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C. Summaries of Fair Use Cases

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The best method of understanding the flexible principle of fair use is to review actual cases decided by the courts. Below are summaries of a series of fair use cases.

1. Cases Involving Text

- **Not a fair use.** An author copied more than half of an unpublished manuscript to prove that someone was involved in the overthrow of the Iranian government. **Important factors:** A substantial portion was taken (half of the work) and the work had not yet been published. (*Love v. Kwitny*, 772 F. Supp. 1367 (S.D. N.Y. 1989).)
- **Fair use.** A biographer of Richard Wright quoted from six unpublished letters and ten unpublished journal entries by Wright. **Important factors:** No more than 1% of Wright's unpublished letters were copied and the purpose was informational. (*Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).)
- **Not a fair use.** A biographer paraphrased large portions of unpublished letters written by the famed author J.D. Salinger. Although people could read these letters at a university library, Salinger had never authorized their reproduction. In other words, the first time that the general public would see these letters was in their paraphrased form in the biography. Salinger successfully sued to prevent publication. **Important factors:** The letters were unpublished and were the "backbone" of the biography--so much so that without the letters the resulting biography was unsuccessful. In other words, the letters may have been taken more as a means of capitalizing on the interest in Salinger than in providing a critical study of the author. (*Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).)
- **Not a fair use.** *The Nation* magazine published excerpts from ex-President Gerald Ford's unpublished memoirs.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 of serialization of Mr. Ford's book in another magazine. Important factors: *The Nation's* copying seriously damaged the marketability of Mr. Ford's serialization rights. (*Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985).)
- **Not a fair use.** A company published a book entitled *Welcome to Twin Peaks: A Complete Guide to Who's Who and What's What*, containing direct quotations and paraphrases from the television show "Twin Peaks" as well as detailed descriptions of plot, character and setting. **Important factors:** The amount of the material taken was substantial and the publication adversely affected the potential market for authorized books about the program. (*Twin Peaks v. Publications Int'l, Ltd.* 996 F.2d 1366 (2d Cir. 1993).)
- **Not a fair use.** A company published a book of trivia questions about the events and characters of the "Seinfeld" television series. The book included questions based upon events and characters in 84 "Seinfeld" episodes and used actual dialogue from the show in 41 of the book's questions. **Important factors:** As in the "Twin Peaks" case, the book affected the owner's right to make derivative "Seinfeld" works such as trivia books. (*Castle Rock Entertainment, Inc. v. Carol Publ. Group*, 150 F.3d 132 (2d Cir. 1998).)
- **Fair use.** Publisher Larry Flynt made disparaging statements about the Reverend Jerry Falwell on one page of *Hustler* magazine. Rev. Falwell made several hundred thousand copies of the page and distributed them as part of a fund-raising effort. **Important factors:** Rev. Falwell's copying did not diminish the sales of the magazine (since it was already off the market) and would not adversely affect the marketability

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of back issues. (*Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526 (C. D. Cal. 1985).)

2. Artwork and Audiovisual Cases

- **Not a fair use.** 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. **Important factors:** The court felt that the portions taken were substantial and part of the "heart" of the film. (*Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095, 1100 (2d Cir. 1982).)
- **Fair use.** The makers of a movie biography of Muhammad Ali used 41 seconds from a boxing match film in their biography. **Important factors:** A small portion of film was taken and the purpose was informational. (*Monster Communications, Inc. v. Turner Broadcasting Sys. Inc.*, 935 F. Supp. 490 (S.D. N.Y. 1996).)
- **Not a fair use.** A television station's news broadcast used 30 seconds from a fourminute copyrighted videotape of the 1992 Los Angeles beating of Reginald Denny. **Important factors:** The use was commercial, took the heart of the work and affected the copyright owner's ability to market the video. (*Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).)
- **Fair use.** In a lawsuit commonly known as the Betamax case, the Supreme Court determined that the home videotaping of a television broadcast was a fair use. This was one of the few occasions when copying a complete work (for example, a complete episode of the "Kojak" television show) was accepted as a fair use. Evidence indicated that most viewers were "time-shifting" (taping in order to watch later) and not "library-building" (collecting the videos in order to build a video library). **Important factors:** The Supreme Court reasoned that the "delayed" system of viewing did not deprive the copyright owners of revenue. (*Universal City Studios v. Sony Corp.*, 464 U.S. 417 (1984).)
- **Not a fair use.** A poster of a "church quilt" was used in the background of a television series for 27 seconds. **Important factors:** The court was influenced by the prominence of the poster, its thematic importance for the set decoration of a church and the fact that it was a conventional practice to license such works for use in television programs. (*Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).)
- **Fair Use.** A search engine's practice of creating small reproductions ("thumbnails") of images and placing them on its own website (known as "inlining") did not undermine the potential market for the sale or licensing of those images. **Important Factors.** The thumbnails were much smaller and of much poorer quality than the original photos and served to index the images and help the public access them. (*Kelly v. Arriba-Soft*, 03 C.D.O.S. 5888 (9th Cir. 2003).)

3. Internet Cases

- **Not a fair use.** Entire publications of the Church of Scientology were posted on the Internet by several individuals without Church permission. **Important factors:** Fair use is intended to permit the borrowing of portions of a work, not complete works. (*Religious Technology Center v. Lerma*, 40 U.S.P.Q. 2d 1569 (E.D. Va. 1996).)
- **Fair use.** *The Washington Post* used three brief quotations from Church of Scientology texts posted on the Internet (see previous case). **Important factors:** Only a small portion of the work was excerpted and the purpose was for news commentary. (*Religious Technology Center v. Pagliarina*, 908 F. Supp 1353 (E.D. Va. 1995).)

4. Music Cases

- **Fair use.** A person running for political office used 15 seconds of his opponent's campaign song in a political ad. **Important factors:** A small portion of the song was used and the purpose was for purposes of political debate. (*Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D. N.H. 1978).)
- **Fair use.** A television film crew, covering an Italian festival in Manhattan, recorded a band playing a portion of a copyrighted song "Dove sta Zaza." The music was replayed during a news broadcast. **Important factors:** Only a portion of the song was used, it was incidental to the news event and did not result in any actual damage

to the composer or to the market for the work. (*Italian Book Corp, v. American Broadcasting Co.*, 458 F. Supp. 65 (S.D. N.Y. 1978).)

5. Summaries of Parody Cases

- **Fair use.** The rap group 2 Live Crew borrowed the opening musical tag and the words (but not the melody) from the first line of the song "Pretty Woman" ("Oh, pretty woman, walking down the street "). The rest of the lyrics and the music were different. **Important factors:** The group's use was transformative and borrowed only a small portion of the "Pretty Woman" song. The 2 Live Crew version was essentially a different piece of music and the only similarity was a brief musical opening part and the opening line. (Note: The rap group had initially sought to pay for the right to use portions of the song but were rebuffed by the publisher who did not want "Pretty Woman" used in a rap song.) (*Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).)
- **Fair use.** The composers of the song, "When Sunny Gets Blue," claimed that their song was infringed by "When Sonny Sniffs Glue, " a 29second parody that altered the original lyric line and borrowed six bars of the song. A court determined this parody was excused as a fair use. **Important factors:** Only 29 seconds of music were borrowed (not the complete song). (*Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986).) (Note: As a general rule, parodying more than a few lines of a song lyric is unlikely to be excused as a fair use. Performers such as Weird Al Yankovic, who earn a living by humorously modifying hit songs, seek permission of the songwriters before recording their parodies.)
- **Fair use.** Comedians on the late-night television show "Saturday Night Live" parodied the song "I Love New York" using the words "I Love Sodom." Only the words "I Love" and four musical notes were taken from the original work. **Important factors:** The "Saturday Night Live" version of the jingle did not compete with or detract from the original song. (*Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D. N.Y.), aff'd 632 F.2d 252 (2d Cir. 1980).)
- **Not a fair use.** An author mimicked the style of a Dr. Seuss book while re-telling the facts of the O.J. Simpson murder trial in *The Cat NOT in the Hat! A Parody by Dr. Juice*. The Ninth Circuit Court of Appeals determined that the book was a satire, not a parody, because the book did not poke fun at or ridicule Dr. Seuss. Instead, it merely used the Dr. Seuss characters and style to tell the story of the murder. **Important factors:** The author's work was nontransformative and commercial. (*Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).)
- **Fair use.** A movie company used a photo of a naked pregnant woman and superimposed the head of actor Leslie Nielsen. The photo was a parody using similar lighting and body positioning of a famous photograph taken by Annie Leibovitz of the actress Demi Moore for the cover of *Vanity Fair* magazine. **Important factors:** The movie company's use was transformative because it imitated the photographer's style for comic effect or ridicule. (*Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. N.Y. 1998).)
- **Not a fair use.** An artist created a cover for a *New Yorker* magazine that presented a humorous view of geography through the eyes of a New York City resident. A movie company later advertised their film *Moscow on the Hudson* using a similar piece of artwork with similar elements. The artist sued and a court ruled that the movie company 's poster was not a fair use. **Important factors:** Why is this case different than the previous case involving the Leslie Nielsen/Annie Leibovitz parody? In the Leibovitz case, the use was a true parody, characterized by a juxtaposition of imagery that actually commented on or criticized the original. The *Moscow on the Hudson* movie poster did not create a parody; it simply borrowed the *New Yorker*'s parody (the typical New York City resident's geographical viewpoint that New York City is the center of the world). (*Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D. N.Y. 1987).)

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