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### Transformed, I'm Sure: A (Polite) Introduction to Fair Use in DH

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*CUNY Graduate Center*

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# Transformed, I'm Sure

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<http://bit.ly/DHtransform>



# Transformed, I'm Sure

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A (Polite) Introduction to Fair Use in DH

**Polite?**

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**I am not a lawyer.**





# Copyright

## 17 U.S. Code § 106

<https://www.law.cornell.edu/uscode/text/17/106>

The copyright owner of a work has the exclusive rights to do and to authorize any of the following:

1. to reproduce the work in copies
2. to prepare derivative works based on the work
3. to distribute copies of the work
4. to perform the work publicly
5. to display the work publicly



# Open Access

## Public Access

free, online availability

## Public Access + Open License

public access + right for anyone to reproduce,  
make derivative works, distribute, display, perform, etc.





# Limitations on Exclusive Rights

## Exemptions

some allowed uses for libraries, people with disabilities, etc.

## Uses That Are “Fair”

“fair use” in United States and a few other countries  
(in many countries, “fair dealing” applies instead)



# Fair Use

## 17 U.S. Code § 107

<https://www.law.cornell.edu/uscode/text/17/107>

“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, **teaching** (including multiple copies for classroom use), **scholarship**, or **research**, is not an infringement of copyright.”



# Determining Fair Use

## 17 U.S. Code § 107 (cont'd)

“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.”

# Fair Use

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# Determining Fair Use

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4. the **effect of the use** upon the potential market for or value of the copyrighted work.”

# Most Important Factor?

## Every Case Is Different

There is no bright-line test for fair use.  
All four factors must always be considered and weighed.

## Nevertheless...

The 4th factor (market effect of the use) used to carry the most weight.  
Since *Campbell v. Acuff-Rose* [stay tuned!], it has been eclipsed  
by the 1st factor (purpose and character of the use).

# Sony v. Universal (aka Betamax)

## “Including” in Action

Time-shifting (i.e., recording copyrighted works while they are broadcast, in order to privately watch them later) is mentioned nowhere in the copyright law, and yet...

In 1984, SCOTUS declared time-shifting to be a fair use!

<https://supreme.justia.com/cases/federal/us/464/417/case.html>

# Campbell v. Acuff-Rose (2 Live Crew)

## “Such As” in Action

Parody is mentioned nowhere  
in the copyright law, and yet...

In 1994, SCOTUS declared parody to weigh in favor of fair use!

<https://supreme.justia.com/cases/federal/us/510/569/case.html>

# Parody & the “Heart” of a Work

“[I]f quotation of the opening riff and the first line may be said to go to the ‘heart’ of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through.”

— SCOTUS Opinion (written by Justice David Souter)

# What's Special about Parody?

## Transformativeness!

“The first factor in a fair use enquiry is ‘the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.’ . . . The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”

— SCOTUS Opinion (written by Justice David Souter)



# What's Special about Parody?

## Transformativeness!

“Although such transformative use is not absolutely necessary for a finding of fair use . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, . . . and 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.”

— SCOTUS Opinion (written by Justice David Souter)

# What's Special about DH?

## Transformativeness!

Many DH projects — specifically, those that mine text or otherwise use copyrighted works as data — are transformative.

# DH = Home Free?

**Not necessarily.**

Not all DH uses of copyrighted works are transformative.

Not all transformative uses will be found to be fair.

**But...**

In fair use deliberations, the 1st factor (purpose/character of use) tends to carry the most weight, and transformativeness is a very important aspect of purpose/character.

# Authors Guild v. Google

## Google Books = Transformative!

“Google’s making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information about Plaintiff’s books without providing the public with a substantial substitute for [the copyrighted works].”

— Second Circuit Court of Appeals, 2015 (written by Judge Leval)

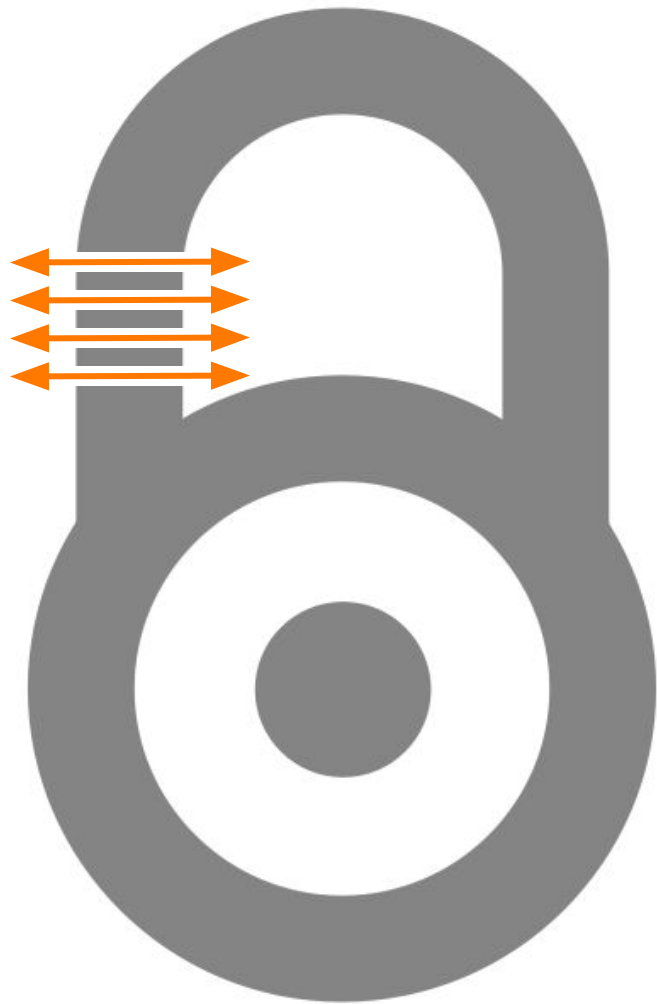
<https://fairuse.stanford.edu/case/authors-guild-v-google-inc/>

**How open are  
copyrighted works  
for DH?**

**Somewhat,  
via fair use**

**How open are  
copyrighted works  
for DH?**

**Fairly fairly open**



# More on 2 Live Crew

## Permission Denied

2 Live Crew had sought permission, and were denied.

Souter for SCOTUS: “[B]eing denied permission to use a work does not weigh against a finding of fair use.”

## Research Repercussions

Proceeding without permission could negatively affect a researcher’s ongoing relationship with their research subject. Researchers may want to factor such considerations into their decision-making.





**“Fair use is not civil  
disobedience.”**

**— James G. Neal**

<https://doi.org/10.7916/D88G8VWC>

# Fair Use Checklist

## Is My Specific Use Fair?

### Fair Use Checklist

<https://copyright.columbia.edu/basics/fair-use/fair-use-checklist.html>

Does not provide yes/no answer but helps you evaluate your use, and can provide documentation of your decision-making process.

# Go Forth & Transform (Thoughtfully, Carefully)!

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