

Celebrate Fair Use Week at Virginia Tech!

February 22 - 26, 2016

A Local Copyright Story: Fair Use, or Copyright Infringement?

This exhibit illustrates *fair* (and *infringing*) uses of copyrighted works to put the U.S. Copyright Law Fair Use exemption in context. Let's consider a local case study.

View the images and news story; explore our 4-panel exhibit to learn more about fair use, and then on panel 4: tell us what you think about this local case!

Was this a *fair use*?



The image of Mary Shelley's character Frankenstein's monster is well known, and some forms are in the public domain (no longer protected by copyright).



A local tattoo artist, Roger LaDouceur, was inspired to create an original artwork based on this image.



In October 2015, Macado's, a local restaurant, created pint glasses with an image of Frankenstein's monster.

Roanoke tattoo artist files lawsuit against Macado's

Local artist sues for copyright infringement when a design resembling his work appeared on Macado's promotional merchandise.

LAUREN FARRAR
news staff writer

Macado's is sandwiched between its marketing methods and a copyright infringement lawsuit.

Roger LaDouceur is a tattoo artist and owner of Star City Tattoos in Roanoke, Virginia. On Oct. 30, 2015, LaDouceur filed a copyright infringement lawsuit against Macado's, Inc. According to LaDouceur, the restaurant has been using his artwork for marketing purposes. He has received no proper credit or compensation.

In October of 2013, LaDouceur created a tattoo for his client, Chris Giles. The tattoo is an altered display of Frankenstein with the caption, "I Am Not A Monster." LaDouceur crafted the tattoo for Giles' leg.

In 2014, LaDouceur discovered that Macado's was using his artwork to market their Halloween season. He found a replica of the Frankenstein tattoo on cups, t-shirts, menus, advertisements and more. Merchandise grew exceedingly popular and was even being sold on eBay.

"It was a very

commercially successful campaign using Roger's image," said James Creekmore, attorney at The Creekmore Law Firm PC and LaDouceur's lawyer. "Even to a point where people are reselling these things on eBay now."

According to LaDouceur, Macado's put Macado's on notice that its use of his artwork was not lawful. Yet, LaDouceur seeks destruction of remaining items displaying his artwork, an award of damages and an award of profits. Profits can range from October 2014 to the present.

"The artist is entitled to see his actual damages and the actual profits that the infringing party received as a result of using the image," Creekmore said. "Those profits can be everything from all of October 2014's profits across all of their restaurants because Macado's used that image to sell their entire Halloween season in 2014."

Creekmore emphasizes that intellectual property law is important for people everywhere. Rewards should go to artists when their work is used for commercial purposes.

"The theory behind intellectual property law is that when a person creates something, that person is entitled to all of the recoveries that were available from the

District of Virginia. The document calls for one count of copyright infringement.

"Plaintiff, Roger Charles LaDouceur, is the artist and creator, and sole and exclusive author, of the original tattoo design created on October 16, 2013," the complaint stated. "Plaintiff has not licensed or otherwise authorized Defendants to reproduce, display, distribute or make any use of the tattoo."

Macado's is unable to comment until the lawsuit progresses. However, Dean Nichols, registered agent for Macado's, states that there is an incorrect piece of information in the allegation.

"(Macado's) only used the image, and not the exact image that the plaintiff tattooed on somebody's leg, in 2014," Nichols said. "They did not use it in 2015."

Nichols added that the company will review the lawsuit and seek an attorney that specializes in intellectual property.

Until the case progresses, Creekmore warns that the Internet should be used with caution.

"People forget that just because (something) is available on the internet, doesn't mean that it's available for your commercial use," Creekmore said. "It belongs to somebody."

Farrar, L. (2015, Nov). "Roanoke tattoo artist sues Macado's for Copyright Infringement." Collegiate Times. Retrieved on February 8, 2016 from: http://www.collegiatetimes.com/news/roanoke-tattoo-artist-sues-macado-s-for-copyright-infringement/article_80c8a5f6-8715-11e5-8d93-5b4a73c77561.html

Fair Use Fundamentals



Copyright law is a carefully balanced system meant to encourage creativity as well as cultural and scientific progress. The law encourages authors by giving them limited control over certain uses of their works, and it encourages everyone (including authors) to use existing cultural and scientific material without permission, under certain circumstances, to engage in a wide variety of vital activities. Many parts of the law favor the freedom to use culture, but by far and away the most flexible, powerful, and universal user's right is fair use. As you'll see below: fair use is a right, fair use is vitally important, fair use is for everyone, and fair uses are everywhere.

Fair Use is a Right

Some people think fair use is a minor exception or a marginal carve-out from the expansive protection for authors, but **fair use is a fundamental right.**



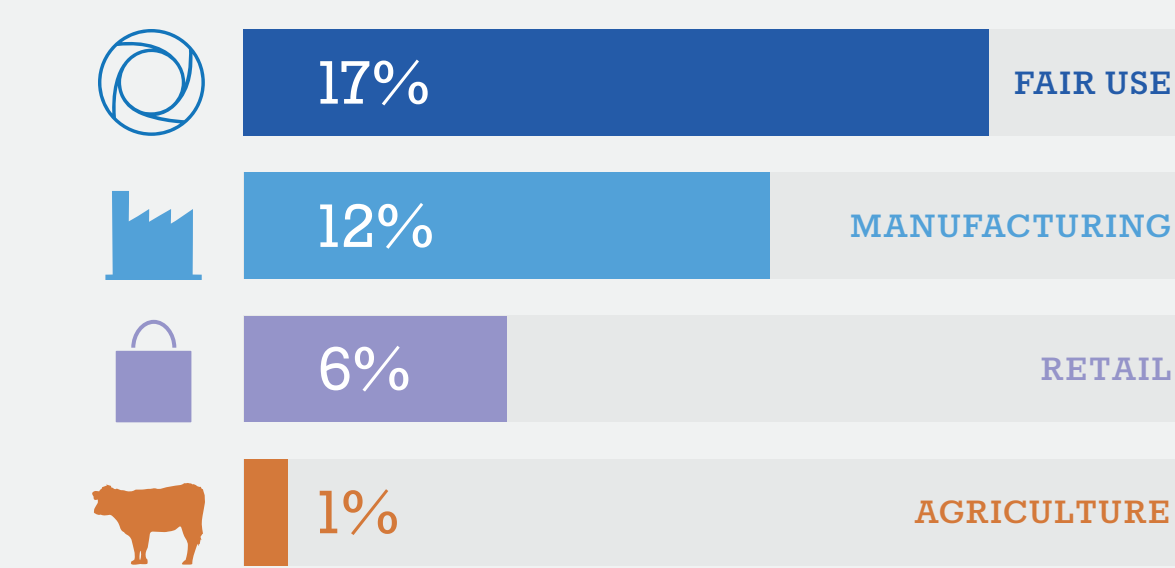
the notorious r.b.g.
Thanks to Justice Ruth Bader Ginsburg, the Supreme Court said fair use is a "First Amendment Safeguard".



Like the First Amendment itself, fair use is **broad, flexible, and responsive to change.** That's why fair use supports the constitutional purpose of copyright: to "promote the progress of science and the useful arts".

Fair Use is Vitally Important

to the economy
Experts estimate that industries reliant on fair use contributed \$2.4 trillion to the U.S. economy in 2008-2009, or approximately 17 percent of the U.S. GDP.¹ In comparison:



to innovation
Fair use enables new technologies and advancements, including new products like DVRs and search engines.

to creativity
Without fair use, there would be no parody, no critique and commentary, no transformative mash-ups, and no homage or pastiche.

to scholarship
Imagine trying to prove your brilliant theory about Ernest Hemingway without quoting Hemingway?

1. CCIA, Fair Use in the US Economy, <http://www.cciainet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>
2. US BEA Statistics, http://www.bea.gov/industry/gdpbyind_data.htm

Fair Use is for Everybody

Fair Use is Everywhere

Critics say that fair use is unpredictable, technical, legal stuff that the everyday person can't understand or apply in daily life. In fact, fair uses are all around. Copyright law provides four factors for courts to consider in determining whether a use is fair:

FOUR FAIR USE FACTORS

- the purpose and character of the use**
- the nature of the copyrighted work**
- the portion used in relation to the copyrighted work as a whole**
- the effect of the use upon the potential market**

The most important factor is the purpose: is the use transformative? Courts are much more likely to uphold a use as fair use if it is transformative, meaning that it adds something new, with a different character, expression, meaning or message, or function. Here are just some examples of uses courts have specifically considered, upholding fair use in all of these cases:

Google GOOGLE TVEYES Creating databases to make information searchable is a fair use.	The New York Times NEW YORK TIMES Quoting and reprinting to report the news is a fair use.	BRAILLE Making books accessible to the blind and print-disabled is a fair use.	CODE Copying a computer program to make new programs that work with it is a fair use.
SOUTH PARK Making fun of culture in parodies is a fair use.	ANDY WARHOL Using old art to make new art is a fair use.	DISH Network, VHS, VCR Using recorders in your home to record television and watch later is a fair use.	BALTIMORE RAVENS Documenting history in a world rich with logos and cultural artifacts is a fair use.

3. "Baltimore Ravens logo" by Source. Licensed under Fair use via Wikipedia - http://en.wikipedia.org/wiki/File:Baltimore_Ravens_logo.svg#mediaviewer/File:Baltimore_Ravens_logo.svg
4. South Park logo by VECTOR.ME

Commissioned by **ARL** (Association of Research Libraries)
Free to share and reuse
Design by **YIPPA**
For more information and additional resources, please visit fairuseweek.org.

Acknowledgements

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Exhibit implementation by: Scott Fralin

5-Step Framework

Fair use in context: U.S. Copyright Law

Fair Use, is a four-factor exemption of U.S. Copyright Law 17 U.S. Code § 107 which allows anyone to:

- Copy
- Re-distribute
- Perform
- Electronically transmit
- Publicly display
- Create new versions of others' copyrighted works ...without permission.*

*When the potential use is deemed to be *fair* rather than *infringing*. Only a court can decide what is truly *fair use*. However, U.S. law allows anyone to conduct a well-informed fair use analysis in good faith to determine if their proposed use of copyrighted material is more fair or more infringing.

5-Step Framework to Analyze Any U.S. Copyright Question

This 5-Step framework will take you through factors to consider, including *fair use*, in a step by step order. If you eliminate one step as an option, continue on to the next. If none work, you may need to request permission to use the work, pay to license your use of the work, or look for alternative content to use.

Step 1 Is the work protected by copyright?

Is the work I want to use a type of work protected by copyright?
 If it is eligible for copyright protection:
 Who owns the copyrights?
 Did I create it and did I retain the copyrights?
 Does someone else own the copyrights?
 Is it in the *public domain*?

Directions:

- Set arrow at correct date
- Read information in window
- Mouse over any (note) or asterisks (*) for clarifying information

Is it Protected by Copyright?
 For works first published in the U.S.A.*

No Permission Needed?

Copyright Status/Term **In Public Domain**

Unpublished Works (date of creation)
 Created under Corporate Authorship

Date of First Publication

Before 1923
 After 1922 & Before 1978
 If published without notice

After 1922 & Before 1964
 If published with © notice, but not renewed after 28 years

After 1922 & Before 1964
 If published with © notice & renewed after 28 years

After 1962 & Before 1978
 If published with © notice

After 1977 & Before 2002
 Created (transmitted) before 1978 & first published before January 1, 2002

After 1977 & Before March 1, 1989
 If published without © notice & renewed after 28 years

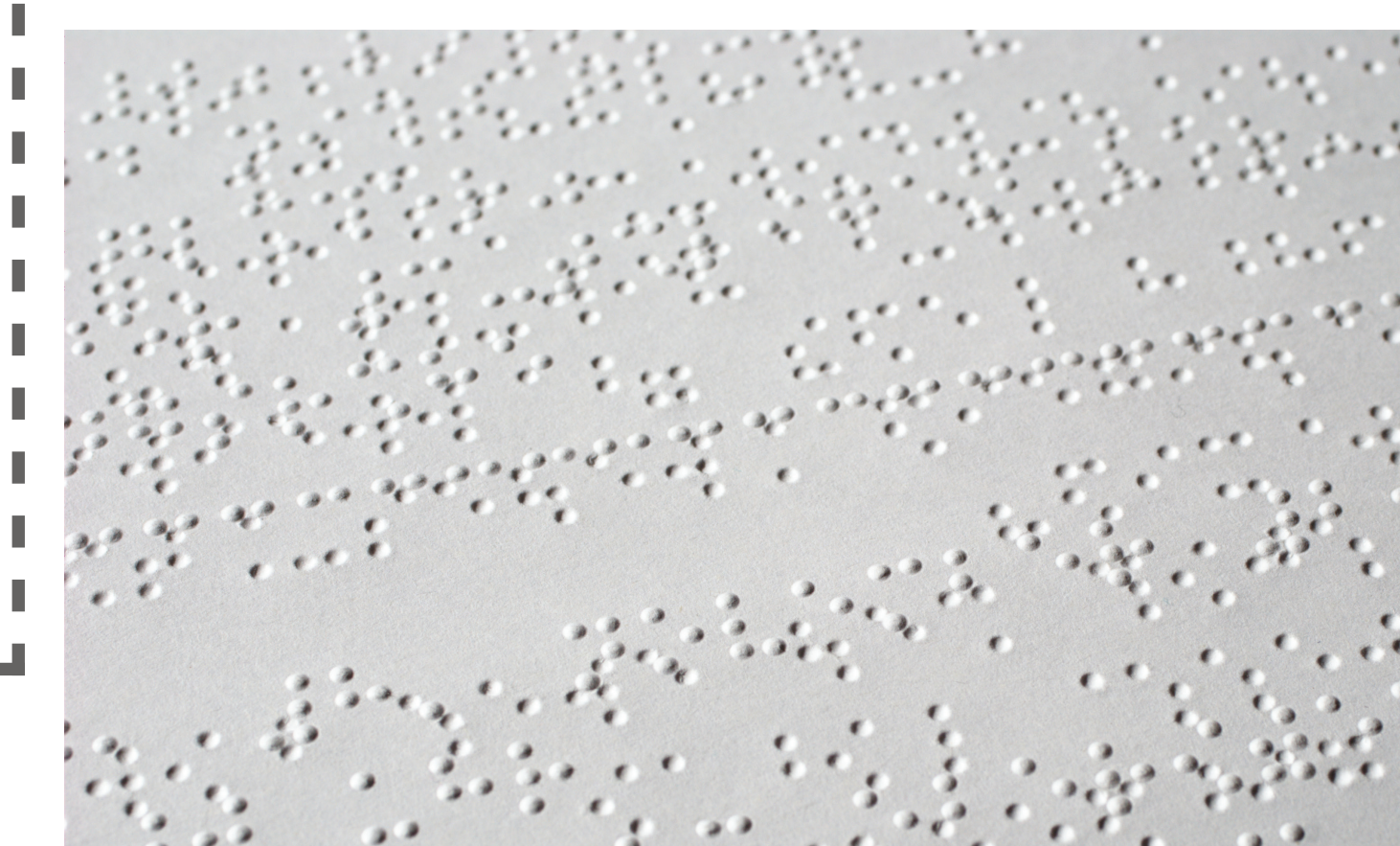
After 1977 & Before March 1, 1989
 If published with © notice but not renewed within 3 years, or published with notice

On or after March 1, 1989
 Published after 2002
 Created before 1978 and author died more than 70 years ago

Published after 2002
 Created under Individual or Joint Authorship
 Created under Corporate Authorship

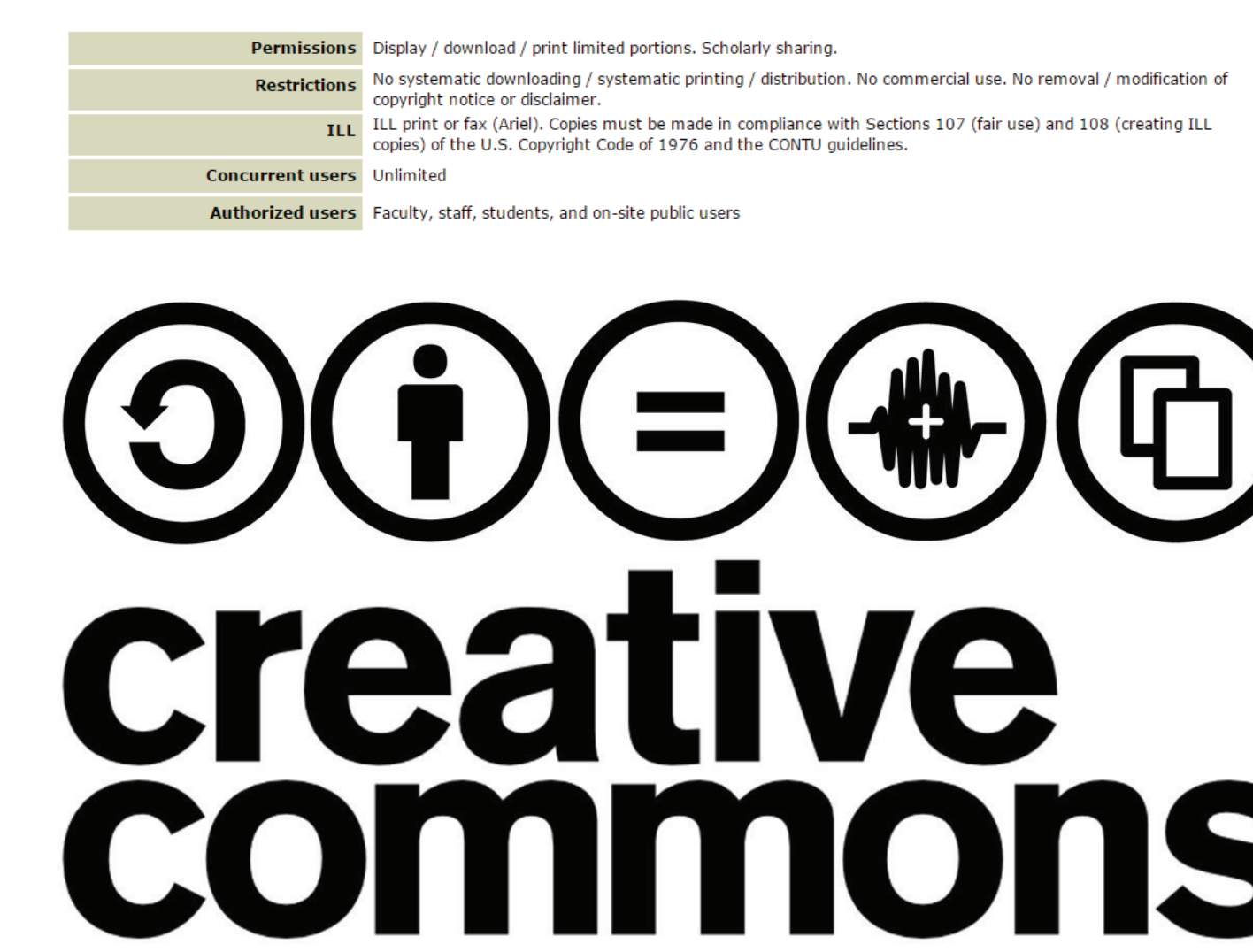
Step 2: Is there a specific exemption in U.S. Copyright Law 17 U.S. Code § 108-121 or others that covers my use?

Section 108: Library copying
 Section 109(a): First sale doctrine
 Section 109(c): Exemption for public displays
 Section 110(1): Displays/performances in face to face teaching
 Section 110(2): Displays/performances in distance learning
 Section 120: Architectural works
 Section 121: Special formats for persons who are blind or have other disabilities



Step 3: Is there a license that covers my use?

Library subscription licenses include some explicit uses for education and research. Open licenses of many types allow creators of copyrightable works to explicitly allow uses of their works by others. Creative Commons Licenses:
<https://creativecommons.org/licenses/>
 GNU General Public License:
<http://www.gnu.org/licenses/gpl-3.0.en.html>



Step 4: Is my use covered by Fair Use?

Fair Use is the exemption described in U.S. Copyright Law 17 U.S. Code § 107. Consider the 4 factors: **Purpose, Nature, Amount, Effect**. Use the Fair Use Evaluator Tool, which will guide you through your analysis of each factor, and then all of them as a whole, supplying you with a PDF of your analysis and comments to keep in your records.

Fair Use Evaluator

What this tool can do for you:

- Help you better understand how to determine the "fairness" of a use under the U.S. Copyright Code.
- Collect, organize & archive the information you might need to support a fair use evaluation.
- Provide you with a time-stamped, PDF document for your records (access, which could prove valuable, should you ever be asked by a copyright holder to provide your fair use evaluation and the data you used to support it. [See this document.](#))
- Provide access to educational materials, external copyright resources, and contact information for copyright help at local & national levels.

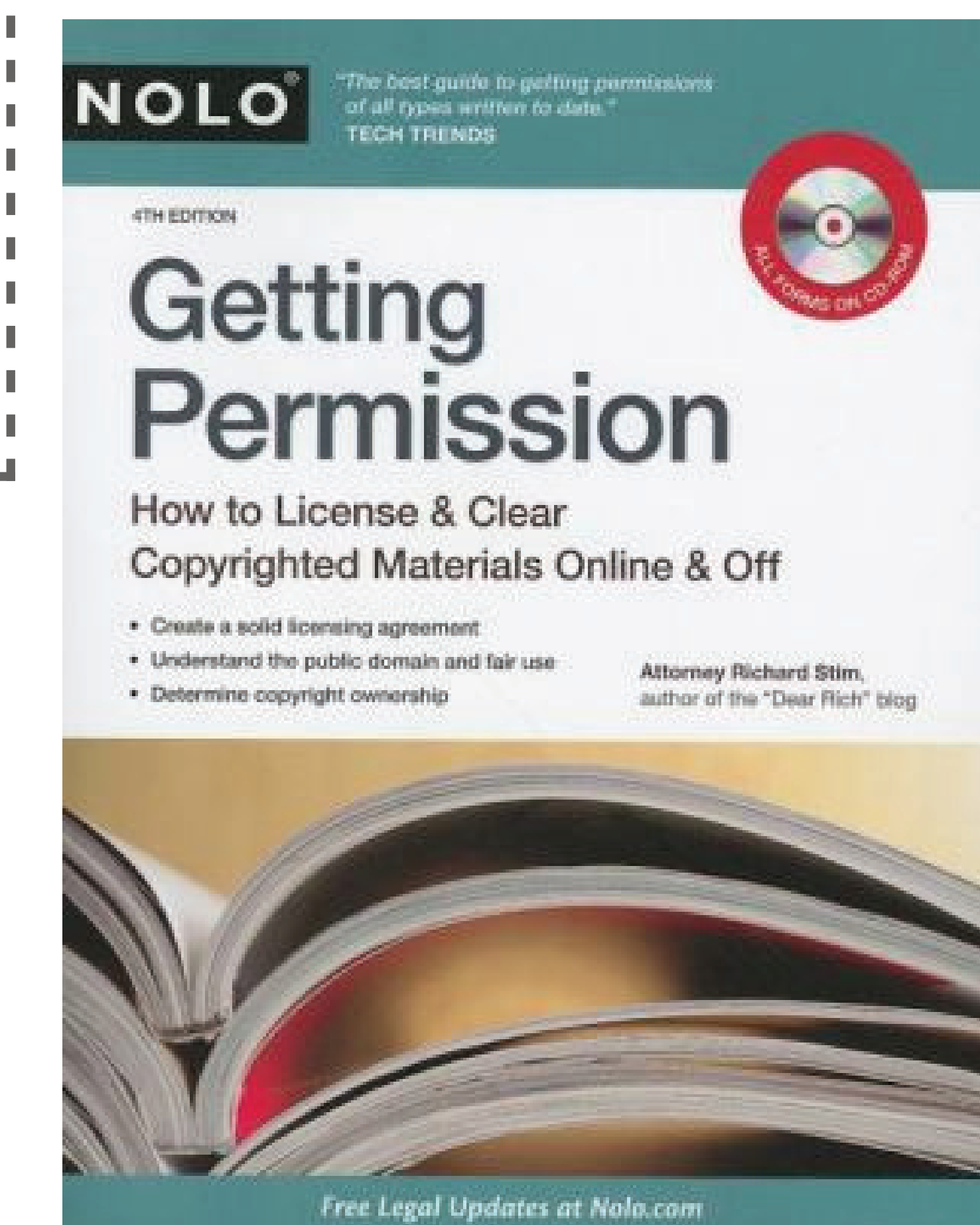
What this tool cannot do for you:

- This tool does not provide legal advice. It records the information you provide it as well as your own judgment on the fairness of the use. See the tool [FAQ](#) for more information.
- Only a court of law can definitively rule on whether a use is fair or unfair. This tool does not assume or predict a court outcome.

Buttons:

Step 5: Will the copyright owner grant permission for my use, or can I arrange to pay for a license for my use?

Stanford University has an excellent guide to 'The Basics of Getting Permission' <http://fairuse.stanford.edu/overview/introduction/getting-permission/>
 VT Copyright Clearance permissions information for VT faculty, staff, and students: <http://www.printing.vt.edu/services/digitalpro.php#copyright>



Step 6: If none of the above: Consider how you may make your use more fair

Identify alternative content
 Create your own content

Ask a librarian for assistance in identify openly license resources, or alternative content.



Fair Use around the world

Most other countries do not have a provision similar to Fair Use within their copyright (or intellectual property) laws. Canada and countries that follow United Kingdom laws include a similar provision called Fair Dealing.

This 5-step framework to analyze any U.S. Copyright question is a revised version of, "A Framework for Analyzing any U.S. Copyright Problem" by Smith, K., Macklin, L. A., and Gillilan, A. T., <http://tinyurl.com/5-step-USCopyrightQuestion>, licensed CC-BY-SA 4.0. Modified by Anita Walz and Ginny Pannabecker; licensed CC-BY-SA 4.0.

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Fair Use or Not?

Lift up a case to see the decision!

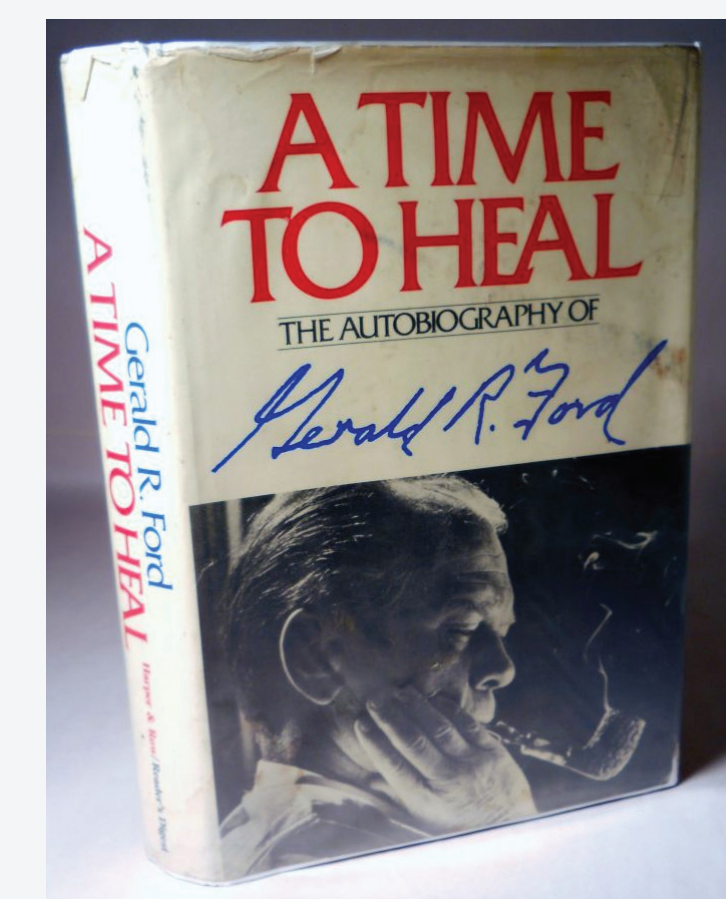
Case 1

"Libraries ... provided a search engine company (Google) with books to scan... the libraries later used the resulting digital scans for three purposes: preservation, a full-text search engine, and electronic access for disabled patrons who could not read the print versions."

Case Study Citation: The case above is an excerpt from content on the Stanford University "Copyright and Fair Use Overview" website section is from NOLO, with much of it taken from the book Getting Permission (October 2010) by Richard Stim.

Were these uses of copyrighted materials considered to be a *fair use*?

Case 2



"The Nation magazine published excerpts from ex-President Gerald Ford's unpublished memoirs. The publication in The Nation was made several weeks prior to the date Mr. Ford's book was to be serialized in another

magazine."

Case Study Citation: The case above is an excerpt from content on the Stanford University "Copyright and Fair Use Overview" website section is from NOLO, with much of it taken from the book Getting Permission (October 2010) by Richard Stim.

Were these uses of copyrighted materials considered to be a *fair use*?

THE FORD MEMOIRS
BEHIND THE NIXON PARDON
In his memoirs, *A Time to Heal*, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.
Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Nelson Rockefeller for Vice President, and that he regretted his "towards" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.
The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in *Time* in mid-April and in *The Reader's Digest* thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.
Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.
Ford was deeply hurt by Haig's revelation.
(Continued on Page 267)

Case 3

"A television news program copied one minute and 15 seconds from a 72-minute Charlie Chaplin film and used it in a news report about Chaplin's death."

Case Study Citation: The case above is an excerpt from content on the Stanford University "Copyright and Fair Use Overview" website section is from NOLO, with much of it taken from the book Getting Permission (October 2010) by Richard Stim.

Was this use of a copyrighted work considered to be a *fair use*?

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Fair Use or Not?

Lift up a case to see the decision!

Fair Use

The actions and uses of copyrighted works in this case were decided as: protected by fair use.

A key fair use factor in this decision was *purpose* in that the intended and resulting uses of the scans were *transformative*. Also, no evidence was found regarding a market *effect* (no detrimental effect on the commercial market of the original works).

Case citation: The Author's Guild v. Hathitrust, No. 1:11-cv-06351-HB (S.D.N.Y., October 10, 2012).

Not a Fair Use

The actions and uses of copyrighted works in this case were decided as: Not a Fair Use.

A key fair use factor in this decision was *effect*. The decision, following a previous decision and an appeal, was that The Nation's actions in publishing the excerpted content, obtained without permission, was detrimental to the market value, and/or commercialization of the published work, specifically, the author's serialization rights. It is worth noting as well that the autobiography itself was not published at the time the excerpt was printed and distributed.

Case citation: Harper & Row v. Nation Enters., 471 U.S. 539 (1985).

Not a Fair Use

The use of a copyrighted work in this case was decided as: Not a fair use.

A key Fair Use factor in this decision was Amount. The court's decision was that the pieces of the film used by the television news program were both substantial, and represented the "heart of the work," or the most instantly recognizable, significant, and well-known portion of the film. So, even though the amount (1 min 15 sec) used relative to the whole (72 min) might appear small, this was still decided as disproportionate due to the significance of the piece used.

Case citation: Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting Sys., Inc., 672 F.2d 1095, 1100 (2d Cir. 1982).

Your Turn! Is it a Fair Use?



Did Macado's use of the tattoo artist's image on their pint glasses a fair use of that copyrighted work?

First, let's apply the 5-Step Framework for Analyzing any U.S. Copyright Question, from Panel 2 of this exhibit:

Step 1: Is the work protected by copyright?

Yes. (It is an image and a creative work. It is not in the public domain.)

Step 2: Is there a specific exemption in U.S. Copyright Law 17 U.S. Code § 108-121 that covers my use?

No. (Exemptions described in U.S. Copyright Law 17 U.S. Code § 108-121 do not apply.)

Step 3: Is there a license that covers my use?

No. (Based on what we know of this circumstance from the news story, this image was not given an open license by its creator, and no license was acquired to use it.)

Step 4: Is the use covered by *fair use*?

Undecided. (No court has decided if this use was covered under the *fair use* exemption in Copyright Law. However, you can use the four fair use factors to decide if you think this example was a fair use.)



Consider the fair use factors

As you consider each of the the four factors listed on this panel, add a pebble to the side of the scale that matches your decision (towards *fair*, or towards *infringing*).

Add a checkmark to show your decision on either the **Fair Use** or the **Infringing** decision notes areas on this panel.

Step 5 - 6: What if it's not a fair use?

If your decision was that this case was not a fair use, and you find yourself in a similar situation, remember that your next options include: *Step 5 - Getting Permission* from the copyright holder to use the work, or *Step 6: Creating or Identifying alternative content* to use.

Fair Use

Infringing

4

4 Fair Use Factors (1)

Deciding whether a use of a copyrighted work falls within a *fair use* exemption requires considering 4 different factors - all of which are important:

Purpose - What is the purpose and character of your use? (How will you use the copyrighted work? Why will you use it? How will the resulting new work be used and distributed? Does your use somehow transform, add meaning, or use the existing work differently than intended?)

Nature - What is the nature of the copyrighted work that you will use? (Is it a highly creative work, such as an artwork, a piece of music, an image? Is it a scholarly work? Is it a work with primarily factual content? Has the copyrighted work been published?)

Amount - What is the amount and substantiality of the portion that you will use, in relation to the whole of the copyrighted work? (Will you use the whole work? A small portion, such as a section of a chapter of a book? Is it the "heart" of the work, such as the 'hook' or main lyric from a famous song?)

Effect - What effect will your intended use have on the current market or potential value of the copyrighted work, and how does that relate to fair use? (Is the copy of the work you plan to use a legal copy? Does the work have an established market, or is it under commercial exploitation through licensing or sale? Will your use of the work damage the current or future marketability of the original work?)