

Art and Technology: A Survey of Modern Copyright Law

BECK ROAN

SLIDE 1: INTRODUCTION

- Art in the news. The banana is a piece entitled ‘Comedian’ by Maurizio [Mau-reet-zee-oh] Cattelan at Art Basel in Miami. Cattelan is famous for the gold toilet, which was recently stolen. Bought the banana at a local grocery store and duct taped it to the wall. Sold for \$120,000. And 3 different ones have sold.
 - Subsequently eaten by performance artist David Datuna
 - Although staff was unhappy, this piece demonstrates that the art was not the banana itself, but the idea. Cattelan sold the idea of the piece, which allows for the
- The banana raises several points for me:
 - (1) How does an artist deal with modern technology. The photos and the shares. The tweets and retweets. The shared material and adopted themes and theft and humor and insanity involved. What can be done to create a unique piece, and also to protect your piece.
 - (2) What can an artist do to protect a work, not only as technology and representations change, but also as the piece changes over time.
 - (3) How can an artist exploit the modern world

SLIDE 2: COPYRIGHT AND FAIR USE

- Think of copyright as part of a balancing act
- Copyright law provides authors exclusive, though not absolute, rights in their work.... But the fair use doctrine provides a counter-balance to the author's rights by allowing for certain unauthorized secondary uses of protected materials
 - On the one hand, it is important to protect creators’ exclusive rights in their work, because it incentivizes new work. On the other hand, other members of society receive the ability to fairly use a piece of work

SLIDE 3: FAIR USE - HISTORICALLY

- These 4 factors of the fair use doctrine come from *Folsom v. Marsh*. The test laid out in that 1841 case were codified in the Copyright Act of 1976.
 - (In *Folsom v. Marsh*, Justice Story considered whether Reverend Charles Upham had infringed the copyright of Mr. Jared Sparks.³ Sparks authored a 12-volume set of the writings of George Washington, which consisted of correspondence, addresses, messages and other papers of the former president. Upham authored a biography of George Washington using numerous letters and writings found in Sparks' volumes, arranged in a manner to tell Washington's life story)

SLIDE 4: FAIR USE - TIMELINE

- Following their codification, there was 2 decades of what was termed the ‘market-centered’ paradigm. In the ‘market-centered’ paradigm, fair use was a very unusual exception to the copyright owner’s exclusive rights. Fair use, under this time, was only available when a reasonable copyright owner would have consented to the secondary use but for the prohibitively high costs of negotiating for such a license

- Then, came transformative use

SLIDE 5: TRANSFORMATIVE USE TEST

- Judge Pierre Leval – ‘Toward a Fair Use Standard’ 1990 Harvard Law Review
 - A secondary use is “transformative” of the original work if that new use “adds value to the original ... [or if the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights, and new understandings”
 - “Transformative,” according to Leval, meant the use was “productive” and “employ[ed] the quoted matter in a different manner or for a different purpose from the original
 - A use that merely “repackages or republishes the original” is likely not transformative
- First used in *Campbell v. Acuff-Rose* in 1994
 - Justice David Souter wrote:
 - Under the first of the four §107 factors, ‘the purpose and character of the use, including whether such use is of a commercial nature ...,’ the enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is ‘transformative,’ altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

SLIDE 6: TRANSFORMATIVE USE CASES

- Richard Prince and the Patrick Cariou pictures
- Thierry Guette (Mr Brainwash) and the photo of Run DMC
- Jeff Koons and photo from Allure Magazine
 - “The test [for transformation from Campbell- “whether it *adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message*”] almost perfectly describes Koons's adaptation of "Silk Sandals": the use of a fashion photograph created for publication in a glossy American "lifestyles" magazine — with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details and, crucially, their entirely different purpose and meaning — as part of a massive painting commissioned for exhibition in a German art-gallery space. We therefore conclude that the use in question was transformative.”

SLIDE 7: TRANSFORMATIVE USE APPLIED TO TECHNOLOGY

SLIDE 8: GRAFFITI (REVOK)

- Background:
 - Brooklyn, NY: a graffitied handball court in the William Sheridan Playground
 - H&M asked permission to parks department, and received it. Shot ad there
- Proceedings
 - Jason Williams (Revok) saw it and sent H&M cease-and-desist letter

- H&M responded mural was not only “unauthorized,” but also “constituted vandalism” so they didn’t need his permission
- Backlash
- H&M drops suit
 - Statement: “It was never our intention to set a precedent concerning public art or to influence the debate on the legality of street art. As a result, we are withdrawing the complaint filed in court. ... We thank everyone for their comments and concerns, as always, all voices matter to us”

SLIDE 9: GRAFFITI (5Pointz)

- Background
 - 5Pointz was a rare collaboration between a real-estate developer and a group of street artists. In 1993, when Long Island City was beset by crime, the developer, Jerry Wolkoff, allowed a crew of taggers to decorate his buildings at 45-46 Davis Street with a wild array of colorful, swirling murals.
 - 5Pointz eventually became “the world’s largest open-air aerosol museum,”
 - About 11,000 murals had come and gone at the complex in about the last decade
 - Wolkoff was going to demolish the building, but artists attempted to stop the demolition (attempting to get landmark status and even attempting to buy it)
 - A group of artists filed a lawsuit in Federal District Court in Brooklyn in 2013 after the developer, Jerry Wolkoff, had their work at 5Pointz in Long Island City, Queens, erased before the building was demolished
- Case
 - Artists’ claim rested on Visual Artists Rights Act, or V.A.R.A., which has been used to protect public art of “recognized stature” created on someone else’s property.
 - Jury found (in 2017) that Wolkoff broke the law when he tore down 5Pointz. Along with the buildings nearly 50 swirling, colorful murals that had been spray-painted on its walls were lost.
 - Ruling that graffiti was of sufficient stature to be protected by the law, a federal judge awarded a judgment of \$6.7 million on Monday to 21 graffiti artists whose works were destroyed in 2013 at the 5Pointz complex in Long Island City, Queens
 - Court awarded statutory damages of \$150,000 for each of forty-five works, for total of \$6,750,000