

FAIR USE SELF-DEFENSE

RYLAND JOHNSON, MA, MA



MAIN QUESTIONS FOR TODAY'S WORKSHOP

- WHAT IS FAIR USE?

- WHAT ARE SOME GUIDELINES FOR FAIR USE SELF-DEFENSE?

UNDERSTANDING THE FOUR FACTORS

- FUN LEARNING EXAMPLES?

'DID JEFF KOONS GET AWAY WITH IT?'



FAIR USE IS FREE SPEECH

FAIR USE IS A LIMITATION ON THE EXCLUSIVE
RIGHTS OF COPYRIGHT.

FAIR USE HAS A WELL-ESTABLISHED HISTORY
AND IS FUNDAMENTAL TO THE FREEDOM OF
SPEECH AND INFORMATION.

FAIR USE IS AN AFFIRMATIVE DEFENSE

- **LIKE A PLEA OF INSANITY OR SELF-DEFENSE, FAIR USE IS AN AFFIRMATIVE DEFENSE**
- **IN RESPONSE TO A CLAIM OF COPYRIGHT INFRINGEMENT, A PERSON CLAIMING FAIR USE AFFIRMS THEIR INFRINGEMENT, BUT CLAIMS THAT FREE SPEECH JUSTIFIES THEIR USE**
- **FAIR USE DOES NOT MAKE COPYRIGHT INFRINGEMENT LEGAL**

BASIC CONTEXTUAL TERMS FOR FAIR USE

INTELLECTUAL PROPERTY

PATENTS, TRADEMARKS,
COPYRIGHTS, & TRADE
SECRETS

COPYRIGHT

RIGHT TO COPY, DISTRIBUTE,
DISPLAY, PUBLISH, &
CREATE DERIVATIVE WORKS
THAT ARE TANGIBLE,
ORIGINAL, & CREATIVE

PUBLIC DOMAIN

THINGS THAT CANNOT BE
PROTECTED BY COPYRIGHT



THE FOUR FACTORS OF FAIR USE

SECTION 107 OF THE COPYRIGHT ACT TELLS US THAT FAIR USE IN CRITICISM, COMMENT, NEWS REPORTING, TEACHING, SCHOLARSHIP, OR RESEARCH SERVES FREE SPEECH

DETERMINING FAIR USE IN THESE AREAS REQUIRES CONSIDERATION OF FOUR FACTORS



PURPOSE

IS THE USE FOR PROFIT OR FOR NON-PROFIT OR EDUCATIONAL PURPOSES?

NATURE

IS THE COPYRIGHTED WORK CREATIVE OR INFORMATIONAL?

AMOUNT

HOW MUCH IS BEING USED? IS IT THE MOST IMPORTANT PART?

EFFECT

DOES THE USE EFFECT THE MARKET FOR THE WORK?

PURPOSE

MORE LIKELY TO BE FAIR USE

TRADITIONALLY FAIR PURPOSE
TEACHING, RESEARCH, SCHOLARSHIP, NEWS, COMMENT, CRITICISM, PARODY

TRANSFORMATIVE USE

USE IS BENEFICIAL TO SOCIETY

NON-COMMERCIAL USE / NOT FOR PROFIT

FOR A SMALL GROUP / LIMITED ACCESS / LIMITED DURATION

USE IS SPONTANEOUS

CREDIT GIVEN

LESS LIKELY TO BE FAIR USE

WORK IS MERELY DUPLICATED / NOT TRANSFORMATIVE

FOR ENTERTAINMENT

COMMERCIAL USE / FOR PROFIT

FOR A LARGE GROUP / UNRESTRICTED ACCESS / ONGOING USE

USE CREATES A DERIVATIVE WORK

CREDIT NOT GIVEN

NATURE

MORE LIKELY TO BE FAIR USE

PUBLISHED WORK

NON-FICTION OR FACTUAL WORK

WORK HAS LIMITED NOVELTY OR CREATIVE CONTENT

WORK CREATED FOR A DIFFERENT PURPOSE FROM USE

USE UPHOLDS EDUCATIONAL OBJECTIVES

LESS LIKELY TO BE FAIR USE

UNPUBLISHED WORK

FICTIONAL WORK

HIGHLY CREATIVE WORK

ART, MUSIC, LITERATURE, DRAMA, ARTISTIC PHOTOGRAPHY, FILM

WORK HAS SIGNIFICANT NOVELTY OR CREATIVE CONTENT

WORK CREATED FOR THE SAME PURPOSE AS THE USE

WORK IS CONSUMABLE

SINGLE-USE WORKSHEETS

AMOUNT

MORE LIKELY TO BE FAIR USE

LIMITED USE OF THE WORK

USE OF THE WORK IS NOT CENTRAL TO THE WORK AS A WHOLE

AMOUNT USED APPROPRIATE FOR EDUCATIONAL OBJECTIVES
OR OTHER SOCIALLY BENEFICIAL ENDS SUCH AS CRITICISM, ETC.

USE OF THE WHOLE WORK ONLY WHEN IT MUST BE USED
AS IN THE CASE OF SHORT POEMS, ETC.

USE FALLS WITHIN ESTABLISHED BEST PRACTICES GUIDELINES

LESS LIKELY TO BE FAIR USE

USE OF THE WHOLE OR LARGE PORTIONS OF THE WORK

USE OF THE MOST IMPORTANT PART OF THE WORK

USE OF THE WORK EXCEEDS WHAT IS NECESSARY

USE EXCEEDS ESTABLISHED BEST PRACTICES GUIDELINES

EFFECT

MORE LIKELY TO BE FAIR USE

USER HAS PURCHASED A COPY OF THE WORK

FEWER COPIES USED / USE IS TIMELY

DOES NOT SIGNIFICANTLY AFFECT THE MARKET FOR THE WORK

MINIMAL POTENTIAL FOR USE OUTSIDE OF THE USE'S CONTEXT

WORK IS OUT OF PRINT, OR LICENSING IS NOT AVAILABLE

USER HAS PERMISSION

LESS LIKELY TO BE FAIR USE

USE REPLACES THE SALE OF THE WORK

MULTIPLE COPIES USED / USE CONTINUES INDEFINITELY

USE SIGNIFICANTLY AFFECTS THE MARKET OF THE WORK

WORK IS MADE AVAILABLE OUTSIDE OF THE USE'S CONTEXT

LICENSING IS ACCESSIBLE AND AVAILABLE

USER DOES NOT HAVE PERMISSION

...BUT THE FOUR FACTORS AREN'T PERFECT

EVERY CASE IS DIFFERENT

ISSUES OF FREE SPEECH ARE ALWAYS
CHANGING AND EVOLVING

THERE IS NO FINAL CONSENSUS OR
DISCRETE MEASURES REGARDING FAIR USE

THERE ARE LOTS OF THINGS TO CONSIDER
WHEN WE TRY TO DETERMINE FREE USE

THE FOUR FACTORS AREN'T ALWAYS EQUALLY IMPORTANT

OR SOMETIMES THE FOUR FACTORS ARE
CONDENSED INTO CONCEPTS SUCH AS
'TRANSFORMATIVENESS' OR
'APPROPRIATENESS'.

UNFAIR POWER DIFFERENTIALS EXIST

ISSUES OF FREE SPEECH OFTEN
DEMONSTRATE PROFOUND CONFLICTS

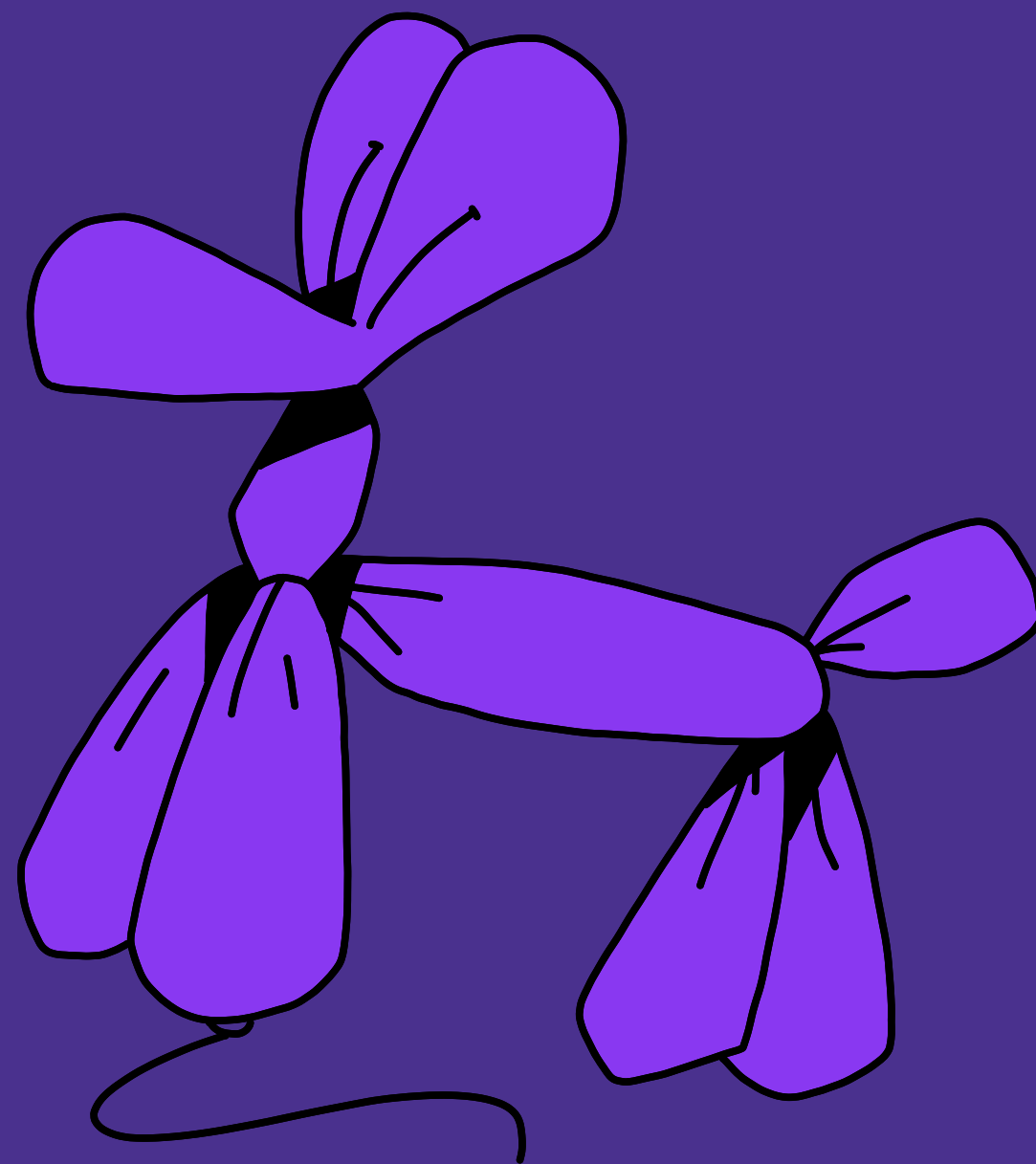
SLAPP CASES

SHOULD INFORMATION BE FREE OR
EXPENSIVE?

RULES OF THUMB FOR FAIR USE SELF-DEFENSE

- USING AN APPROPRIATE AMOUNT IS BEST! AVOID USING MORE THAN NECESSARY!
- BE MINDFUL OF YOUR TEACHING OBJECTIVES! HOW IS YOUR USE TRANSFORMATIVE?
- ALWAYS CITE SOURCES!
- LINK TO RESOURCES RATHER THAN COPYING!
- EXPLORE PUBLIC DOMAIN AND CREATIVE COMMONS OPTIONS!
- DON'T COPY CONSUMABLES!
- DON'T BE AFRAID TO ASK FOR PERMISSION!
- TALK TO YOUR LIBRARIAN ABOUT LIBRARY RESOURCES, OERS, AND COURSE RESERVES!

NOW... LET'S PLAY
DID JEFF KOONS GET AWAY WITH IT?



ROGERS V KOONS, 1992



ROGERS, "PUPPIES"



KOONS, "STRING OF PUPPIES"

- ART ROGERS' COPYRIGHTED WORK, "PUPPIES," APPEARS ON POSTCARDS AND OTHER MEDIA
- KOONS FINDS THE POSTCARD, GIVES IT TO ASSISTANTS TO REPLICATE INTO LIFE-SIZED SCULPTURES TO SHOW IN AN ART EXHIBIT ABOUT THE BANALITY AND MEANINGLESSNESS OF LIFE
- KOONS SELLS THREE SCULPTURES FOR \$367,000
- ROGERS SUES, KOONS ADMITS TO INTENTIONALLY COPYING THE WORK INTO A SCULPTURE, CLAIMS FAIR USE BY PARODY

DID JEFF KOONS GET AWAY WITH IT?

NO

THE COURT RULED IT'S COPYRIGHT INFRINGEMENT

**PARODY REQUIRES DIRECT REFERENCE TO THE WORK
RATHER THAN `CULTURE-AT-LARGE**

**MERELY MAKING CHANGES ISN'T ENOUGH
TO PROTECT YOU FROM INFRINGEMENT**

BLANCH V KOONS, 2006



BLANCH, "SILK SANDALS BY GUCCI"



KOONS, "NIAGRA"

- **ANDREA BLANCH'S COPYRIGHTED PHOTOGRAPH, "SILK SANDALS BY GUCCI," APPEARED IN ALLURE MAGAZINE, 2000.**
- **KOONS APPROPRIATES THE PHOTOGRAPH IN "NIAGRA," A PAINTING ABOUT THE PROMISCUITY OF IMAGES**
- **BLANCH SUES, KOONS CLAIMS FAIR USE**

DID JEFF KOONS GET AWAY WITH IT?

YES

THE COURT RULED IT'S FAIR USE

**THE COURT DECIDED THAT KOONS' WORK
WAS SUFFICIENTLY TRANSFORMATIVE**

GREY V KOONS, 2016



GORDON'S GIN ADVERTISEMENT W/ PHOTO BY GRAY



KOONS, "I COULD GO FOR SOMETHING GORDON'S"

- MITCHEL GRAY ISSUES A LIMITED-USE, LIMITED-DURATION LICENSE TO GORDON'S GIN TO USE HIS PHOTOGRAPH OF PEOPLE ON A BEACH IN THEIR ADVERTISEMENT
- JEFF KOONS USES THE GORDON GIN ADVERTISEMENT IN HIS 1986 PAINTING "I COULD GO FOR SOMETHING GORDON'S"
- YEARS LATER, GRAY SUES, KOONS CLAIMS FAIR USE

DID JEFF KOONS GET AWAY WITH IT?

YES?

THE CASE WAS SETTLED OUT OF COURT

WHAT HAVE WE DISCUSSED TODAY?

**FAIR USE IS
FREE SPEECH**

**THE FOUR
FACTORS GIVE US
GUIDELINES FOR
FAIR USE**



**THERE ARE
RESOURCES
AVAILABLE THAT
CAN HELP US**

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RYLAND JOHNSON, MA, MA

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LOUISIANA STATE UNIVERSITY SHREVEPORT

OFFICE: (318) 797-5382 FAX: (318) 798-4138

RYLAND.JOHNSON[AT]LSUS.EDU WWW.LSUS.EDU