

## Copyright Infringement in Videos

### INTRODUCTION

This article addresses whether an artist's exclusive rights are violated when the visual image of a copyrighted work is incidentally<sup>1</sup> reproduced and displayed in a video without permission from the copyright owner.<sup>2</sup> Part I explains the relevant copyright law. Part II looks at a statistical analysis of the four fair use factors and then reviews the case law pertaining to incidental use of a copyrighted work in the background of videos. Part III proposes weighting and prioritizing factors so courts have clearer guidelines in future cases.

### I. RELEVANT COPYRIGHT LAW

The following paragraphs briefly cover: (i) the right of reproduction, (ii) the right of display, and (iii) the fair use defense in relation to copyrighted work in videos.

#### A. The Right of Reproduction

A copyright owner has the exclusive right to control the reproduction or copying of his copyrighted works.<sup>3</sup> A copy is defined in the Copyright Act as a material object in which a work

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<sup>1</sup> For example, a video of a person reading a magazine in such manner that the picture on the cover of the magazine may be observed by the viewer of the video.

<sup>2</sup> If the work used in the background is itself found to be an unauthorized copy, this is a separate issue of reproduction.

<sup>3</sup> 17 U.S.C. §§ 106.

is fixed and communicated, regardless of the medium through which it is communicated.<sup>4 5</sup> The copy or reproduction must be sufficiently permanent to permit it to be perceived<sup>6</sup> and must be communicated for a period of more than transitory duration.<sup>7</sup> This leaves open several questions. How does one determine if something is sufficiently perceived and communicated for more than a transitory duration? How should courts decide whether the second piece of work expresses the idea in too similar a manner to the original piece?<sup>8</sup>

To violate the exclusive right of reproduction, the second author's copying must be "substantial and material."<sup>9</sup> If the second piece is found to be different from the first, it is not considered a reproduction; it is a new and original work. There is no set rule or formula to determine how much copying is "substantial and material." Reproduction violations are

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<sup>4</sup> 17 U.S.C. §§ 101. "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed. See, *Turner v. Century House Publishing Co.*, 290 N.Y.S.2d 637, 642 (Sup.Ct.1968), The word "copy" is defined as an "exact or substantial reproduction of the original ... as to give every person seeing it the idea created by the original and must be such that ordinary observation would cause it to be recognized as having been taken from the work of another." See also BLACK'S LAW DICTIONARY 336 (6th ed. 1990).

<sup>5</sup> *Time Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 144 (S.D.N.Y.1968) ("Copyright in work protects against unauthorized copying not only in original medium in which work was produced, but also in any other medium as well." (quoting MELVILLE B. NIMMER, NIMMER ON COPYRIGHT 98 (1963)).

<sup>6</sup> In *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), the Court held that perforated piano rolls were not copies of musical compositions since the composition could not be visually perceived from the piano roll.

<sup>7</sup> 17 U.S.C. § 101; "[T]he definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer." H.R.REP. No. 1476, 94th Cong., 2d Sess. 47 (1976), at 53, reprinted in 1976 U.S.C.C.A.N. at 5666. Section 101 of the 1976 Act contains a provision allowing some works to be considered "fixed" if the work is being fixed (e.g., taped) while it is being transmitted live. H.R.REP. No. 1476, supra note 17, at 62, reprinted in 1976 U.S.C.C.A.N. at 5675 (noting further that, because of the requirement of fixation in a stable tangible form, the showing of images on a screen or tube would not be in violation of the exclusive right to reproduce the work, although such a showing might infringe the owner's exclusive right of public display, H.R.REP. No. 1476, 94th Cong., 2d Sess. 47 (1976), at 56, reprinted in 1976 U.S.C.C.A.N. at 5669).

<sup>8</sup> For application of this concept in a case, see *Baker v. Selden*, 101 U.S. 99 (1879). Selden copyrighted a book comprised of special "condensed ledgers" used for bookkeeping. He sued Baker for using a similar plan which reached the same results but used different arrangements on the ledger. The Court found that an accounting system is open to public use and that any author has the right to express the system in his own way. The copyright of Selden's book did not confer upon him an exclusive right in the system.

<sup>9</sup> The "substantially similar" factor in the reproduction analysis concerns whether a work is too much like another previous work. Since this memo is concerned with the use of lawful copies this factor is explored only to the extent of whether a screen image is substantially similar to the original physical copy.

determined on a case by case basis and courts differ over what constitutes reproduction.<sup>10</sup>

A narrow interpretation of Title 17 would hold that the use of a copyrighted piece of work in the background of a video will result in a technical reproduction violation. The infringing copy would be the image of the original work captured on the video. The video reproduction of the image is substantially similar and the video permits the image to be perceived. Thus, under Title 17 a reproduction violation has occurred.

This reproduction violation may not necessarily be determinative for purposes of infringement liability. Some jurisdictions have applied a quantitative test to conclude that the reproduction is non-infringing because the use was *de minimis*.<sup>11</sup> For example, the Southern District of New York has held that where the duplicated portions of the copyrighted work are small and insignificant, they are *de minimis* and non-infringing.<sup>12</sup> The same court affirmed this quantitative analysis in a later case in which it announced that there is no substantial similarity (a necessary element for finding reproduction) where the *context* of a work is significantly different.<sup>13</sup> If a court does not find the use to be *de minimis*, the alleged infringer still has a viable defense under the fair use doctrine.<sup>14</sup>

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<sup>10</sup> NIMMER ON COPYRIGHT, Matthew Bender & Company, Inc., 2011.

<sup>11</sup> To establish that a copyright infringement is *de minimis*, the alleged infringer must demonstrate that the copying of the protected material is so trivial “as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.” *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997). In determining whether the allegedly infringing work falls below the quantitative threshold of substantial similarity to the copyrighted work, courts often look to the amount of the copyrighted work that was copied, as well as the observability of the copyrighted work in the allegedly infringing work. *See id.* at 75. Observability is determined by the length of time the copyrighted work appears in the allegedly infringing work, as well as the prominence in that work as revealed by the lighting and positioning of the copyrighted work. *See id.*

<sup>12</sup> *Werlin v. Reader’s Digest Ass’n*, 528 F.Supp. 451 (S.D.N.Y.1981).

<sup>13</sup> *Heyman v. Salle*, 743 F.Supp. 190 (S.D.N.Y.1989). In this case a photograph had been torn out of a copyrighted book and used as a minimal part of a huge backdrop for an opera. The court noted that the backdrop was not presented alone, but appeared as the background in the overall context of an opera scene (and for only five minutes). *See also Mura*, 245 F.Supp. at 590. In *Mura*, the rationale was applied by the same court in the context of television reproduction where the use of the work was minimal and insignificant. In that case the use was considered a reproduction, but it was allowed.

<sup>14</sup> *Infra*, Section I, Paragraph C.

## B. The Right of Display

The display right was created by the 1976 Copyright Act.<sup>15</sup> It provides, that in the case of pictorial, graphic and sculptural works, the copyright owner shall have the exclusive right to display the copy publicly.<sup>16</sup> The statute defines public display in section 101 as the showing of the original or a lawful copy of a work “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered.”<sup>17</sup> The inclusion of a display right under the copyright law was intended by the legislators to prohibit indirect public displays.<sup>18</sup>

The legislative history makes clear that once the copy or its image is “otherwise communicat[ed]” to viewers not located in the same physical surroundings of the work it becomes a public display.<sup>19</sup> And, section 101 of the Copyright Act states that public communication may be achieved “either directly or by means of a film, slide, television image or any other device or process ... whereby images or sounds are received beyond the place from which they are sent.”<sup>20</sup>

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<sup>15</sup> *Supra*, footnote 5.

<sup>16</sup> *Id.* See also, *Streeter v. Rolfe*, 491 F.Supp. 416, 421 (W.D.La.1980) (use of a decoy in a hunt is not a public display); see also Thomas, 672 F.Supp. at 240 (showing designs at trade show constitutes public display).

<sup>17</sup> 17 U.S.C. § 101. The courts have dealt with the meaning of “public place” in a number of performance infringement cases. The definition for public performance is the same as the definition for public display with the only difference being the number of images or musical notes played and whether they are played in a sequence or shown alone. See *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154, 158 (3d Cir.1984); see also *Columbia Pictures Indus. v. Aveco Inc.*, 800 F.2d 59, 62 (3d Cir.1986). In *Redd Horne*, private viewing rooms were included within the “public place” clause because the pertinent place was the entire store, which was public. Certainly, a network television program over national airways will be considered public. “A ‘network television program’ is a program supplied by one of the television networks in the United States providing nationwide transmissions to television broadcast stations that are owned or operated by, or affiliated with, the television network.” 25 Pat.Trademark & Copyright J. (BNA) 376, 378 (1983) (text of H.R.REP. No. 1388).

<sup>18</sup> H.R.REP. No. 1476, 94th Cong., 2d Sess. 47 (1976), at 80, reprinted in 1976 U.S.C.C.A.N. at 5694.

<sup>19</sup> *Id.*

<sup>20</sup> 17 U.S.C. § 101.

Thus, the use of a copyrighted work in a video will result in a display violation.<sup>21</sup> Many Courts generally agree that the showing of the copyrighted work on video is not “de minimis”<sup>22</sup> The issue then becomes whether the incidental display is allowable under a fair use exception.<sup>23</sup>

### C. Fair Use Exception

After a court has found a reproduction or display infringement, an infringer may assert that the violation is permissible under the fair use exception<sup>24</sup> in section 107 of the Copyright Act. The Act gives express statutory recognition to fair use exception by providing that the “fair use” of a work is not an infringement of copyright where it is for purposes such as criticism, comment, news reporting, teaching, scholarship or research.<sup>25</sup>

Section 107 of the Act does not attempt to define “fair use.”<sup>26</sup> Instead, it lists “the factors to be considered” for the purpose of determining whether the use of a work is a fair use.<sup>27</sup> The

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<sup>21</sup> *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F.Supp. 875 (S.D.Fla.1978) (Defendant’s use of TV Guide constitutes a “display” within the ambit of the Copyright Act. The new Act provides that the term “display” includes a showing of a “copy” of the work in question via television, where “copy” includes the original depiction of the work.), *aff’d*, 626 F.2d 1171 (5th Cir.1980). See 187 U.S.P.Q. (BNA) 22 (D.Ariz.1975), *aff’d*, 591 F.2d 1278 (9th Cir.1979). *Estate of Vane v. The Fair, Inc.*, 849 F.2d 186 (5th Cir.1988), cert. denied, 488 U.S. 1008 (1989). *Heyman v. Salle*, 743 F.Supp. 190 (S.D.N.Y.1989) (offending backdrop shown for only five minutes). The Ninth Circuit and the Southern District of Florida found the unauthorized showing of an image on television to be a violation of the copyright owner’s display right. The Fifth Circuit used a quantitative analysis in which the duration of the display of the copyrighted work was so minimal as to preclude infringement. The Southern District of New York, in a similar analysis, also considered the minimal amount of time the infringement occurred in its finding of fair use. This decision suggests that the court found a violation and applied a fair use exception.

<sup>22</sup> See *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 77 (2d Cir. 1997). The court inquired whether usage on a television show of a graphic work was so brief as to be de minimis. It concluded that the threshold for substantial similarity had been crossed by display of the image for more than three seconds, by analogy to the regulations discussed in *Nimmer*. See, *NIMMER ON COPYRIGHT*, Matthew Bender & Company, Inc., § 8.01[G]; see also, *NIMMER* § 13.03 and § 13.05[D][3].

<sup>23</sup> *Id.*

<sup>24</sup> Although section 106 of the statute gives the artist exclusive rights, the law specifically states that these rights are subject to some limitations set forth in sections 107-118 of the Act.

<sup>25</sup> 17 U.S.C. § 107.

<sup>26</sup> *New Era Publications Int’l, ApS v. Carol Publishing Group*, 729 F.Supp. 992 (S.D.N.Y.), *rev’d in part*, 904 F.2d 152 (2d Cir.), cert. denied, 111 S.Ct. 297 (1990).

<sup>27</sup> 17 U.S.C. § 107. The factors listed in section 107 are preceded by the words “shall include,” and use of the term “including” is defined as “illustrative and not limitative.” 17 U.S.C. § 101. According to the House Report, the seven categories do not necessarily exhaust the scope of original works of authorship that the bill was intended to

factors to be considered are: 1) the purpose and character of the use, including whether it is commercial in nature or non-profit;<sup>28</sup> 2) the nature of the copyrighted work and the interest at stake;<sup>29</sup> 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;<sup>30</sup> and 4) the effect of the use upon the potential market for or value of the copyrighted work and whether the new use serves the same functional purpose as the original.<sup>31</sup>

The factors listed in section 107 are not exhaustive. Courts have regularly introduced additional considerations such as size, context, medium, amount of time shown, and likelihood of confusion.<sup>32</sup> Other criteria include the size and number of excerpts taken; the number of copies reproduced; and the extent of reuse and exchange.<sup>33</sup>

The inherent ambiguity of “factors to be considered” has resulted in judicial uncertainty regarding the outcomes of fair use defenses. One scholar commented that: “The difficulty of predicting how courts will make such judgments has left many producers and users of copyrighted materials uncertain as to their legal rights. It is imperative that courts rebuild the doctrine along more sensible lines.”<sup>34</sup> The best that can be said is that each case must be decided on its own facts and tailored to the issues at hand.<sup>35</sup>

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protect. Rather, the list sets out the general area of copyrightable subject matter with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories. H.R.REP. No. 1476, 94th Cong., 2d Sess. 47 (1976), reprinted in 1976 U.S.C.C.A.N. at 5666-67. It has been said, however, that “normally these four factors would govern the analysis.” *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 n. 10 (5th Cir.1980). See, e.g., Saul Cohen, Fair Use in the Law of Copyright, 1955 ASCAP COPYRIGHT L.SYMP. 43.

<sup>28</sup> 17 U.S.C. § 107(1).

<sup>29</sup> 17 U.S.C. § 107(2).

<sup>30</sup> 17 U.S.C. § 107(3).

<sup>31</sup> 17 U.S.C. § 107(4).

<sup>32</sup> See *Heyman v. Salle*, 743 F.Supp. 190 (S.D.N.Y.1989).

<sup>33</sup> H.R.REP. No. 1476, 94th Cong., 2d Sess. 47 (1976), at 72, reprinted in 1976 U.S.C.C.A.N. at 5685-86.

<sup>34</sup> William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV.L.REV. 1661, 1794 (1988).

<sup>35</sup> H.R.REP. No. 1476, 94th Cong., 2d Sess. 47 (1976), at 65, reprinted in 1976 U.S.C.C.A.N. at 5678-79. Fair use is a mixed question of law and fact.

## II. ANALYSIS OF CASES INVOLVING COPYRIGHTED WORKS CONTAINED WITHIN VIDEOS

The following paragraphs discuss in order: (i) the four fair use factors, (ii) the statistical results from a fair use study, and (iii) an in depth study of cases involving copyrighted material in videos.

### A. The Four Factors in Fair Use Analysis

To determine whether the use of a copyrighted work in a video is a fair use the court must consider the following factors: 1) the purpose and character of the use, including whether it is commercial in nature or non-profit;<sup>36</sup> 2) the nature of the copyrighted work and the interest at stake;<sup>37</sup> 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;<sup>38</sup> and 4) the effect of the use upon the potential market for or value of the copyrighted work and whether the new use serves the same functional purpose as the original.<sup>39</sup>

Historically, the fourth fair use factor was the most important factor in the analysis. This factor analyzes the effect of the use upon the potential market for the copyrighted work that was borrowed.<sup>40</sup> Recently, it appears that the first fair use factor, that deals with the purpose and character of the use, has been considered by the Court to be a more important factor in the fair use analysis.<sup>41</sup> The first factor deals with whether the use of the borrowed material is “transformative”. For example, the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* held that:

The central purpose of this investigation is to see . . . whether the new work merely ‘supersede[s] the objects’ of the original creation (‘supplanting’ the

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<sup>36</sup> *Supra*, foot note 29.

<sup>37</sup> *Supra*, foot note 30.

<sup>38</sup> *Supra*, foot note 31.

<sup>39</sup> *Supra*, foot note 32.

<sup>40</sup> *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985). “This last factor is undoubtedly the single most important element of fair use.”

<sup>41</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

original), 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.’ 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.<sup>42</sup>

## **B. Statistical Analysis of the Four Factors in Fair Use Analysis**

Statistical analysis can help shed light on the varying weight the individual factors carry in the fair use analysis. One scholar analyzed a data set consisting of all reported federal opinions from 1978 through 2005 that made substantial use of the section 107 four-factor test for fair use.<sup>43</sup> This included the analysis of 297 dispositive opinions. The results show that the outcomes of factors one and four strongly correlated with the test outcome and strongly correlated with each other, while the outcome of factor two and three correlated weakly, if at all, with the outcome of the test and with the outcomes of the other factors.<sup>44</sup> Factor four coincided with the outcome of the overall test in 83.8% and factor one coincided with the outcome of the overall test in 81.5% of these same opinions.<sup>45</sup> In 72.1% of the opinions, factors one and four either both favored or both disfavored fair use.<sup>46</sup> In all but one of these opinions, the outcome of the fair use test followed the outcome of these two factors.<sup>47</sup> Factors one and four pointed in opposite directions in only 20 of the opinions.<sup>48</sup> In 14 of these opinions, the outcome of the test followed the outcome of factor four, while in 6, the outcome of the test followed the outcome of

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<sup>42</sup> *Id.*

<sup>43</sup> Barton Beebe, *An Empirical Study of U.S. Copyrightfair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549, 554 (2008).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



factor one.<sup>49</sup> This would tend to show that, although contra to the opinion in *Campbell*, factor four exerts the stronger influence on the outcome of the test.

### C. Cases Involving Copyrighted Material Within a Video

Focusing on the first and fourth factors of the fair use analysis can allow a more accurate examination of case outcomes of copyrighted material<sup>50</sup> contained within videos. A brief analysis of past holdings involving copyrighted material within videos is needed. The first section covers cases of incidental use of copyrighted material in videos that the court held to be fair use. The second section covers cases of incidental use held not to be fair use. In addition see APPENDIX A<sup>51</sup> for a table of case summaries of a specific subset of cases - copyrighted videos contained within third party videos.

#### *i. Incidental Use held to be Fair Use*

The following paragraphs are case analyses of incidental copyright infringement cases that held the incidental use to be fair use.

In *Mura v. Columbia Broadcasting Sys., Inc.*, defendants broadcasted a television image of plaintiff's puppets on the Captain Kangaroo program for approximately 35 seconds.<sup>52</sup> The puppets were not featured as the principal objects of attention.<sup>53</sup> Rather, the puppets were manipulated as hand puppets subordinate and incidental to the principal action of Captain

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<sup>49</sup> *Id.*

<sup>50</sup> "material" as used in this memo is photographs, paintings, artwork, books, etc. It does not include copyrighted videos. A brief summary of cases involving videos within videos is in Appendix A. Videos within videos was left out of discussion in this memo because stock videos typically do not have video content within them. The stock videos themselves are usually placed in videos as filler content, not the other way around.

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<sup>52</sup> *Mura v. Columbia Broadcasting Sys., Inc.*, 245 F. Supp. 587 (S.D.N.Y. 1965).

<sup>53</sup> *Id.*

Kangaroo and Mr. Green Jeans.<sup>54</sup> The District Court held that the brief and incidental appearance of copyrighted puppets on television program constituted fair use.<sup>55</sup>

In *Amsinck v. Columbia Pictures Indus., Inc.*, the owner of copyrighted artwork consisting of pastel-colored teddy bears brought action for copyright infringement against a motion picture studio for the display of the copyrighted artwork in the film.<sup>56</sup> In the alleged infringing scenes, the artwork can be seen for periods of time ranging from two seconds to twenty-one seconds, with a total exposure of approximately one minute and thirty-six seconds.<sup>57</sup> In some instances, the artwork appears only in the distance, with the artwork barely visible, while at other times the image is viewed in a close-up shot.<sup>58</sup> On defendant's motion for summary judgment, the District Court held that the use constituted fair use.<sup>59</sup>

In *Sandoval v. New Line Cinema Corp* plaintiff's photographs were shown in the motion picture *Seven* without permission by the plaintiff.<sup>60</sup> The incidental copying of plaintiff's photographs ranged from 1 to 6 seconds, for an aggregate total of 30 seconds of the 128 minute film.<sup>61</sup> The images were out-of-focus and never the highlight of the screen, meaning that only "careful scrutiny" could reveal that the images in the film were plaintiff's.<sup>62</sup> The District Court held that defendant's use was proper under the fair use doctrine.<sup>63</sup>

In *Gottlieb Dev. LLC v. Paramount Pictures Corp* plaintiff owned a copyright in the graphical design of the "Silver Slugger," a pinball machine that was shown in a scene of

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044, 1048 (S.D.N.Y. 1994).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Sandoval v. New Line Cinema Corp*, 973 F. Supp. 409, 413 (S.D.N.Y. 1997).

<sup>61</sup> *Id.* at 410-411.

<sup>62</sup> *Id.* at 411

<sup>63</sup> *Id.*

defendant's film.<sup>64</sup> The 'Silver Slugger' did not appear in any shot by itself, did not appear anywhere else in the film and was not part of the plot.<sup>65</sup> The Silver Slugger appeared intermittently in the background and partially obscured in one scene lasting three and one-half minutes.<sup>66</sup> The District Court held that the defendant's use was proper under the fair use doctrine.<sup>67</sup>

In *Straus v. DVC Worldwide, Inc.*, plaintiff, a professional photographer, brought copyright infringement action against defendant for unauthorized use of plaintiff's copyrighted picture of the well-known professional golfer Arnold Palmer.<sup>68</sup> In the allegedly infringing commercial, Straus's 1989 photograph of Palmer appears on the cover of the "Quitting Together Kit" that is shown briefly as a narrator states that purchasers of Nicorette will receive the "Quitting Together Kit" for free.<sup>69</sup> The photograph on the cover of the kit appears on screen for 1-3 seconds.<sup>70</sup> The commercial containing the image aired 509 times nationwide between December 2001 and March 2002.<sup>71</sup> The District Court held that the unauthorized use of the copyrighted photograph for two to three seconds at the end of a thirty-second television commercial was de minimis.<sup>72 73</sup>

In *Gordon v. Nextel Communications & Mullen Adver., Inc.*, plaintiff sued defendant for copyright infringement for the unauthorized use of plaintiff's dental illustrations that were

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<sup>64</sup> *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 630 (S.D.N.Y. 2008).

<sup>65</sup> *Id.* at 629.

<sup>66</sup> *Id.* at 630.

<sup>67</sup> *Id.*

<sup>68</sup> *Straus v. DVC Worldwide, Inc.*, 484 F. Supp. 2d 620 (S.D. Tex. 2007)

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> This is an example where the court held the use to be de minimis and thus non-infringing.

displayed in defendant's television commercial for two-way text messaging.<sup>74</sup> Enlarged versions of two of plaintiff's illustrations can be seen in the defendant's television commercial featuring a man in a dentist chair.<sup>75</sup> The primary use of the alleged illustrations came from the focus on words.<sup>76</sup> The initial focus on the illustration itself was only very brief.<sup>77</sup> The District Court held the use was de minimis.<sup>78</sup> On appeal, the Court of Appeals also held the use to be de minimis stating that the illustrations appear fleetingly and are primarily out of focus.<sup>79 80</sup>

In summary, the cases containing incidental use of copyrighted works that were held to be fair use or non-infringing focus more on the first fair use factor or the fact that the use was de minimis. Court analysis had in depth discussion of fair use factor one and it tended to be the dominant decision maker in finding fair use for the incidental use of the copyrighted work.

ii. *Incidental Use Held Not to be Fair Use*

The following paragraphs are case analyses of incidental copyright infringement cases that held the incidental use was not fair use.

In *Ringgold v. Black Entertainment Television, Inc.*, plaintiff owned the copyright in a "story quilt".<sup>81</sup> Plaintiff brought a copyright infringement action against a producer of a television program which used a poster of the "story quilt" as set decoration.<sup>82</sup> The show used the poster as a wall-hanging in a church scene, from which all or part of it was visible a total of nine times, for an aggregate duration of 30 seconds.<sup>83</sup> The District Court granted summary

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<sup>74</sup> *Gordon v. Nextel Communications & Mullen Adver., Inc.*, 345 F.3d 922 (6th Cir. 2003)

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> This is an example where the court held the use to be de minimis and thus non-infringing.

<sup>81</sup> *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 72-73.

judgment for defendants under fair use.<sup>84</sup> The plaintiff appealed.<sup>85</sup> The Court of Appeals held that: (i) the use of the poster was not de minimis; (ii) use of the poster for the same decorative purpose for which the poster was sold weighed against defendants on fair use factor addressing purpose and character of use; and (iii) district court erroneously assessed fair use factor addressing effect of use on potential market for artist's work.<sup>86</sup> The Court of Appeals stated the effect of the use upon the potential market for the copyrighted work was a significant issue:

It is not difficult to imagine a television program that uses a copyrighted visual work for a purpose that heavily favors fair use. If a TV news program produced a feature on Faith Ringgold and included camera shots of her story quilts, the case for a fair use defense would be extremely strong. ...However, it must be recognized that visual works are created, in significant part, for their decorative value, and, just as members of the public expect to pay to obtain a painting or a poster to decorate their homes, producers of plays, films, and television programs should generally expect to pay a license fee when they conclude that a particular work of copyrighted art is an appropriate component of the decoration of a set.<sup>87</sup>

In *Fitzgerald v. CBS Broad., Inc.* plaintiff held a copyright on a photograph of a gangster being arrested.<sup>88</sup> Plaintiff brought infringement action against television network and two stations airing the photograph in connection with their story about an arrest of another gangster.<sup>89</sup> The court held the television's use was not transformative and its use had substantial impact on the only market for the photograph.<sup>90</sup> In holding the use was not transformative the court stated:

Fitzgerald photographed the arrest of Stephen Flemmi for use in news reporting of the arrest. CBS argues that it transformed the meaning of the photo by cropping out some of the evidence of the arrest-the state troopers-and embedding the cropped photo in a narrative about John Martorano. ...The only "transformation" was that Flemmi's arrest was downgraded from breaking news to a supplementary part of a larger story. The distinction that CBS argues for here

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 79-80.

<sup>88</sup> *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177 (D. Mass. 2007).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

is so fine that it ceases to have meaning in the context of ordinary news practice. Therefore, I find its use to be non-transformative.<sup>91</sup>

In *Bouchat v. Baltimore Ravens Ltd. P'ship*, plaintiff of copyrighted drawing from which a professional football team's former logo was derived brought action against the football team, football league, film production company, and others, seeking an injunction prohibiting depiction of the logo in season highlight films.<sup>92</sup> The highlight films contain actual game footage.<sup>93</sup> The Flying B logo is displayed in the films primarily by appearing on the helmets of the Ravens players.<sup>94</sup> The Flying B logo is also displayed as the introductory graphic, on a flag used as a backdrop for an interview, and as a graphic next to the name of the interviewee.<sup>95</sup> The District Court held that defendants' depictions of the logo were fair use and entered judgment against artist. The plaintiff then appealed.<sup>96</sup> The Court of Appeals reversed and held that the team's use of the logo in season highlight films was not fair use of the copyrighted drawing.<sup>97</sup> The Court of Appeals discussed in depth the first fair use factor and to a lesser extent the fourth fair use factor. In discussing the first factor the Court of Appeals stated, "A 'transformative' use is one that 'employ[s] the [copyrighted work] in a different manner or for a different purpose from the original,' thus transforming it. A logo is an identifying symbol. ... There is no transformative purpose behind the depiction of the Flying B logo in the highlight films."<sup>98</sup> In briefly discussing the fourth factor, the Court of Appeals stated, "the licensing of NFL logos for use in the sale of

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<sup>91</sup> *Id.*

<sup>92</sup> *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010)

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 309 quoting *Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir.2009)

official team merchandise, in exchange for royalties, is exactly the type of potential market that exists for Bouchat's copyrighted logo.”<sup>99</sup>

In summary, the cases containing incidental use of copyrighted works in videos that were held not to be fair use focus both on the first and fourth factor. Court analysis had more in-depth discussion of fair use factor one but the fourth factor tended to be an important decision maker in finding that the incidental use was not fair use of the copyrighted work.

### III. SOLUTIONS

The issue of whether the use of copyrighted work in the background of stock videos has no direct case precedent. This has caused considerable confusion and complexity in determining the rights of copyrighted works within stock videos and has led many stock agencies to conclude that using a copyrighted work without authority, even if it is a de minimis use, is not worth the risk of a legal battle. This type of reasoning has created many difficulties for creators of video content.

The following paragraphs argue: (i) that weighting and prioritizing factors offers a more systematic approach and provides clearer guidelines for court decisions, and (ii) application of the weighted factors would result in most videos that contained copyrighted work to be fair use of those works.

#### **A. Weighting and prioritizing factors offers a more systematic approach and provides clearer guidelines for court decisions.**

Courts should give explicit weight to certain factors in determining the application of fair use. For example, there should be a systematic prioritization for the weight given to each factor. For instance, heaviest weight should be given to the amount of time the work is shown and

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<sup>99</sup> *Id.* at 312.

whether the work is focused on or is quickly panned. If a work is in the background of the scene and only visible for a few seconds then fair use should be granted. The next most important factor should be whether all or part of a work is used or shown. If only a portion of the work is visible then fair use should be granted. The third weighted factor should be whether the display may be used as a substitute for the original. If the display cannot legitimately be used as a substitute for the original, then fair use should be granted. The fourth prioritized factor should be whether the use is more like beneficial advertising or more like negative exposure leading to devaluation of the work from overuse. If the use is beneficial advertising, then the use would lean towards a holding of fair use. In addition to explicitly weighting the factors, Congress should add de minimis or incidental and fortuitous use to the fair use section of the next amendment to the Copyright Act.

**B. Application of the weighted factors concludes that most stock videos containing copyrighted work falls into the fair use category.**

Application of these principles indicates that copyrighted work in the background of stock videos should fall into the fair use category. First, stock videos generally only last 5 seconds in duration. Any copyrighted work in the background would only be visible for a few seconds. Second, this sort of display cannot not be used legitimately as a substitute for the original copyrighted work. A two dimensional image of a picture in the background of a five second stock video cannot replace the original three-dimensional work. It simply is not a substitute for a picture hanging on your wall. Third, stock videos cannot devalue the actual copyrighted work, because stock videos generally last only five seconds in duration. Thus, they would not make back-ground copyrighted work commonplace, nor would they over-saturate the market for the work. Finally, because of the short duration of stock videos, nearly all cases of copyrighted work in the background of stock videos would be considered de minimis use.



There is considerable confusion in determining the rights of copyrighted works within stock videos. Adopting a weighted and prioritized framework of factors for fair use analysis would help eliminate confusion and create consistent case outcomes.

#### IV. CONCLUSION

This memo addressed the application of the existing fair use scheme in analyzing the use of images of works in videos. The memo found that the present copyright law is nondescript concerning unauthorized use of copyrighted work in the background of stock videos.

The Constitution protects the rights of artists by empowering Congress to “promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive rights to their respective writing and discoveries.”<sup>100</sup> The copyright laws were originally intended to control unauthorized copying and use of a work.<sup>101</sup> the ultimate aim of the law, however, was “to stimulate artistic creativity for the general public good.”<sup>102</sup> The copyright clause of the Constitution was intended to motivate creative activity by providing a special reward: protection.<sup>103</sup> The primary benefit was for the public. Thus to cultivate a cultured society, as espoused by the founding fathers, federal statutes were passed. Congress should continue this endeavor by removing the burdens faced by creative artists such as documentary film makers. Congress can do this by adding a more comprehensive fair use provision, with an express exception for incidental and de minimis use in the next amendment to the 1976 Copyright Act.

One significant problem of current copyright law is that the current legal frame work

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<sup>100</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>101</sup> *Bobbs-Merill Co. v. Straus*, 210 U.S. 339, 346-47 (1908).

<sup>102</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

<sup>103</sup> See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

encourages litigation.<sup>104</sup> <sup>105</sup> This has caused many difficulties for creative artists such as documentary film makers. Currently, the only advice an attorney can give a client regarding copyrighted work in the background of his video is to either (i) get permission and pay licensing fees to the copyright owner, or (ii) avoid using the work altogether. This need not be the case.

The court in *Hofheinz v. A&E Television Networks* stated it succinctly, “The very point of fair use is that, in certain circumstance, such as the one at bar, the law will not require an infringer of a copyrighted work to obtain such a license if it advances the overall goal of copyright -- to create more works.”<sup>106</sup> Many video clips do exactly that, they are bricks used in the creation of artistic works.

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<sup>104</sup> KEITH AOKI, JAMES BOYLE, JENIFFER JENKINS. BOUND BY LAW?, Creative Commons, Attribution-NonCommercial-ShareAlike 2.5, 2006.

<sup>105</sup> Eric Harrison thought it necessary to pay tribute to the late Keith Aoki. Keith Aoki was a law professor at University of California Davis and died last year at the age of 55. Keith Aoki’s book, BOUND BY LAW? is a comic book designed around making the topic of copyright law sexy. The comic book sold thousands of copies and has been downloaded by more than 500,000 people.

<sup>106</sup> *Hofheinz v. A&E Television Networks*, 146 F. Supp.2d 442, 140 (S.D.N.Y. 2001), aff’d, 2002 U.S. App. LEXIS 13314 (2d Cir. 2002) (“*Hofheinz II*”).

**APPENDIX A**
**Copyrighted Videos Contained within Videos**
**Case Summaries**

<b><u>Fair Use:</u></b>	<b><u>Not Fair Use:</u></b>
<p>In <i>Monster Communications, Inc. v. Turner Broadcasting System, Inc</i> the plaintiff owned an 84-minute film about the 1974 heavyweight title fight between Mohammed Ali and George Forman in Zaire. The defendant used 9 to 14 clips from plaintiff's film, or about two minutes of film (2.4%). The footage was not of the fight itself, but of the fighters training and arriving in Zaire. Denying plaintiff's motion for a temporary restraining order and preliminary injunction, the court held that the amount of footage copied was <i>de minimus</i> and would have no negative effect on the market for plaintiff's film.</p>	<p>In <i>Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.</i>, the defendants used 2.5 minutes of plaintiff's 28-minute film (or 8% thereof). The plaintiff's film was a biography of a champion wrestler who later won an Olympic gold medal. In holding that the fair use defense was "unavailable" to ABC, the court stated, "The fair use doctrine is not a license for corporate theft . . . we do not suppose that [ABC] would embrace their own defense theory if another litigant sought to apply it to the ABC Evening News."</p>
<p>In <i>Hofheinz v. AMC Productions, Inc.</i>, plaintiff purported to license footage from motion pictures produced by her late husband to defendant for use in defendant's documentary about the filmmaker. The license proposal was extensively negotiated, modified and signed by defendant and delivered to plaintiff, who refused to sign the agreement immediately prior to the theatrical exhibition of the picture. In holding that AMC was protected by the fair use doctrine, the court noted that the amount of the copyright material used was <i>de minimus</i> (an average of 26 seconds from each of the 6 films featured in the documentary).</p>	<p>In <i>L.A. News Service (LANS) v. KCAL-TV</i>, LANS made and owned the "best" helicopter footage of the now-famous Reginald Denny beating during the L.A. riots in 1992, and had licensed its news footage to TV stations. KCAL asked for and was denied the right to use the footage, and obtained a copy from another station and broadcasted it a number of times on its news programs. It used 30 seconds out of 4 minutes and 40 seconds of the tape, (10.7%). The court held it to be fair use on the grounds that there was a significant public interest and it was used for news purposes. The Ninth Circuit reversed and remanded, emphasizing that although there was a public interest, the use was commercial, the defendant already had been refused a license, and defendant used the heart of the tape.</p>
<p>In <i>Hofheinz v. A&amp;E Television Networks</i>, defendant created a biography of actor Peter Graves and used approximately 20 seconds from the promotional trailer for the film "It Conquered the World" to describe the actor's</p>	<p>In <i>Elvis Presley Enterprises, Inc. v. Passport Video</i>, 5% to 10% of defendant's 16-hour documentary utilized plaintiff's copyrighted film footage, in addition to still photographs and music owned by plaintiff. Defendant had</p>

<p>early career roles. In finding fair use, the court emphasized the transformative nature of the documentary in analyzing the purpose and character of the use: “Appearing in “It Conquered The World” was a fact of Graves' life. The 20 seconds of footage shown of that appearance in defendants' biography was not shown to recreate the creative expression reposing in plaintiff's film, it was for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business.”</p>	<p>sought a license, but was refused because plaintiff planned its own anthology documentary. In its fair use analysis, the court focused on the fact that the use was not transformative, emphasizing, “some of the clips are played without much interruption, if any. The purpose of showing these clips likely goes beyond merely making a reference for a biography, but instead serves the same intrinsic entertainment value that is protected by Plaintiffs' copyrights.” The court held the use not to be fair use.</p>
<p>In <i>Hofheinz v. Discovery Communications, Inc.</i>, defendant used 3 excerpts, of an aggregate duration of 48 seconds, from plaintiff's trailer of its 1957 film “Invasion of the Saucerman,” to create a 1-hour documentary (with commercials) regarding ideas of alien visitations and presumed cover-ups as represented in Hollywood films. The court granted summary judgment for defendant, holding fair use, emphasizing the documentary nature of defendant's work, that the use of the clips was transformative - illustrating the cover-up theme, how special effects were used, and difference between early and later treatment of the genre - and not as a substitute for viewing the movie.</p>	
<p>In <i>Los Angeles News Service (LANS) v. CBS Broadcasting, Inc.</i>, LANS offered to license a segment of the Reginald Denny tape to Group W for distribution. Group W declined, but distributed the clip to, among others, Court TV. Court TV used 3 seconds of the 8 minute video of which 45 seconds was considered the heart of the work. The court held that the purpose and character of the use was different from the plaintiff's, but that the use was not transformative, stating, “Merely plucking the most visually arresting excerpt from LANS's nine minutes of footage cannot be said to have added anything new.” The court held that the effect of unauthorized use on the potential market for licenses to rebroadcast the work was minimal. The court upheld the district court's</p>	

finding of fair use.	
In <i>Kane v. Comedy Partners</i> short clips of plaintiff's public access television program were shown on the mock news program "The Daily Show" in a segment entitled "Public Excess." In its fair use analysis, the court focused on the transformative nature of parody in its discussion of the nature and purpose of the use, stating that by holding the plaintiff up to ridicule "the defendants unquestionably used her material for the purpose of criticism."	