CLASS 19:
FAIR USE I – FOUNDATIONAL CASES
Class Outline

- Fair Use
  - Section 107
  - The 4 factors
  - Other considerations
Not All Unauthorized Copying Is Unlawful

Though Some Is; It Depends
§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
Fair Use used to be an affirmative defense.

This meant you had to cop to infringement, then you could use fair use to beg forgiveness. *Lenz* changed this (as we’ll see in a future class).
Four factors:

(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.
Two key questions:

(1) Did the unlicensed use "transform" the material taken from the copyrighted work by using it for a different purpose than the original, or did it just repeat the work for the same intent and value as the original?

(2) Was the amount and nature of material taken appropriate in light of the nature of the copyrighted work and of the use?
Other considerations:

(1) Did the user act reasonably?
(2) Did the user act in good faith?
(3) Is the use consistent with general practice in the particular field? (See the Fair Use statement from American University at http://www.cmsimpact.org/sites/default/files/fair_use_final.pdf.)
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The Sony Betamax SL-5800 has a remarkable feature called BetaScan that allows you to find any single image from among the thousands of images on a tape many hours long. BetaScan lets you go fast forward or reverse without interrupting the image on the screen. A Variable BetaScan feature lets you adjust the speed at which you can view the tape from slow times up to twenty times normal speed. And a Sony Portable Videotape Camera enables you to actually make your own programs and play them back instantly.

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A TIME TO HEAL
THE AUTOBIOGRAPHY OF

[Signature]

 Gerald R. Ford
THE 2 LIVE CREW
AS NASTY AS THEY WANNA BE
“a transformative work is one that serves a new and different function from the original work and is not a substitute for it…”