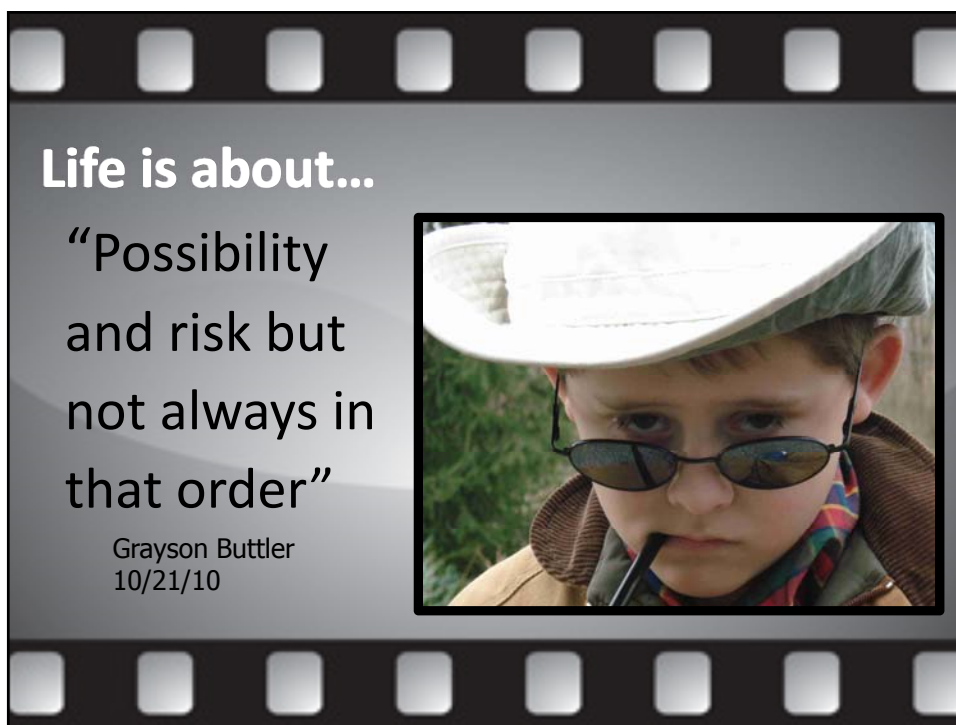


**Why copyright matters
(or does it?)**

A sometimes conflicting tale of copyright, contracts,
(aka “licenses”), scholarly communication, and policy
choices...

Dwayne K. Buttler, J.D.,
Professor, University Libraries,
Evelyn J. Schneider Endowed Chair for Scholarly
Communication, University of Louisville
dwayne.buttler@louisville.edu

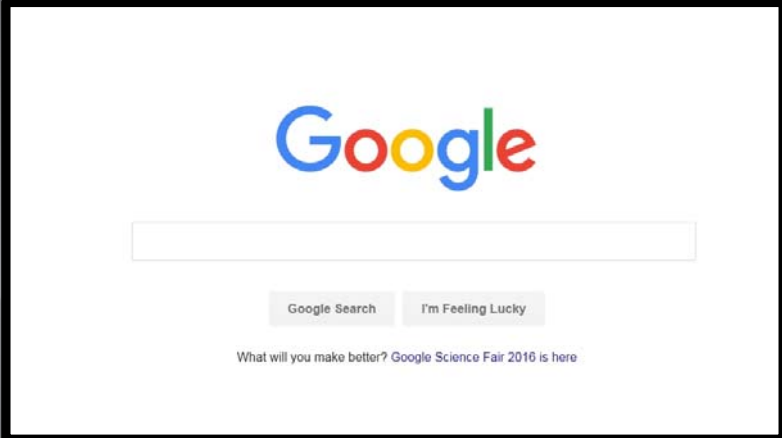






Leibovitz v. Paramount Pictures, 137 F.3d 109 (2nd Cir. 1998)

Why is this important (to copyright)?



Why is this important (to copyright)?





**Why you should
consider caller
ID.**

the Unprotected

- facts
- ideas
 - “merger” doctrine (idea = expression)
- expired works
- statutory defects
 - notice and renewal under the 1909 Act
- U.S. government works
- presumably monkey selfies (primate horseplay)?

the Curious Case of Oscar Wilde...

The Congress shall have Power
To ...*promote* the Progress of
Science and useful Arts, by
securing for *limited Times* to
Authors and Inventors the
exclusive Right to their
respective *Writings* and
Discoveries... Art. 1, § 8, Cl. 8.



Yours...Mine...Somebody's....

- creator
OR
- “W-M-F-H”
OR
- “assignee”
OR
- inherited





infringement TOO

- secondary (you & ???)
 - contributory (akin to “aiding & abetting”)
 - knowledge of underlying infringement
 - material contribution
 - vicarious (akin to *respondeat superior*)
 - right and ability to control
 - direct financial benefit
 - knowledge unnecessary

The Fair Use Doctrine

“[L]ook to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work” *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (CCD Mass. 1841)

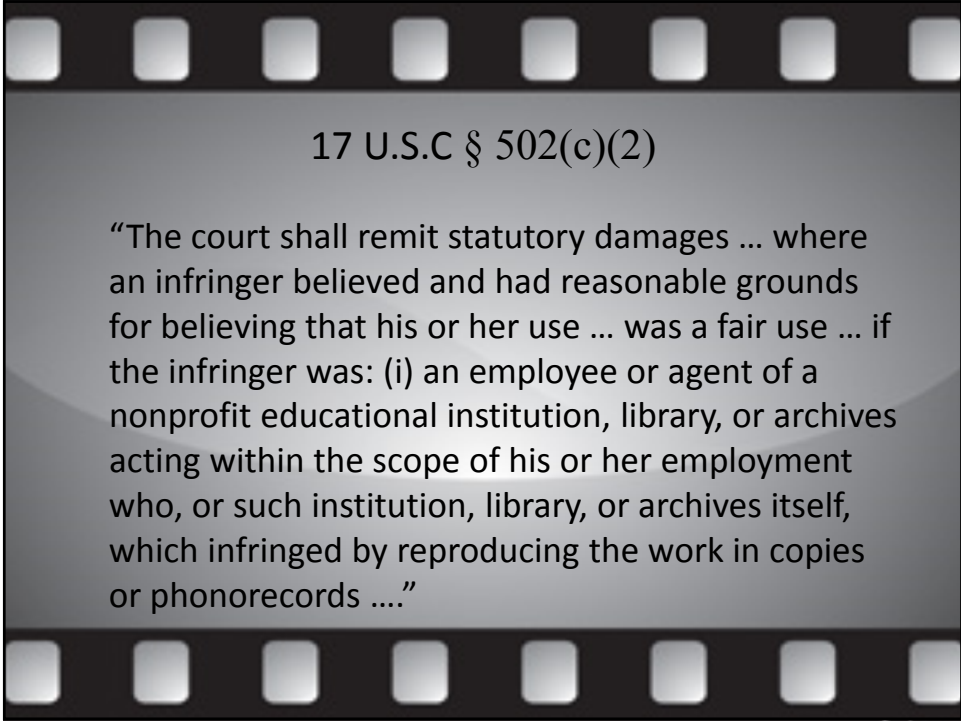
the Supremes...

“[F]air use doctrine ... ‘permits [and requires] courts to avoid rigid application of the ... statute when, on occasion, it would stifle the very creativity which that law is designed to foster... .The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.’”

Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)


Fair Use

- equitable rule of reason
- limit on exclusive rights. Fundamental as constitutional “safety valve.”
- procedurally a “defense” but makes activity noninfringing. Walks like a right...
- underlying facts and circumstances critical to making “good faith, reasonable” application of fair use (the Fair Use Checklist as a tool).
 - “good faith, reasonable” excludes some liability



17 U.S.C § 502(c)(2)

“The court shall remit statutory damages ... where an infringer believed and had reasonable grounds for believing that his or her use ... was a fair use ... if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords ...”



Fair Use

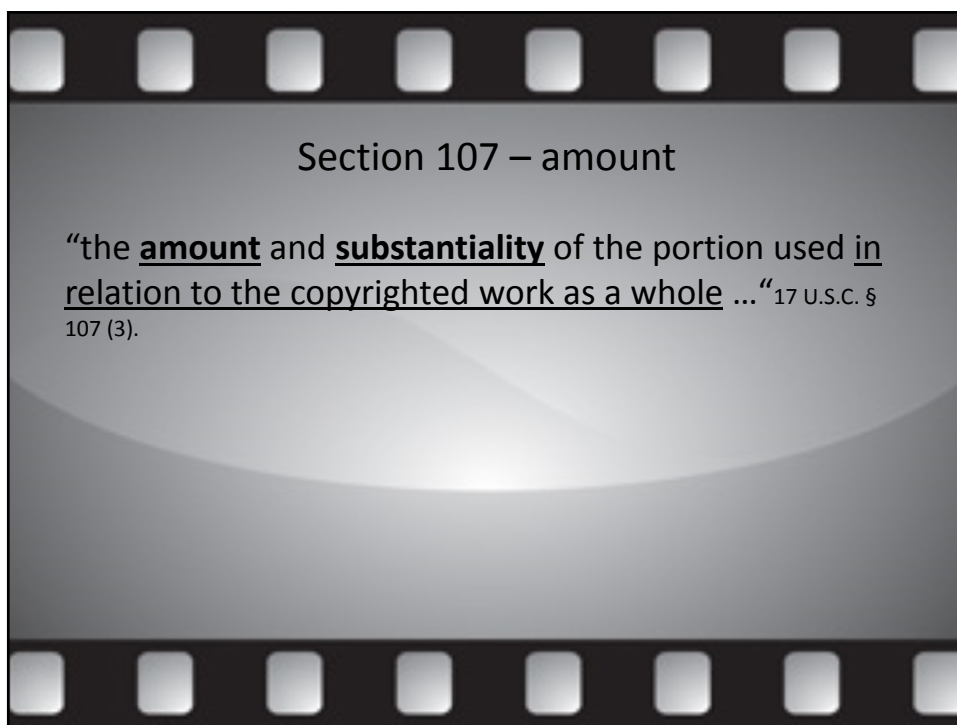
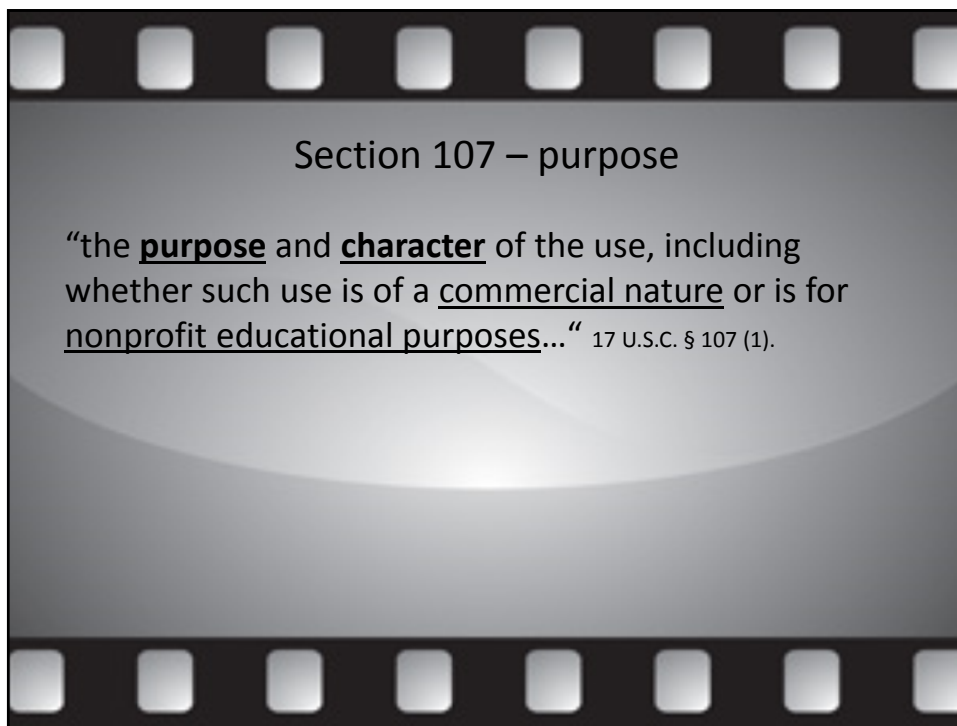
- courts have made clear that fair use requires “ad hoc” analysis. “Bright line” rules are unnecessary and unhelpful.
- fair use provides flexibility for making practical decisions notwithstanding the broad scope of copyright protection.
- real people must make real decisions in real time about real protected works.

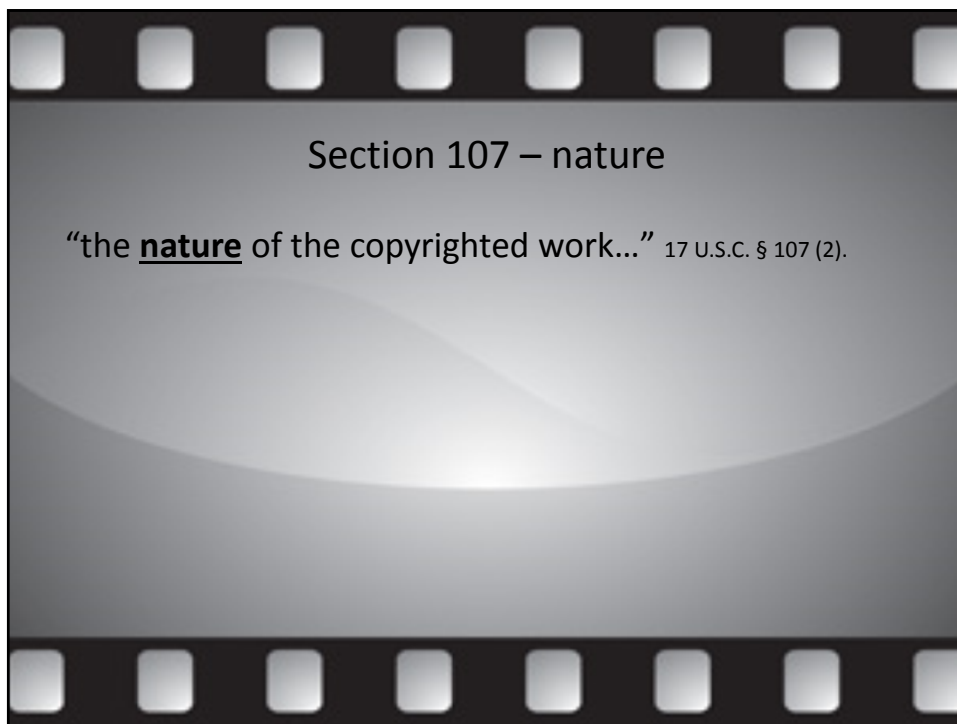
PANE and Statutory Copyright

- The fair use doctrine included in Copyright Act of 1976 as Section 107.
- Consists of preamble with “illustrative examples” and “the 4 factors” of (1) purpose (2) nature (3) amount (4) effect.
- My students like PANE: purpose, amount, nature, and effect.
 - Fair use as “ a window on copyright.”

Section 107 – the preamble

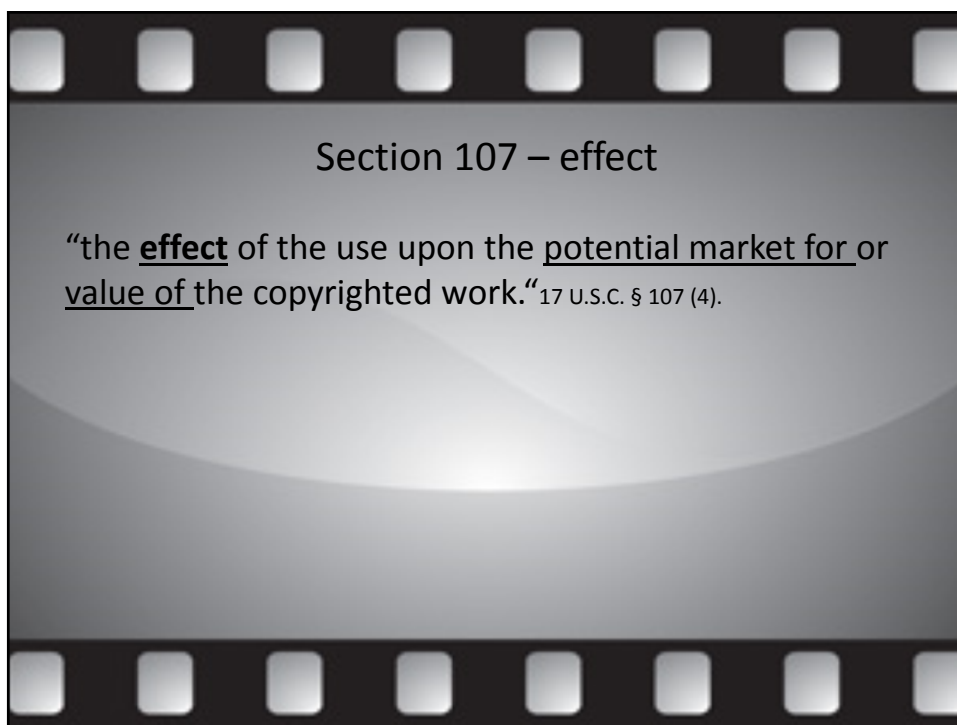
“[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107.





Section 107 – nature

“the nature of the copyrighted work...” 17 U.S.C. § 107 (2).

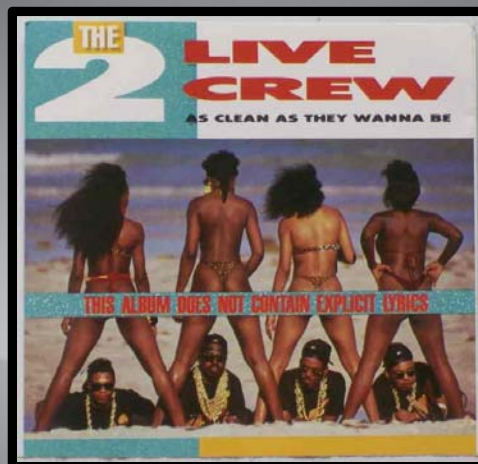


Section 107 – effect

“the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107 (4).

Some important cases...

- Basic Books v. **Kinko'S** Graphics Corporation, 758 F. Supp. 1522 (SDNY 1991) (commercial copy service).
- Princeton U. Press, v. **Michigan Document Services**, 99 F.3d 1381 (6th Cir. 1996)(commercial copy shop).
- American Geophysical Union, v. **Texaco.**, 60 F.3d 913 (2nd Cir. 1994)(copies for research by Texaco).
- **Campbell** v. Acuff-Rose Music, Inc., 510 US 569, 1994 (transformative use of *Pretty Woman*).
- Cambridge University Press v. Patton [**"GSU case"**] 769 F.3d 1232 (11th Cir. 2014).
- Authors Guild, Inc. v. Hathi Trust, 755 F.3d 87, (2nd Cir. 2014).
- Authors Guild, Inc. v. Google, 804 F.3d 202, (2nd Cir. 2015).



Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)



