, 46-proof, refreshing spirit, just mild enough to make you drink too much before you know you're intoxicated. For your first time, mix it with orange juice. Or maybe some white wine. Then you won't remember anything the next morning. Campari: the mixable that mixes.

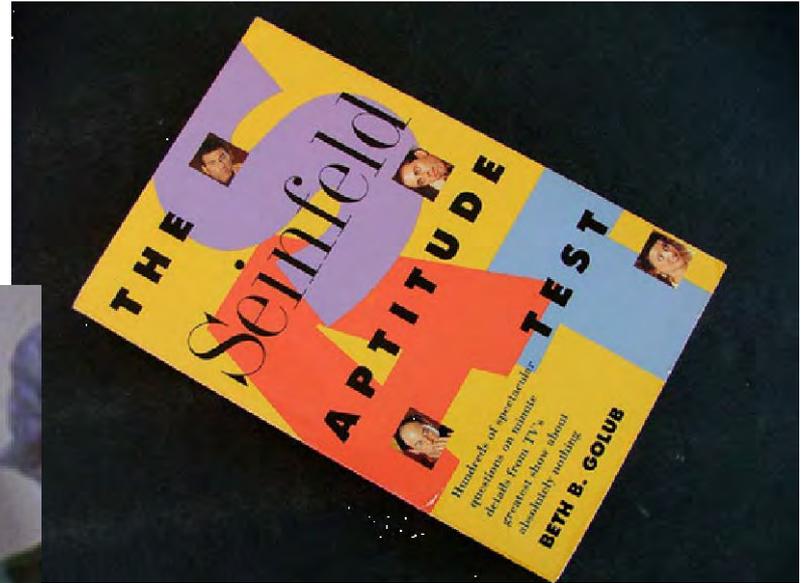


CAMPARI You'll never forget your first time.

140 PROOF (70% ALC/VOL) • 46% ALC/VOL

"I never really expected to make it with me Mom, but then after she showed all the other guys in town such a good time, I figured, 'What the hell!'"

1. *“What candy does Kramer snack on while observing a surgical procedure from an operating-room balcony?”*



“The Junior Mint,” 1993

*“Who’s gonna turn down a Junior Mint?
It’s chocolate, it’s peppermint—it’s
delicious!” ~Kramer*



*“An artist’s only concern is to shoot for some kind of perfection,
and on his own terms, not anyone else’s.”*
~ J.D. Salinger, *Franny and Zooey*

Oct. 21, 1962

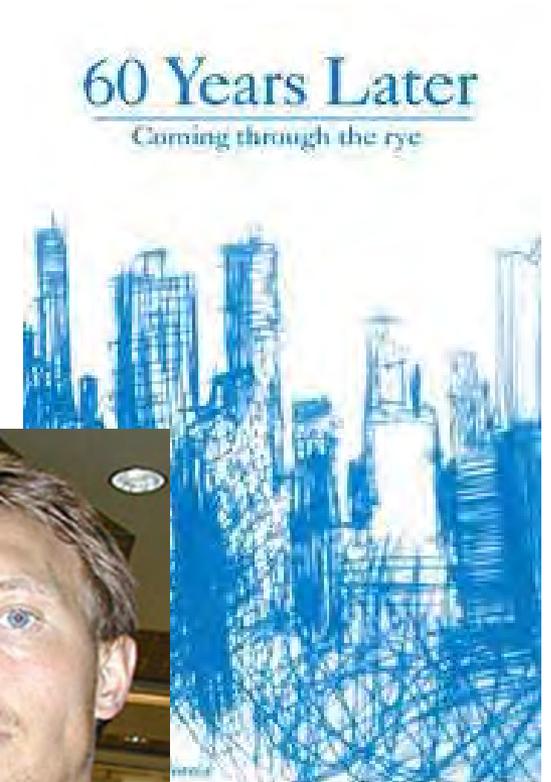
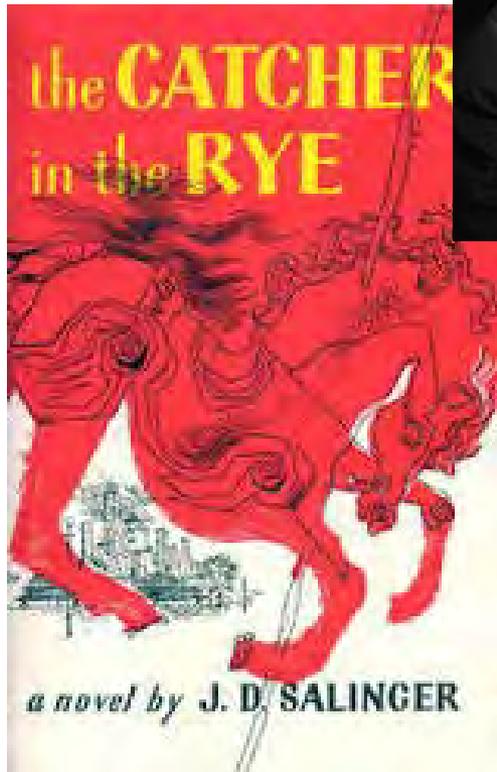
Dear Mr. Stevens,

I must tell you first, offputtingly or no, that I am at best a one-shot letter writer, these days. Along with that, I really never have anything to say when I'm done writing fiction at the end of a day. One thought, and one only, hits me about your letter. Entirely "materialistic," I'm afraid.

You need a new typewriter ribbon. Get one or don't get one, but unless you make an effort to deal with things as unabstractly as that, you're stewing quite unnecessarily. You've decided that Things are what matter to people. Of course. Not only with "people" but with you, too. Everything in your letter is a thing, concrete or abstract. Avidya and vidya are things.



“There’s no more to Holden Caulfield. Read the book again. Holden Caulfield is only a frozen moment in time.” ~ J.D Salinger, 1980





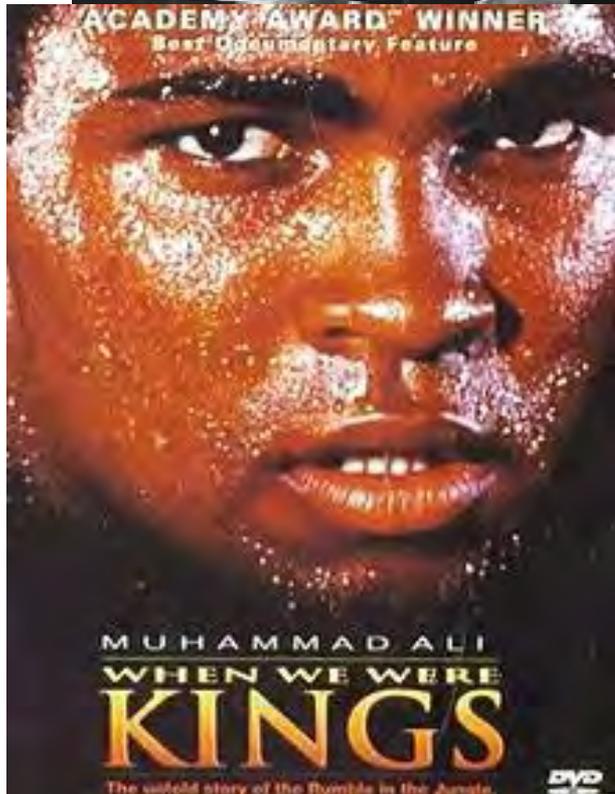
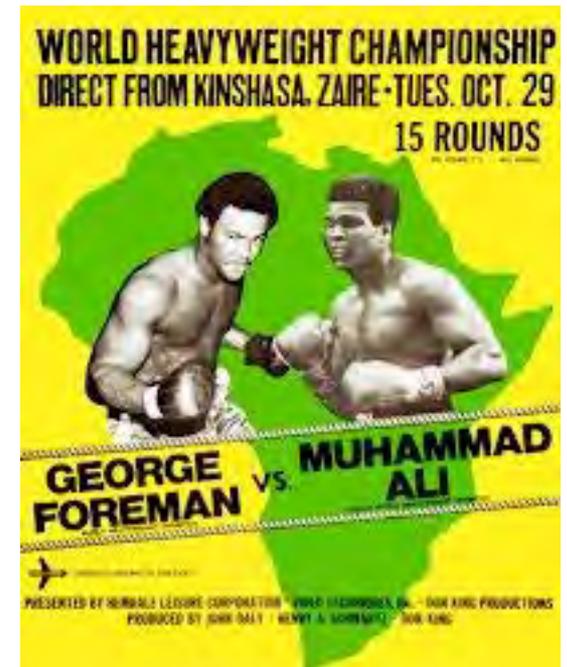
[I Love New York Commercial, 1977](#)

I 
NY.®



[I Love Sodom Skit](#)



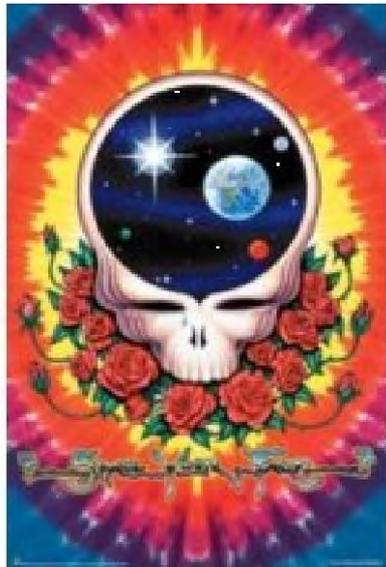
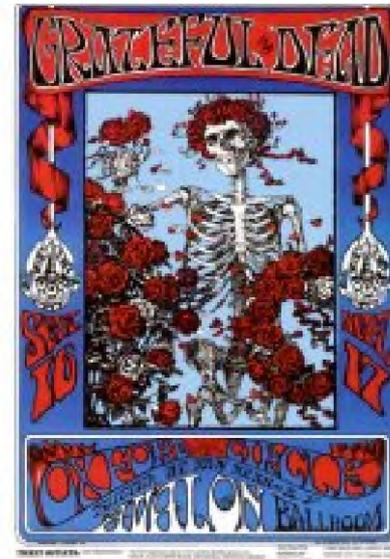
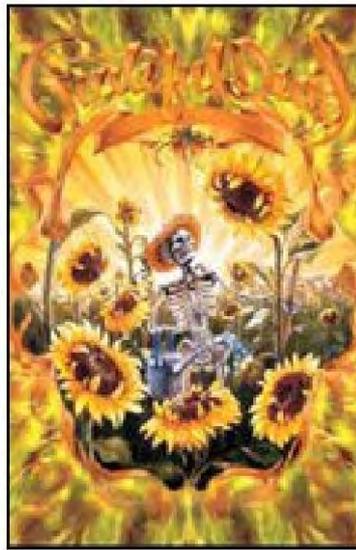
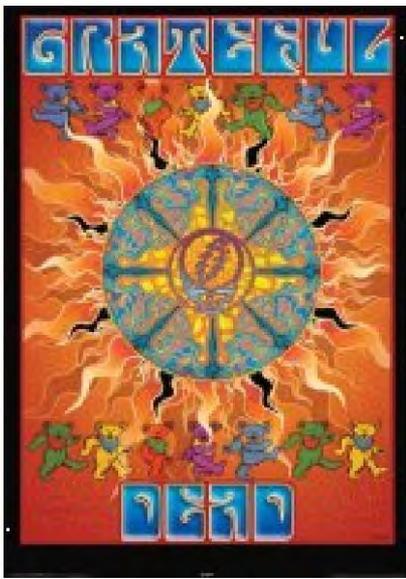


Ali v. Foreman

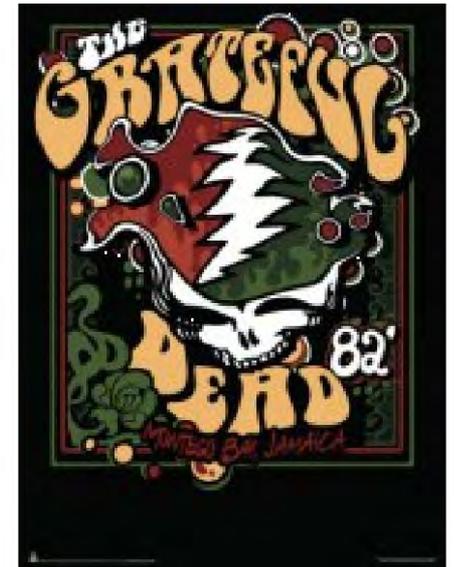
[Knockout](#)



“He who is not courageous enough to take risks will accomplish nothing in life.” ~ Muhammad Ali



“A couple of years ago, a couple of geniuses put on something called Woodstock Festival. It was a tragedy. Groups recognized that they could go into larger cattle markets, play less time and make more dollars. What they've done is to destroy the rock industry.” ~ Bill Graham

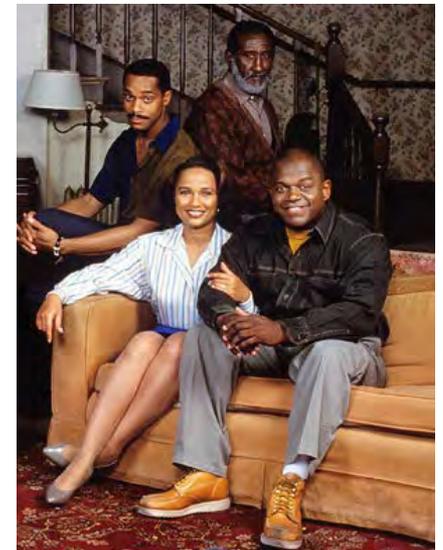




Church Picnic Story Quilt, 1988



Faith Ringold



Cast of "ROC"



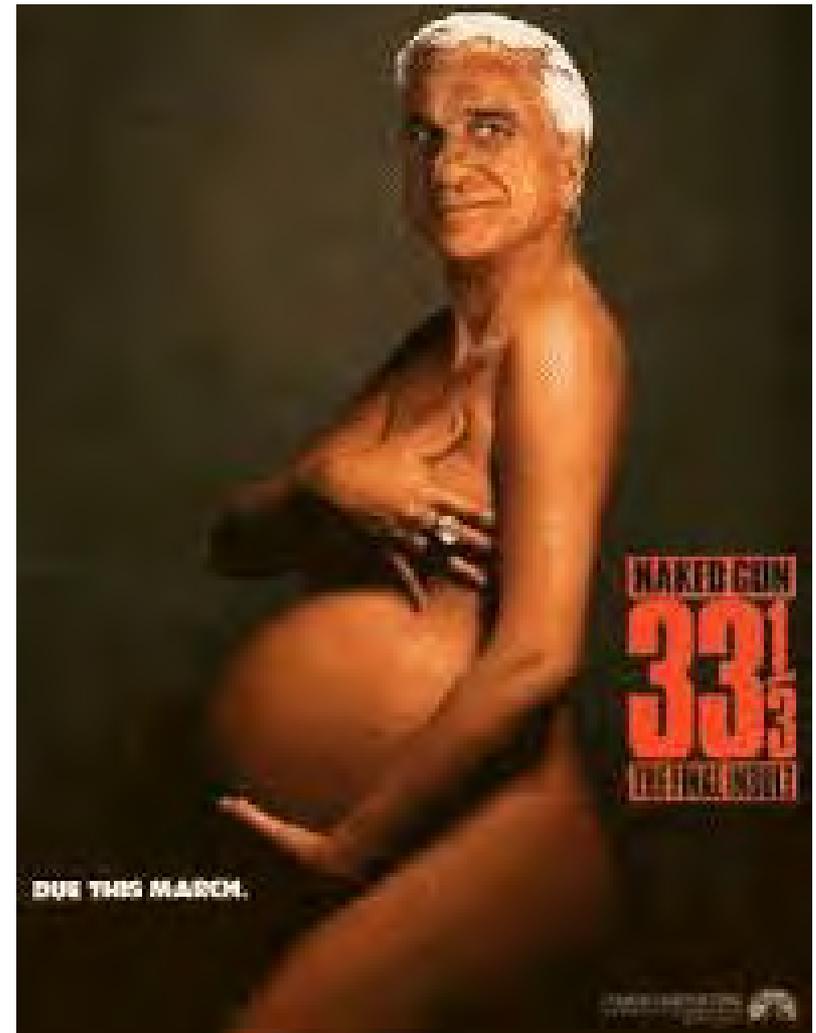
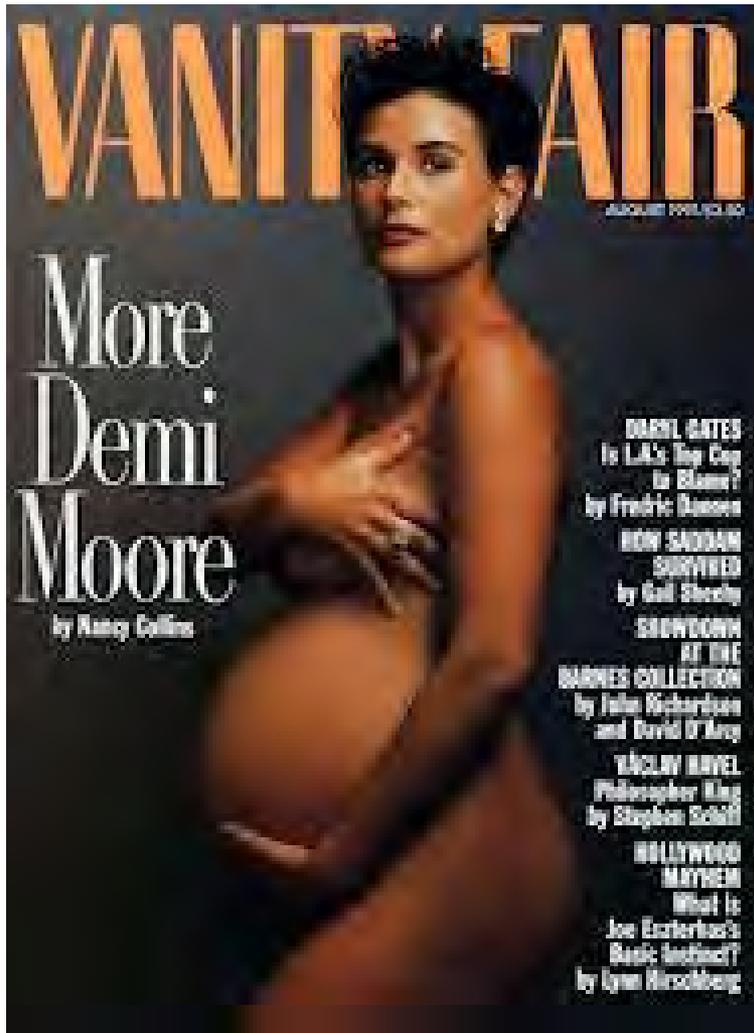


Roy Orbison, [Oh, Pretty Woman](#)

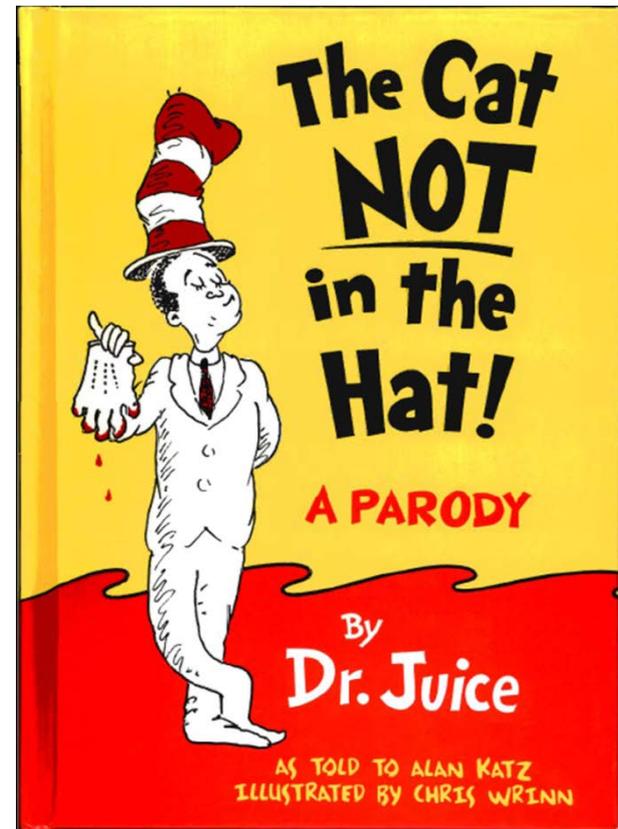
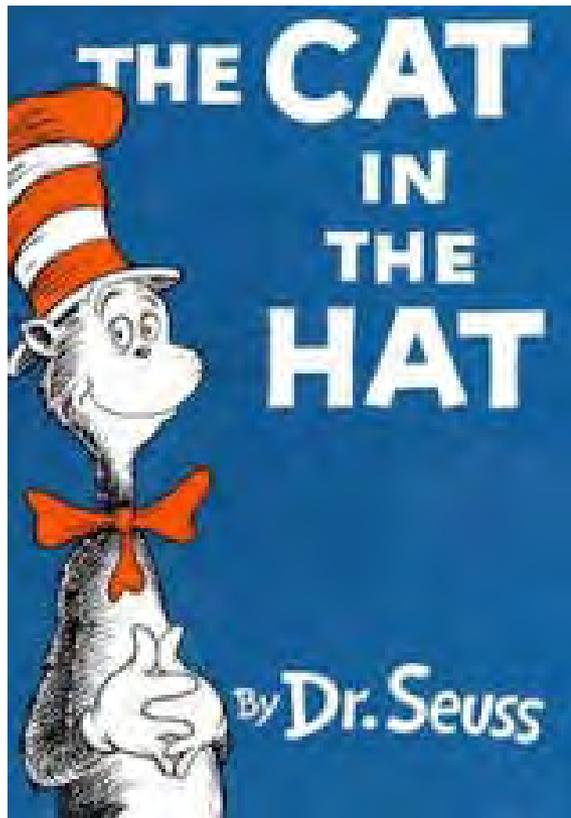


2 Live Crew, [Pretty Women](#)

"Big hairy woman you need to shave that stuff/Big hairy woman you know I bet it's tough/Big hairy woman all that hair it ain't legit/ 'Cause you look like 'Cousin It'" ~ 2 Live Crew



“Look, baby. I am what I am, and I do what I do. A few guys make shoelaces, some lay sod, others make a very good living neutering animals. I’m a cop!” ~ Leslie Nielsen as Frank Drebin, Naked Gun 33 1/3

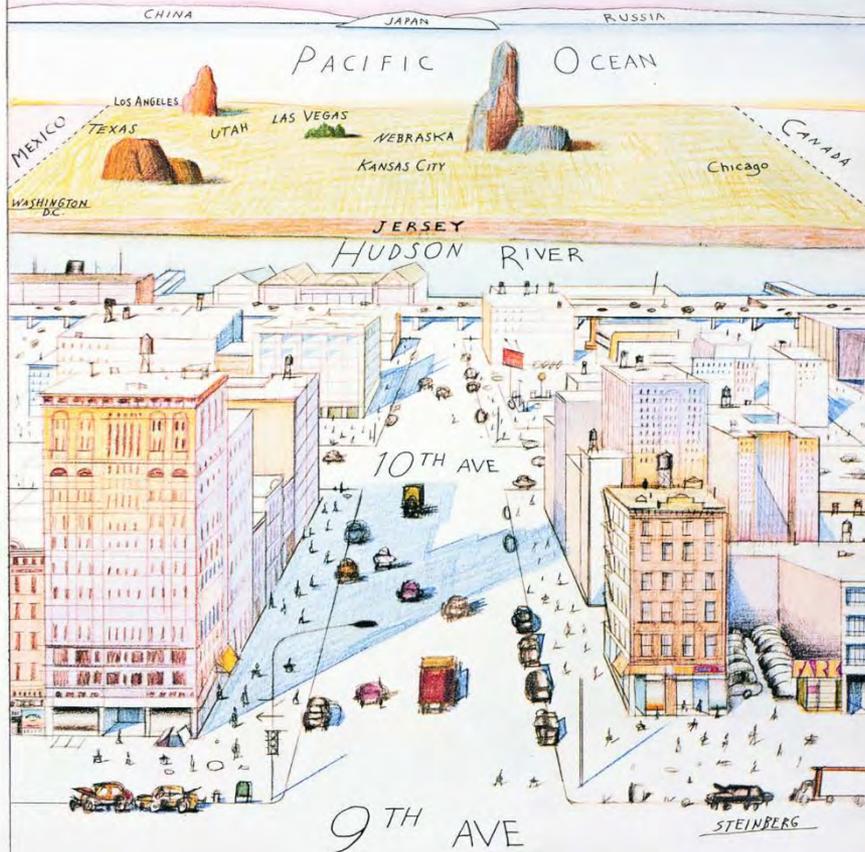


*“One Knife?
Two Knife?
Red knife.
Dead wife.”
~ “Dr. Juice”*

Mar. 29, 1976

THE NEW YORKER

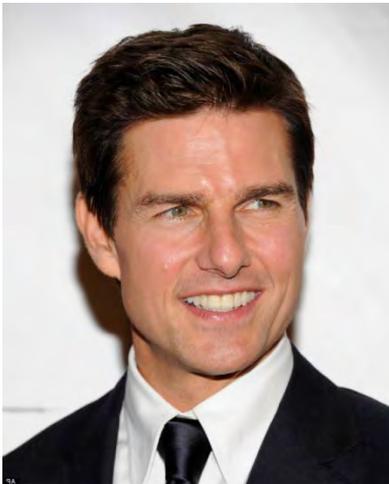
Price 75 cents



MOSCOW ON THE HUDSON

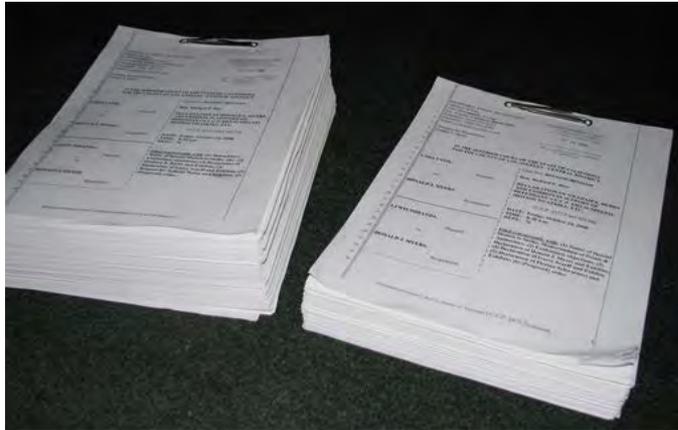
America is sometimes a strange place even for Americans.
 Let alone for Vladimir Ivanoff, a Russian defector with a black roommate,
 a Cuban lawyer and an Italian girlfriend.
 Who's learning to live with Big Macs, cable TV, hard rock, softcore,
 unemployment and a whole new wonderful word for him.
 Freedom.



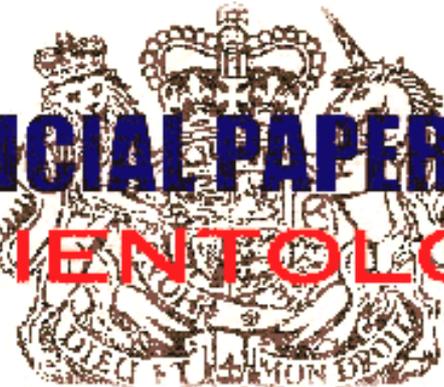


“I’d prefer to die speaking my mind than live fearing to speak. The only thing that always works in scientology are its lawyers. The internet is the liberty tree of the new millennium. Secrets are the mortar binding lies as bricks together into prisons for the mind.” ~Arnie Lerma

The Washington Post

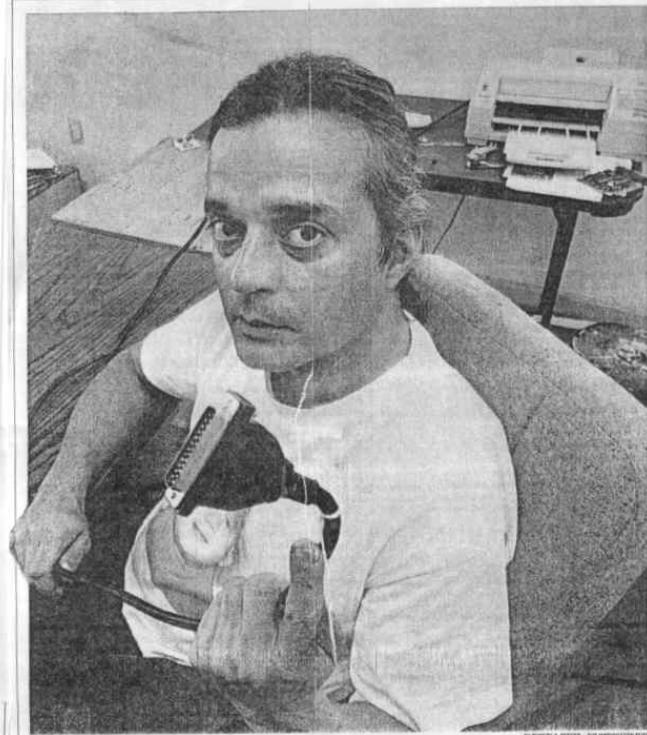


**OFFICIAL PAPERS ON
SCIENTOLOGY**



WASH POST AUG 19/95

Backstage: Tim Miller, baring body and soul	2	Style	3	Names the Clin
Galleries: Sculptures with a piece of history	2		4	Weekend Highlight



Church in Cyberspace

Its Sacred Writ Is on the Net. Its Lawyers Are on the Case.

By Marc Fisher
Washington Post Staff Writer

It was 9:30 and Arnie Lerma was lounging in his living room in Arlington, drinking his Saturday morning coffee, laughing. Suddenly, a knock at the door—who could it be at this hour?—and boom, before he could force anything out of his mouth, they were pouring into his house: federal marshals, lawyers, computer technicians, cameramen.

They stayed for three hours last Saturday. They inventoried and confiscated everything Lerma cherished: his computer, every disk in the place, his client list, his phone numbers. And then they left.

"I'm one of those guys who keeps everything—my whole life—on the computer," Lerma says. "And now they have it all."

"They" are lawyers for the Church of Scientology, the controversial group that Lerma once considered his home, his rock, his future. Now they call him a criminal, accusing him of divulging trade secrets and violating copyrights.

Founded in 1954 by science fiction writer L. Ron Hubbard, Scientology has grown into a worldwide organization that has been recognized as a religion by the Internal Revenue Service but has been called a cult by the German government. The church claims membership of more than 8 million; its critics say the figure is dramatically lower.

Lerma spent nearly 10 years in Scientology. But that was almost two decades ago. Since then, he's lived in Virginia, designing sound and video systems for nightclubs and other clients. It was only in the past year or so that Scientology

See SCIENTOLOGY, C8, Col. 1

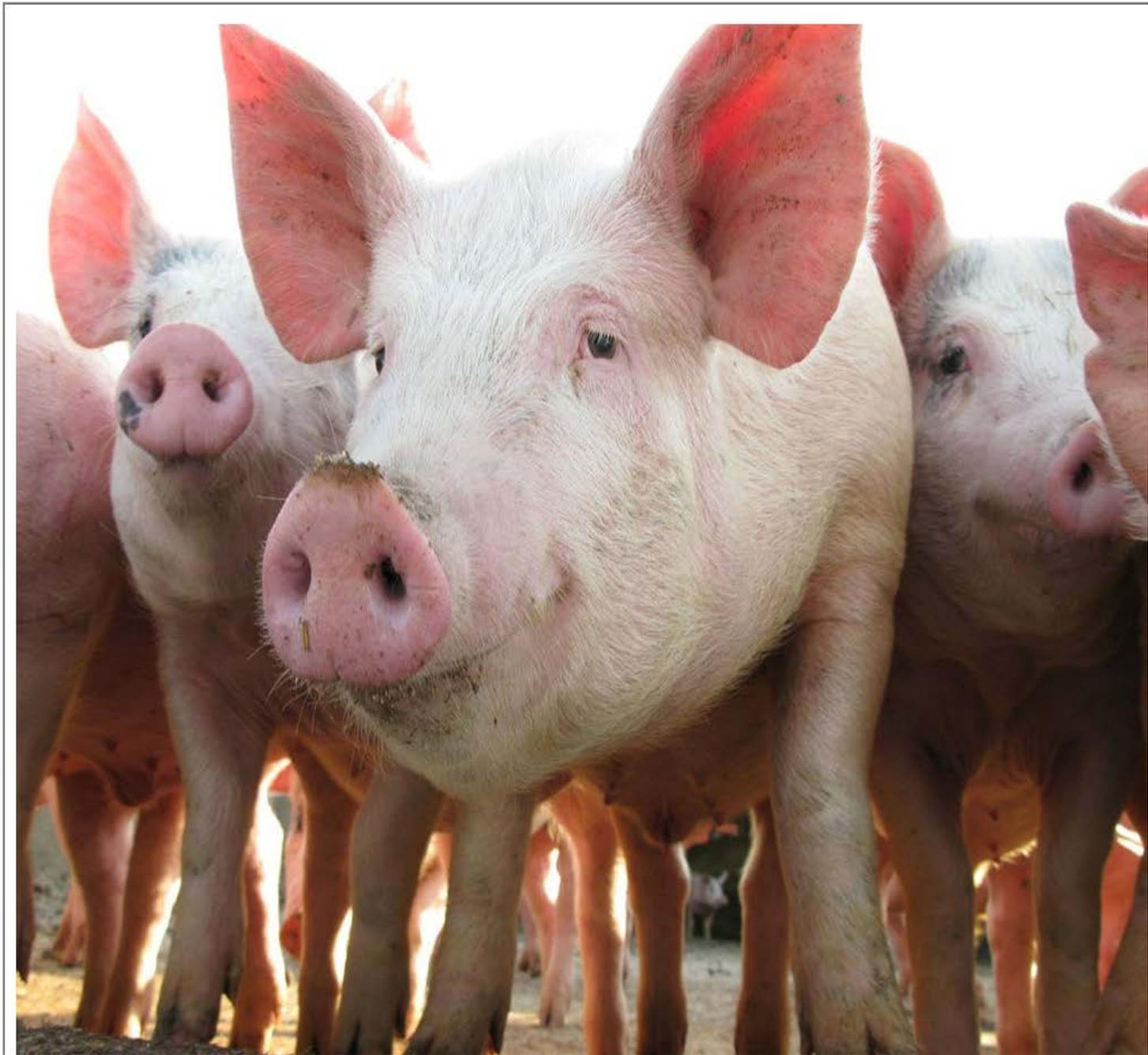
Arnie Lerma holds the plug to his computer, confiscated by the Church of Scientology after he posted copyrighted documents on the Internet. "We take very forceful and elaborate steps to maintain the confidentiality," says one Scientology official.











THE NEW YORK TIMES BESTSELLER

A provocative literary parody that explores the mythology popularized by a Southern classic

THE WIND DONE GONE



An
Unauthorized
Parody

ALICE RANDALL

"Candid, intense, and subversive." — *EW*

"The Wind Done Gone is a most compelling literary parody." — *Los Angeles Times*

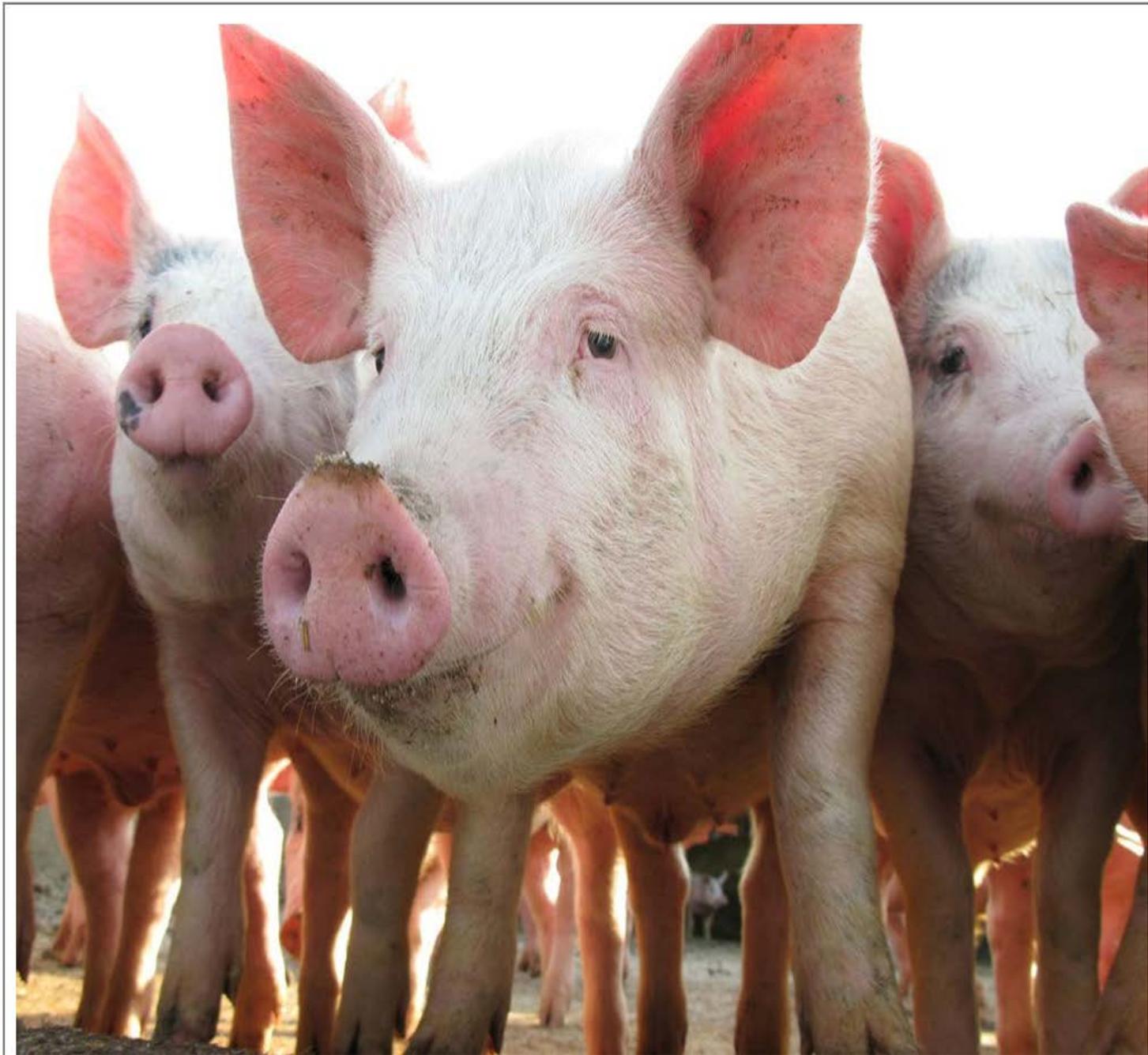










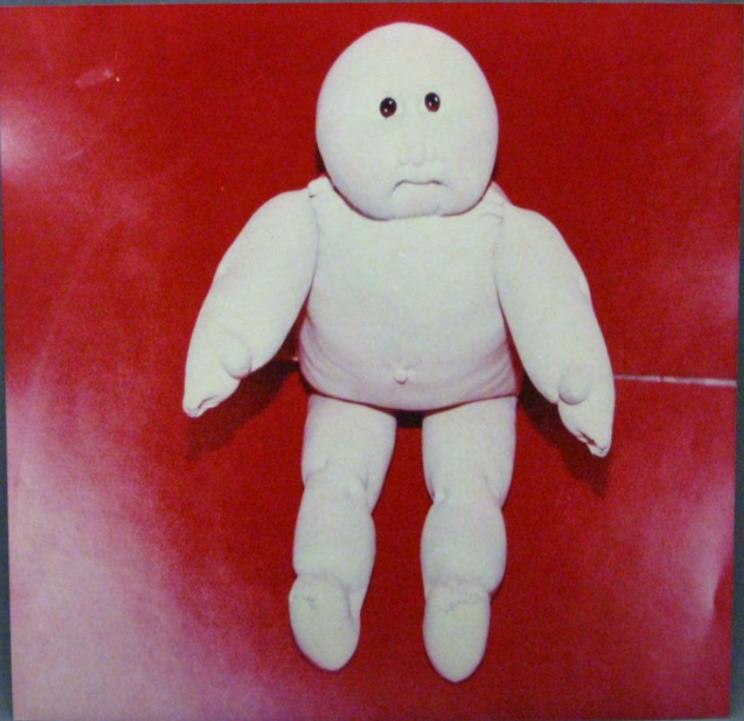
















499 U.S. 340, 121 P.U.R.4th 1, 111 S.Ct. 1282, 68 Rad. Reg. 2d (P & F) 1513, 113 L.Ed.2d 358, 59 USLW 4251, 1991 Copr.L.Dec. P 26,702, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889
(Cite as: 499 U.S. 340, 111 S.Ct. 1282)



Supreme Court of the United States
FEIST PUBLICATIONS, INC., Petitioner
v.
RURAL TELEPHONE SERVICE COMPANY,
INC.

No. 89-1909.
Argued Jan. 9, 1991.
Decided March 27, 1991.

Telephone utility brought copyright infringement action against a publisher of an area-wide telephone directory for publisher's use of listings in utility's local white pages. The United States District Court for the District of Kansas, *Richard Dean Rogers, J.*, 663 F.Supp. 214, held that the white pages were copyrightable, and the publisher appealed. The Court of Appeals for the Tenth Circuit, 916 F.2d 718, affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) names, towns and telephone numbers of utility's subscribers were uncopyrightable facts, and (2) these bits of information were not selected, coordinated, or arranged in an original way in white pages that utility was required to publish under state law, and hence white pages did not meet constitutional or statutory requirements for copyright protection.

Reversed.

Justice **Blackmun** concurred in the judgment.

West Headnotes

[1] Copyrights and Intellectual Property 99 ↩
12(3)

99 Copyrights and Intellectual Property

99I Copyrights

99I(A) Nature and Subject Matter

99k12 Originality of Work; Creativity

99k12(3) k. Compilations and Derivat-

ive Works; Copies and Reproductions. **Most Cited Cases**

(Formerly 99k12.2)

Compilations of facts are within subject matter of copyright, even though facts themselves are not copyrightable. 17 U.S.C.A. § 101 et seq.; Act March 4, 1909, § 1 et seq., 35 Stat. 1075.

[2] Copyrights and Intellectual Property 99 ↩
12(1)

99 Copyrights and Intellectual Property

99I Copyrights

99I(A) Nature and Subject Matter

99k12 Originality of Work; Creativity

99k12(1) k. In General. **Most Cited**

Cases

(Formerly 99k12)

Work is "original" to author and thus qualifies for copyright protection if work is independently created by author and possesses some minimal degree of creativity. 17 U.S.C.A. § 101 et seq.; Act March 4, 1909, § 1 et seq., 35 Stat. 1075; U.S.C.A. Const. Art. 1, § 8, cl. 8.

[3] Copyrights and Intellectual Property 99 ↩
12(1)

99 Copyrights and Intellectual Property

99I Copyrights

99I(A) Nature and Subject Matter

99k12 Originality of Work; Creativity

99k12(1) k. In General. **Most Cited**

Cases

(Formerly 99k12)

In order for a work to meet originality requirement for copyright protection, the level of creativity required is extremely low, and work satisfies that requirement as long as it possesses some creative spark, no matter how crude, humble or obvious it might be; originality does not signify novelty. 17 U.S.C.A. § 101 et seq.; Act March 4, 1909, § 1 et seq., 35 Stat. 1075; U.S.C.A. Const. Art. 1, § 8, cl. 8.

Expanded Edition

SANDRA DAY O'CONNOR

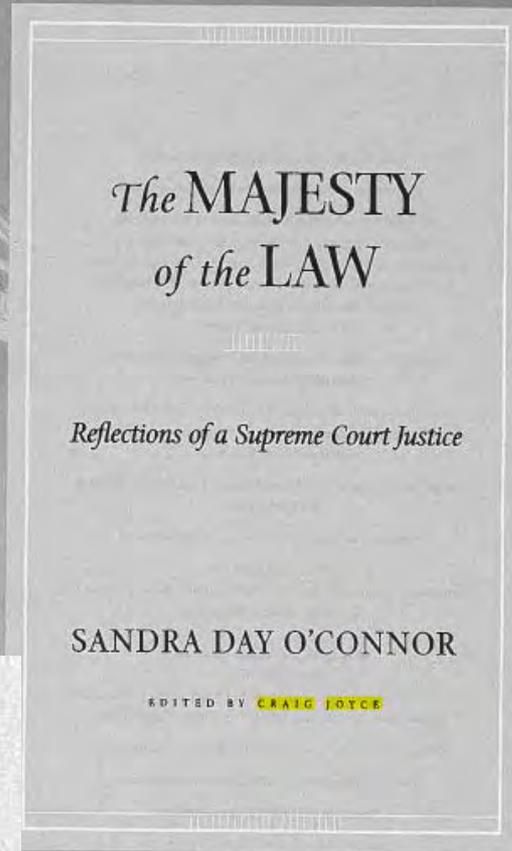
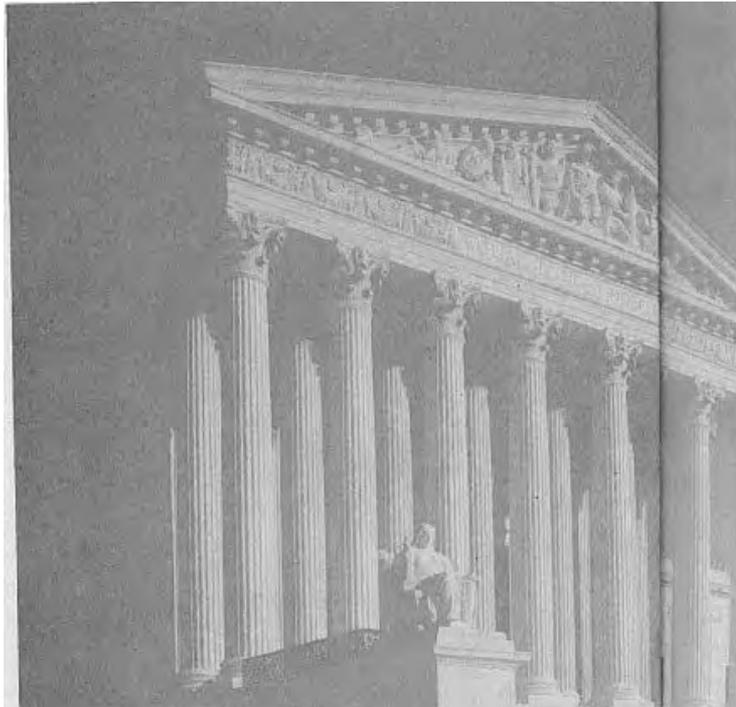
BESTSELLING AUTHOR OF *LAZY B*

The Majesty of the Law



REFLECTIONS
OF A SUPREME
COURT JUSTICE

"Shows us why Sandra Day O'Connor is as compelling as a human being
and as vital as a public figure." —MICHAEL BRESCHNER



**CRAIG JOYCE is a Law Foundation Professor
and codirector of the Institute for
Intellectual Property and Information Law
at the University of Houston Law Center.**

is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like." *Ibid.* (emphasis in original).

In *Burrow-Giles*, the Court distilled the same requirement from the Constitution's use of the word "authors." The Court defined "author," in a constitutional sense, to mean "be to whom anything owes its origin; originator; maker." 111 U.S., at 58, 4 S.Ct., at 281 (internal quotation marks omitted). As in *The Trade-Mark Cases*, the Court emphasized the creative component of originality. It described copyright as being limited to "original intellectual conceptions of the author," 111 U.S., at 58, 4 S.Ct., at 281, and stressed the importance of requiring an author who accuses another of infringement to prove "the existence" of those facts of originality, of intellectual production, of thought, and conception." *Id.*, at 59-60, 4 S.Ct., at 281-282.

[4] The originality requirement articulated in *The Trade-Mark Cases* and *Burrow-Giles* remains the touchstone of copyright protection today. See *Goldstein v. California*, 412 U.S. 546, 561-562, 93 S.Ct. 2303, 2312, 37 L.Ed.2d 163 (1973). It is the very "premise of copyright law." *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (CA5 1981). Leading scholars agree on this point. As one pair of commentators succinctly puts it: "The originality requirement is *constitutionally mandated* for all works." *Patterson & Joyce, Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L.Rev. 719, 763, n. 155 (1989) (emphasis in original) (hereinafter *Patterson & Joyce*). Accord, *id.*, at 759-760, and n. 140; *Nimmer* § 1.06[A] ("[O]riginality is a statutory as well as a constitutional requirement"); *id.*, § 1.08[C][1] ("[A] modicum of intellectual labor ... clearly constitutes an essential constitutional element").

It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim

originality as to facts." *Id.*, § 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its "maker" or "originator." 111 U.S., at 58, 4 S.Ct., at 281. "The discoverer merely finds and records." *Nimmer* § 2.03[E]. Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. *Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 Colum.L.Rev. 516, 525 (1981) (hereinafter *Denicola*). Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense. *Nimmer* § 3.48 § 2.03[E]. The same is true of all facts—scientific, historical, biographical, and news of the day: "[T]hey may not be copyrighted and are part of the public domain available to every person." *Miller, supra*, at 1369.

[5][6] Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. *Nimmer* §§ 2.11[D], 3.03; *Denicola* 523, n. 38. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement. See *Harper & Row*, 471 U.S., at 547, 105 S.Ct., at 2223. Accord, *Nimmer* § 3.03.

[7][8] This protection is subject to an important limitation. The mere fact that a work is copyrighted

Patterson & Joyce, Monopolizing Law

UNITED STATES COURT OF APPEALS**Tenth Circuit**

DECISIONS WITHOUT PUBLISHED OPINIONS

<u>Title</u>	<u>Docket Number</u>	<u>Date</u>	<u>Disposition</u>	<u>Appeal from and Citation (if reported)</u>
Rural Telephone Service Co., Inc. v. Feist Publications, Inc.	88-1679	3/8/90	AFFIRMED	D.Kan., 663 F.Supp. 214

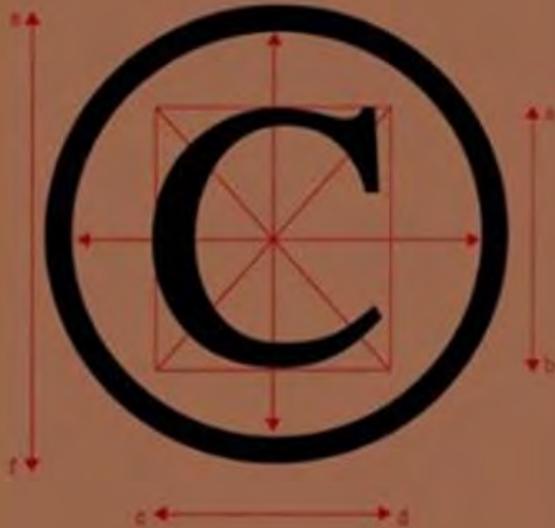


THE NATURE OF COPYRIGHT

A Law of Users' Rights

L. Ray Patterson & Stanley W. Lindberg

Foreword by Robert W. Katzman



THE PATRY COPYRIGHT BLOG

TUESDAY, JULY 05, 2005

Sandra Day O'Connor

Justice O'Connor's announcement last Friday of her retirement was surprising and expected. The last time I saw her, the morning of the Grokster argument (March 29), she had moved out of her novel chambers into much smaller chambers on the other side of

She is also down to earth, as befits someone who grew up on a working ranch and who was cut no slack because she was a woman. An illustration: once, when I was working for the House IP subcommittee, my direct line rang: I answered the phone and heard a very recognizable voice on the other end: "Hello, Bill, this is Sandra. Are you free for dinner at the house Thursday with Craig and I?" The DC protocol for important people is to have their staff call for them: Justice O'Connor always called herself, and always referred to herself as Sandra.

Craig is Craig Joyce, an old friend (I was for a time co-author of a few editions of his [casebook on copyright](#) and he is the co-author with her of her latest book, the one I am reading in my blog photo). He is a close relative of the Justice's by marriage and once worked as an associate for John O'Connor in the latter's then Arizona law firm. (In 1978, the O'Connors set him up on a blind date with the woman who became his wife, Molly, a cousin of the Justice's; they have two children, Will and Matt.) The dinner the Justice had called me about consisted of her cooking dinner for Craig and I in her kitchen, she bedecked with an old apron. We had

ABOUT ME



WILLIAM PATRY

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The End

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"Everytime the lawyers tell their old jokes they end up arguing over copyright infringement."

Thank You

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quiz bowl

PRESENTED BY
THE ATLANTA IP
AMERICAN INN OF COURT
PUPILAGE GROUP 6

APRIL 17, 2013

1. Recent Developments

The Supreme Court decided *Kirtsaeng d/b/a Bluechristine99 v. John Wiley & Sons Inc.*, (U.S., No. 11-697, 3/19/13) on March 19. Supap Kirtsaeng helped to finance his doctorate in mathematics at the University of Southern California by having friends and family send him textbooks they purchased in Thailand for him to resell in the United States through eBay, where Kirtsaeng sold the books for \$1.2M, so that's about 10 books. These books were lawfully purchased in Thailand, but John Wiley & Sons sued Kirtsaeng for copyright infringement.

Q1: What important question was raised by the case?

A1: Does the first sale doctrine allow the importation into the United States of copies of works legally manufactured and sold overseas?

Q2: What is the "first sale" doctrine?

A2: The first sale doctrine provides that the owner of a particular copy, lawfully made under the Copyright Act, of a copyrighted work is entitled, without the authority of the copyright owner, to sell or otherwise dispose of that copy. (§ 109(a); *see also Bobbs–Merrill Co. v. Straus*, 210 U.S. 339 (1908)).

Q3: How did the Supreme Court rule: was Kirtsaeng's importation and resale of copies of textbooks legally manufactured and sold overseas permissible under the first sale doctrine?

A3: Yes. While the Supreme Court had previously split 4-4 on the applicability of the first sale doctrine to goods manufactured and first sold overseas in a similar case in 2012, *Costco v. Omega*, the Court this time held 6-3 (with Justices Ginsburg and Kennedy dissenting and Justice Scalia dissenting in part) that the first sale doctrine does apply to copies of works legally manufactured and sold overseas and imported into the United States without the permission of the copyright holder. (*Kirtsaeng d/b/a Bluechristine99 v. John Wiley & Sons Inc.*, U.S., No. 11-697, 3/19/13)

In *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, No. 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013), the Ninth Circuit held that Veoh Networks – a video sharing site that had been sued for direct and secondary copyright infringement by Universal Music Group – was protected under a DMCA safe harbor that limits the liability of Internet Service Providers, or ISPs, where the copyright infringement occurs "by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider." 17 U.S.C. § 512(c)(1).

Q4: DMCA is an acronym for what federal statute?

A4: The Digital Millennium Copyright Act signed into law in 1998 by President Clinton. (Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998); 17 U.S.C. §§ 1201-05).

Q5: What is a DMCA “safe harbor?”

A5: The DMCA provides four limitations on liability, or “safe harbors,” for ISPs: 1) a safe harbor for transitory digital network communications; 2) a safe harbor for system caching; 3) a safe harbor for instances where information is stored on an ISP’s system or network at the direction of users; and 4) a safe harbor for instances where an ISP refers or links users to an online location that contains infringing material or activity. The requirements for ISPs to qualify for each of these safe harbors are different, and are outlined in the DMCA at 17 U.S.C. § 512(a)-(d). But the basic point is that if the ISP meets the requirements, it can limit its secondary liability for the infringement of its users.

Q6: And the DMCA safe harbor at issue in the *UMG* case was the 512(c) safe harbor that limits the liability of ISPs for copyright infringement that occurs “by reason of the storage at the direction of a user.” Why did the Ninth Circuit conclude that the infringement in the *UMG* case occurred “by reason of the storage at the direction of a user”?

A6: Veoh only provides an automated process for making files accessible and the automated process is initiated by its users. The Ninth Circuit held that “the access-facilitating processes that automatically occur when a user uploads a video to Veoh” fall into the DMCA safe harbor. (*UMG Recordings, Inc. v. Shelter Capital Partners LLC*, No. 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)).

Another Ninth Circuit dealing with vicarious and contributory liability. In *Luvdarts, LLC v. AT&T Mobility, LLC*, No. 11-55497, 2013 WL 1192950 (9th Cir. Mar. 25, 2013), the plaintiffs, which published and distributed mobile multimedia content (namely games, greeting card messages, ads, coupons, and other content), sued mobile wireless carriers AT&T, Verizon, Sprint, and T-Mobile, arguing that the carriers should be vicariously and contributorily liable for the copyright infringement that took place on their MMS networks. Specifically, while the plaintiffs conceded that the carriers did not have any way of supervising the use of their MMS networks for copyright infringement, they argued that the carriers could “establish a system” to do so. Moreover, the plaintiffs had sent the carriers a 150-page list of all of the plaintiffs’ titles that were protected by copyright, and had demanded “accountability” from the carriers for the unauthorized distribution of those titles.

Q7: What is MMS?

A7: MMS stands for Multimedia Messaging Service. It is the standard way to send messages that include multimedia content to and from mobile phones. It is an extension of basic

SMS, or Short Message Service, which allows exchange of text messages, but only up to 160 characters in length.

Q8: The plaintiffs in *Luvdarts* claimed that AT&T, Verizon, Sprint, and T-Mobile should be “vicariously” and “contributorily” liable for copyright infringement taking place on their MMS networks. What are the tests for “vicarious” and “contributory” liability under copyright law?

A8: “Vicarious” liability attaches if the defendant has both: 1) the right and ability to supervise the infringing activity; and 2) a direct financial interest in the activity. “Contributory” liability attaches if the defendant both: 1) knows of the direct infringement; and 2) either induces, causes, or materially contributes to it.

Q9: Did the Ninth Circuit rule for the plaintiffs or the carriers on the vicarious and contributory infringement claims in *Luvdarts*?

A9: The Ninth Circuit ruled for the carriers and affirmed the dismissal of the plaintiffs’ complaint. On vicarious liability, the court said that an allegation that the carriers *could build* a system that would give them the right and ability to supervise the infringing activity was insufficient; rather, the test is that the “right and ability” to supervise must be evaluated based on the networks’ “current architecture.” And on contributory infringement, the court concluded that the 150-page generalized notice that the plaintiffs sent was not sufficient to give the carriers knowledge of the infringements. (*Luvdarts, LLC v. AT & T Mobility, LLC*, No. 11-55497, 2013 WL 1192950 (9th Cir. Mar. 25, 2013)).

In *Flava Works, Inc. v. Gunter*, the Seventh Circuit addressed the contributory liability of myVidster, an online social bookmarking service that allowed users to embed videos that infringed Flava’s copyrights. Specifically, myVidster’s users would find videos on the Internet and “bookmark” them on myVidster’s website to make them available to other myVidster users. After receiving the bookmark, myVidster would automatically request the video’s embed code from the server hosting it, which would enable myVidster users to watch the video from myVidster’s site. In Flava’s case, some of those videos were videos that Flava’s users had improperly uploaded; Flava was upset by the fact that visitors to myVidster could then watch the videos while circumventing Flava’s paywall. (*Flava Works, Inc. v. Gunter*, No. 11-3190, 2012 WL 3124826 (7th Cir. Aug. 2, 2012)).

Q10: What does it mean to embed a video?

A10: To embed a video means to embed, or place, a video within the HTML code of the page you are posting on. So in this case, when a video was bookmarked on myVidster, myVidster would request the video’s embed code from the server hosting it and then create a page around the video: myVidster users could click on a thumbnail of the video’s opening screen shot, which would then connect the user’s computer to the server hosting

the video, and allow the users to watch the video. So while it would appear to the user that they were watching the video on myVidster's website, myVidster was not actually hosting the content (the way that say, YouTube does).

Q11: What is a "paywall?"

A11: A paywall is a system that prevents Internet users from accessing content without a paid subscription. Interestingly, it appears that *Flava Works* is the first appellate opinion to use the term "paywall."

Q12: What did the Seventh Circuit hold in *Flava Works*: was myVidster liable for contributory infringement by virtue of having allowed its users to view embedded content that was hosted on other servers?

A12: The Seventh Circuit held that myVidster was not liable for contributory infringement. The structure of how embedding works appears to have been key here: the court suggested that the only actual infringement was done by the Flava users who had improperly uploaded the video in the first instance (which had later been "bookmarked" by myVidster users, and then viewed by other myVidster users). But myVidster had no relationship with those initial uploaders, and had done nothing to encourage or contribute to *that* conduct. Moreover, the myVidster site was designed in such a way that it made no "copy" of the videos (save for an archival feature that myVidster had since disabled, and that the Seventh Circuit said would in fact infringe Flava's copyrights directly). Therefore, because myVidster had not contributed significantly to the infringement of Flava's copyrights, the Seventh Circuit vacated the district court's preliminary injunction.

2. Fair Use

The doctrine of fair use has been called . . . "the most troublesome in the whole law of copyright." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 475, 104 S. Ct. 774, 805 (1984) (J. Blackmun, dissenting).

The test to be employed by the courts in applying the fair use doctrine was set forth by Justice Story in *Folsom v. Marsh*, 9 F.Cas. 342 (No. 4,901) (CDD Mass. 1841) and has since been codified as: 17 U.S.C. § 107, which provides:

[T]he fair use of a copyrighted work . . . for purposes such as:

- criticism,
- comment,
- news reporting,
- teaching (including multiple copies for classroom work),
- 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 application of the fair use doctrine, however, “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for a case-by-case analysis.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S. Ct. 1164, 1170 (1984).

Q13: In 1983, Hustler magazine published a parody of an advertisement for Campari liquor that portrayed televangelist Jerry Falwell’s “first time” as involving not only Campari but a sexual experience—with his mother, in an outhouse—and a fictitious interview replete with scatological humor. In response, Falwell not only sued Larry Flynt for defamation but also sent out hundreds of thousands of copies of the one-page ad to members of the Moral Majority asking for contributions to fund his lawsuit and television network. He also held up copies of the ad during his sermons. Falwell’s copying did not diminish the sales of the magazine because the magazine was already off the market and would not adversely impact the marketability of back issues, but his activities brought in nearly \$750,000 in donations. Is Falwell’s copying and displaying of the Hustler ad fair use?

A13: Yes. (*Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526 (C.D. Cal. 1985)).

Q14: In 1994, Carol Publishing Group published *The Seinfeld Aptitude Test (The SAT)*, a book containing trivia questions about the events and characters depicted in the popular television series *Seinfeld*, produced and owned by Castle Rock. The book drew from 84 of the 86 *Seinfeld* episodes that had been broadcast as of the time the book was published. Every question and correct answer has as its source a fictional moment in a *Seinfeld* episode. Forty-one questions and/or answers contain dialogue directly from *Seinfeld*. The name “*Seinfeld*” appears prominently on the front and back covers of *The SAT*, and pictures of the principal actors in *Seinfeld* appear on the cover and on several pages of the book. There was no evidence that *The SAT*’s publication diminished *Seinfeld*’s profitability, and in fact *Seinfeld*’s audience grew after *The SAT* was first published. However, Castle Rock claimed that the book affected Castle Rock’s right to make derivative works such as trivia books. Does *The Seinfeld Aptitude Test* constitute fair use of the *Seinfeld* television series?

- A14: No. (*Castle Rock Entertainment, Inc. v. Carol Publ. Group*, 150 F.3d 132 (2d Cir. 1998)).
- Q15: A respected literary writer wrote a biography of American novelists J.D. Salinger. The biography contained unpublished letters written between Salinger and his friends and colleagues. The letters were the “backbone” of the biography which contained 59 instances of quoting or close paraphrasing from 44 unpublished letters. The letters were available to the public at a university library; however, Salinger—who shunned all publicity—had never authorized reproduction of the letters. Does the use of Salinger’s unpublished letters in the biography constitute fair use?
- A15: No. (*Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987)).
- Q16: Another Salinger case. In 2009, Fredrik Colting, under the pseudonym John David California, published *60 Years Later: Coming Through the Rye*, a novel detailing the life of a character named “Mr. C.” J.D. Salinger filed suit for copyright infringement alleging Mr. C resembled Salinger’s main character Holden Caulfield in *The Catcher in the Rye*. After suit was filed, Colting alleged the character was a parody. Although Mr. C was depicted older than Caulfield and in present day settings, he retained substantial character traits of Holden Caulfield. Does Mr. C constitute fair use of Salinger’s character?
- A16: No. (*Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009)).
- Q17: In 1980, comedians on the late night show Saturday Night Live parodied the song “I Love New York,” a jingle featured in a 1977 television commercial created as part of an ad campaign to revamp the then-bankrupt city of New York. In the SNL skit, politicians of the City of Sodom discuss ways to change the reputation of their city including a massive campaign featuring “citizens” singing “I Love Sodom.” In the skit, only the words “I love” and four musical notes were taken from the original “I Love New York” jingle. The SNL version of the jingle did not compete with or detract from the original song. Does the SNL parody constitute fair use of the “I Love New York” jingle?
- A17: Yes. (*Elsmere Music, Inc. v. National Broadcasting Company*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff’d*, 623 F.2d 252 (2d Cir. 1980)).
- Q18: Turner Broadcasting produced a documentary entitled “Ali-The Whole Story,” a made-for-TV biography on Muhammad Ali. The biography featured approximately 41 seconds of clips from the 84-minute motion picture “We Were Kings.” The 41 seconds of clips were of historical footage and comprised less than 2% of the 94 minute “Ali” documentary. “We Were Kings”—a chronicle of Ali and George Foreman’s 1974 “rumble in the jungle” title fight—received praise at the Sundance Film Festival and was anticipated to be a great commercial success. Both works were scheduled to be released in 1996. Does Turner’s use of the film clips from “We Were Kings” constitute fair use?

- A18: Yes. (*Monster Communications, Inc. v. Turner Broadcasting Sys., Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996)).
- Q19: In 2003, Dorling Kindersley published a coffee table book entitled *Grateful Dead: The Illustrated Trip*, which told the story of the Grateful Dead through images. The book included seven images originally depicted on event posters held in copyright by counter-culture music promoter Bill Graham. The 480-page book contained over 2000 images, displayed in chronological order, combined with commentary and original artwork. The images in the biography were reproduced 1/20 the size of the original poster images. Is the use of the poster images in the biography fair use?
- A19: Yes. (*Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006)).
- Q20: HBO Independent Productions produced the television sitcom “ROC.” In an episode of the show, a poster reproduction of “Church Picnic Story Quilt”—a work by successful contemporary artist Faith Ringgold—was used as major part of the thematic set decoration in a church hall. The poster was visible behind and between main characters in nine sequences for a total of 26.75 seconds. HBO aired the episode in 1992, and BET aired the episode repeatedly between 1994 and 1995 when Ringgold noticed the image while watching TV. Does the use of the “Church Picnic Story Quilt” poster in the TV episode constitute fair use?
- A20: No. (*Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997)).
- Q21: In 2002, The Postal Service decided to issue a 37-cent stamp commemorating the 50th Anniversary of the armistice of the Korean War. The Postal Service selected a picture of the National Korean War Veteran’s Memorial taken by a photographer named John Alli and paid him \$1,500 for its use. The Veteran’s Memorial—consisting of 19 stainless steel statues and located at the National Mall in Washington, D.C.—was held in copyright by its sculptor, Mr. Gaylord, who was not contacted regarding the stamp. Alli’s photograph creatively depicted 14 of the 19 statues in the snow. Does the stamp constitute fair use of the memorial?
- A21: No. (*Gaylord v. U.S.*, 595 F.3d 1364 (Fed. Cir. 2010)).
- Q22: In 1989, the rap group 2 Live Crew released a song entitled “Pretty Woman,” a parody of Roy Orbison’s song “Oh, Pretty Woman.” The parody borrowed the characteristic opening bass riff and lyrics from the first line of Orbison’s song. The rest of the song utilized different words and melodies. The parody sold a quarter of a million copies in the first year. Does this use constitute fair use?
- A22: This is a trick question. The Supreme Court ruled in favor of the defendants, that it *could* be fair use as a parody, but remanded the case for further findings on fair use factors, including harm to the potential market for other non-parody, rap versions of “Oh, Pretty

Woman.” The parties ultimately settled. (*Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)).

Q23: In 1991, a portrait of a pregnant Demi Moore—taken by well-known photographer Annie Leibovitz—appeared on the cover of *Vanity Fair*. In 1994, in connection with its forthcoming release of the motion picture *Naked Gun 33 1/3: The Final Insult*, Paramount Pictures ran a magazine ad campaign parodying the Leibovitz portrait. In the Paramount campaign, the head of Leslie Nielsen was superimposed onto the body of a nude model photographed in the same posture as the Leibovitz photograph. Does the Paramount ad constitute fair use of the Leibovitz photograph?

A23: Yes. (*Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998)).

Q24: In 1995, Penguin Books published *The Cat NOT in the Hat! A Parody by Dr. Juice*, a rhyming summary of highlights from the O.J. Simpson double murder trial. The book mimicked the style of Dr. Seuss’s *The Cat in the Hat*, illustrating Simpson wearing the characteristic shabby red and white stove-pipe hat worn by Dr. Seuss’s Cat a total of 13 times. The text also used the same typeface, poetic meter, whimsical style and visual style as Seuss’ work. Does *The Cat NOT in the Hat!* constitute fair use of Dr. Seuss’ *The Cat in the Hat*?

A24: No. The court distinguished between satire, where authors use a copyrighted work as a vehicle to target something entirely other than that underlying copyrighted work itself, as was the case here, and protectable parody, which comments on or criticizes the underlying work and by definition must use some portion of it. (*Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997)).

Q25: In 1976, a humorous illustration by Saul Steinberg depicting “a parochial New Yorker’s view of the world” appeared on the cover of *The New Yorker* magazine. Subsequently, Columbia Pictures released an ad campaign for the film *Moscow on the Hudson* featuring a scene similar to Steinberg’s work. Does this constitute fair use?

A25: No. (*Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987)).

Q26: In 1995, Arnie Lerma acquired and copied copyrighted sacred documents belonging to the Church of Scientology. Lerma then uploaded the documents in their entirety to the Internet. Lerma asserted that he merely gathered the information like a news reporter and then published it on the Internet to unveil for the Internet community the “foibles” of Scientology in the same spirit of the modern news exposé. Does this constitute fair use?

A26: No. (*Religious Technology Center v. Lerma*, 40 U.S.P.Q. 2d 1569 (E.D. Va. 1996)).

Q27: Subsequent to Lerma’s posting, *The Washington Post* published a news article entitled “Church in Cyberspace: Its Sacred Writ is on the Net. Its Lawyers are on the Case.” The

article discussed Lerma’s current litigation involving the Church of Scientology, as well the history of Scientology litigation against its critics and the growing use of the Internet by Scientology dissidents. The article included three quotations from three Church of Scientology documents posted on the internet by Lerma. The quoted material totaled 46 words. Do the quotations in the *Washington Post* news article constitute fair use of the Church documents?

A27: Yes. (*Religious Technology Center v. Pagliarina*, 908 F. Supp. 1353 (E.D. Va. 1995)).

3. Greatest Hits of Atlanta IP

Based on the following pair of cases:

1. The “Scarlett Fever” case. *MGM v. Showcase Atlanta Co-Op. Prod., Inc.* (479 F. Supp. 351 (N.D.Ga. 1979)). Orinda Evans 1980. Rogers Lunsford for Margaret Mitchell Estate. Tony Askew for Showcase.
2. the Wind Done Gone case. *Suntrust v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001). Miles Alexander and Joe Beck for the defendant parody author.

Q28: What is significance of the Statue of Anne?

A28: Judge Birch wrote extensively about the *Statute of Anne*, with citations to Professor L. Ray Patterson, in the 11th Circuit’s *Wind Done Gone Decision*. The Statute of Anne gave copyright to authors (and took it away from publishers), required the book be original and limited the copyright to a term of years (rather than granting perpetual protection).

Q29: What is the significance of a photo of the Ansley Mall?

A29: Ansley Mall was a character name in the “Scarlett Fever” play at issue in *Showcase Atlanta*—a play on “Ashley Wilkes.”

Q30: What is the significance of a photograph of the Baptismal Font at Sacred Heart Catholic Church on Peachtree?

A30: Pat Conroy submitted a declaration in the WDG case describing himself as “Atlanta-born and Atlanta-shaped and baptized in downtown Atlanta . . . at the same font where Margaret Mitchell was christened forty-six years earlier.”

Q31: These two cases ended differently. In *MGM v. Showcase Atlanta*, Judge Evans enjoined the production of “Scarlett Fever”; in WDG, Judge Pannell similarly enjoined WDG, but the 11th Circuit reversed. What explains the difference?

A31: A critical difference was this. In *Showcase*, the play did not make sufficient critical commentary about GWTW, but instead used it as a platform for comedy. By contrast, WDG aimed directly at GWTW. That’s why the Pat Conroy declaration was so important. He testified (via declaration) that the Margaret Mitchell estate had asked him to write a sequel to GWTW, but that he had refused because the estate imposed a

condition that he not mention “miscegenation or homosexuality.” This fact served as a factual premise for the 11th Circuit panel, including Judge Birch, to highlight Randall’s incorporation of both into her work: Ashley Wilkes with a male lover in WDG and Cynara, the protagonist WDG, is Scarlett’s half-sister, the daughter of Scarlett’s father and Mammy.

Q32: In *Estate of Martin Luther King v. CBS*, 194 F.3d 1211 (11th Cir. 1999), Miles Alexander and Joe Beck represented the MLK estate against CBS. In *Original Appalachian Works, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 826 (11th Cir. 1982), Judge Birch (before he was appointed to the Eleventh Circuit) and Bill Needle represented OAA, with help from Professor Patterson. What legal issue links the two cases?

A32: Both cases discuss whether the works were published without notice under the 1909 Copyright Act and, thereby, forfeited copyright protection.

Q33: And what was the outcome of each?

A33: In the *MLK* case, Judge O’Kelly ruled that Reverend King forfeited the copyright to his “I have a Dream” speech by publishing it without notice, but, on appeal, the 11th Circuit reversed (2-1, Roney dissenting), holding that performance of a copyrighted work (in this case, delivering the famous speech) is not “general publication,” even if the audience is big. In this case, big meant “real big” since there were 200,000 people on the Mall that day and perhaps millions more listening live on radio and TV.

In the *OAA v. Toy Loft* case, Judge Tidwell and the 11th Circuit both held that Xavier Roberts did not lose his copyright when in 1977, i.e., under the forfeiture provisions of the 1909 Act, he “made available for adoption” “experimental” hand crafted “Little People” babies. Even though the copyright to the 1977 experimental “babies” may have been lost, the 1978 babies were different enough to support their own copyright and, thereby, the infringement action.

Q34: *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340 (1991). Upon what authority did Justice O’Connor rely when she wrote the *Feist* opinion for the Court?

A34: A law review article by Professors Patterson and Joyce. Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 763, n. 155 (1989).