



Parody: Fair Use or Copyright Infringement?

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Introductions



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Disclosures

- This class is not legal advice. This class is for informational purposes only and you should speak with an attorney if you have a specific legal issue or question.
- Please **no recording** of any kind.
- The PowerPoint presentation will be available after the class for those who are interested.

Goals for Today's Class

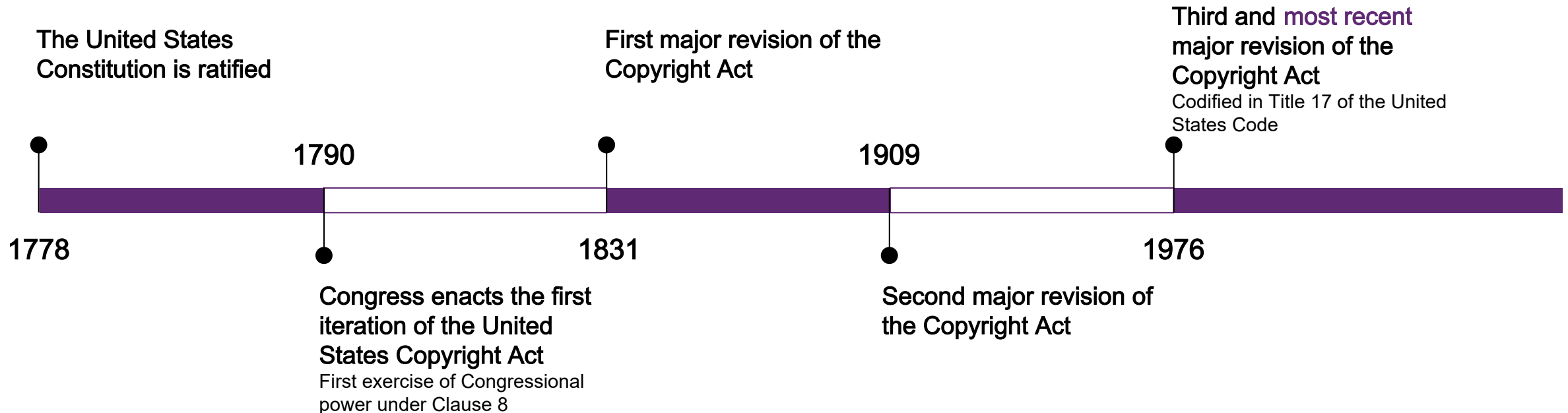
- **To get a basic understanding of copyright and fair use**
- **To understand how courts have applied fair use for parodies**

Copyright Basics

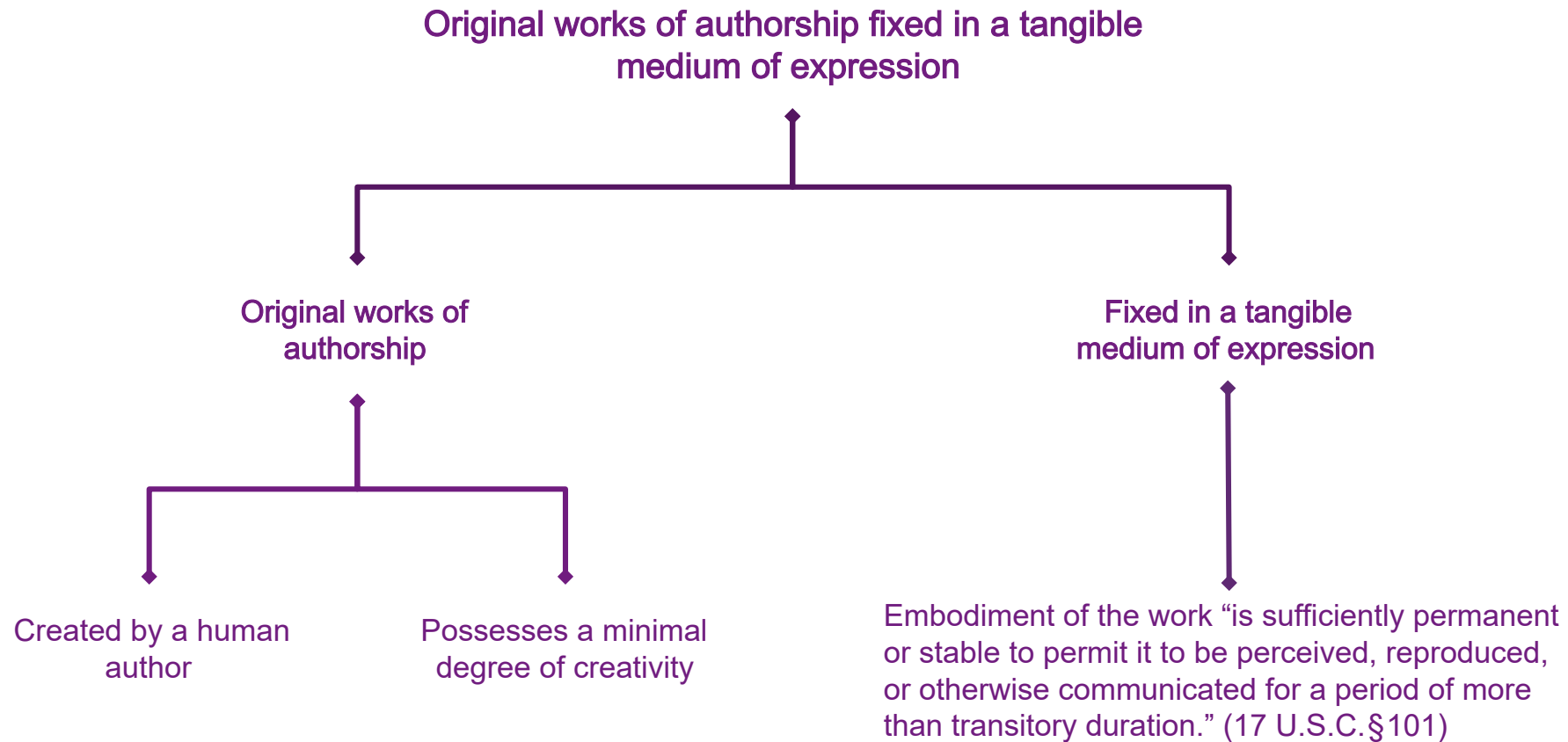
Where does copyright law come from?

Article I, Section 8, Clause 8 of the **United States Constitution** grants Congress the power:

“To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”



What is protected by copyright law?



What is protected by copyright law?

Expression versus Ideas

Copyright **does** protect expression, including:

- Literary works;
- Musical works;
- Dramatic works;
- Pantomimes and choreographic works;
- Pictorial, graphic and sculptural works;
- Motion pictures and other audiovisual works;
- Sound recordings; and
- Architectural works.

Copyright **does not** protect:

- Ideas;
- Procedures;
- Processes;
- Systems;
- Methods of operation;
- Concepts;
- Principles; or
- Discoveries.


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graph LR; A[Work is Fixed: Copyright Protection Begins] --> B[Appropriation of Copyright Protected Work]; B --> C[Infringement Lawsuit]; C --> D[Fair Use Analysis]
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Work is Fixed: Copyright Protection Begins

Appropriation of Copyright Protected Work

Infringement Lawsuit

Fair Use Analysis

Parody

What is parody?

Parody is defined as “a literary or musical work in which the style of an author or work is closely imitated for comic effect or ridicule” (Merriam-Webster)

Parody versus Satire

- Important distinction because satires are more likely than parodies to be found as infringing copyright
- In satire, “the copyrighted work is merely a vehicle to poke fun at another target” (Dr. Seuss Enterprises v. Penguin Books (9th Cir. 1997)).
- In parody, the “copyrighted work is *at least in part the target*” of the new work (Dr. Seuss Enterprises v. Penguin Books (9th Cir. 1997)).

**You want this to be your last stop on the timeline.
Infringement lawsuits are expensive, time consuming,
and have potentially large consequences.**

**Work is Fixed: Copyright
Protection Begins**

**Appropriation of
Copyright Protected
Work**

**Infringement
Lawsuit**

Fair Use Analysis

**Ideally, you ask for and receive
permission from the copyright holder
here, before you appropriate their work for
parody.**

Copyright Infringement

Exclusive Rights in Copyrighted Work

17 U.S.C. §106 provides: “the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to **reproduce** the copyrighted work in copies or phonorecords;
- (2) to prepare **derivative works** based upon the copyrighted work;
- (3) to **distribute** copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform the copyrighted work publicly**;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display the copyrighted work publicly**; and
- (6) in the case of sound recordings, to **perform** the copyrighted work **publicly** by means of a **digital audio transmission**.”

Copyright Infringement

- Copyright is structured as a monopoly
 - Clause 8 quid pro quo
- Potentially large consequences
 - Injunctions
 - Damages
 - Jail time

Work is Fixed: Copyright
Protection Begins

Appropriation of
Copyright Protected
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Fair Use Analysis

Fair Use

What is Fair Use?

- Dates back to a Supreme Court case from 1841, *Folsom v. Marsh*
 - Need to distinguish between appropriation of work that seeks to replace the demand for the original versus those that introduce new demand
 - Creating new demand furthers the purpose of copyright law by promoting the progress of art
- Fair use is a defense that you can raise if you are sued for copyright infringement
 - You do not simply engage in fair use. A court will determine whether your unauthorized appropriation of another's copyright protected work is fair use.

§107 - Limitations on exclusive rights: Fair Use

“[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**. 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 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 as a Balancing Test

Four factors listed in 17 U.S.C. §107 are weighed in a balancing test.

No one factor is determinative. A court will consider all four in a fair use determination.

This means that there is **no hard and fast rule** for determining if something is fair use. You can never be certain that your parody will be considered fair use.

Because there is no certainty, and because lawsuits are time-consuming, costly, and have potentially large consequences, you do not want to be in a position where a court is engaging in a fair use analysis.

Work is Fixed: Copyright
Protection Begins

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Fair Use Analysis

The Purpose and Character of the Use

- How is the alleged infringer using the copyrighted work?
- **Commercial** use? Nonprofit education? Noncommercial use?
- **Transformative?**
 - “If it adds something new, with a further purpose or different character, altering the first work with new expression, meaning, or message . . .”
 - “The more transformative the new work, the less will be the significance of other factors, like commercialism.”

The Nature of the Copyrighted Work

- Certain types of work are more deserving of protection than others.
 - Creative works versus less creative works
 - e.g. fictional movies vs biographical works
 - Published versus unpublished works
- Holds the least weight of the four factors in a fair use analysis of a parody

Amount and Substantiality of Use

- In general, the greater the portion used, the less likely it will be found a fair use.
- However, both **Quantity** and **Quality** are considered.
- “Conjure Up” Test
- Dependant upon the analysis of other three factors



Puffs or Seven Increasingly Eventful Years at a Certain School of Magic and Magic

Effect on the Work's Market or Value

- **Effect of the use upon the potential market for or value of the copyrighted work**
 - Does your use deprive the copyright owner of income or undermines a new or potential market for the copyrighted work?
 - Potential market includes that of original work and derivative works
 - Does the unauthorized use diminish or negatively impact the potential sale of the original copyrighted work?
 - Does it interfere with the marketability of the work? Fulfill the demand for the original copyrighted work?

Case Study

Campbell v. Acuff-Rose Music, Inc.

- 2 Live Crew wrote “Pretty Woman”, a parody of Roy Orbison’s song, “Oh, Pretty Woman.”
- 2 Live Crew manager sought permission to license the song for parody. Acuff-Rose refused.
- 2 Live Crew released the song anyway. A year later, Acuff-Rose sued.

Findings

- Fair use defense may be applied to parody
- The commercial nature of the parody is just one element to be considered.



Case Studies - Play

Lombardo v. Doctor Seuss Enterprises, L.P.

- Imitating the style of the Grinch for comedic effect and to mock the naïve, happy world of the Whos
- The play's coarseness and vulgarity lampoons Grinch by highlighting the ridiculousness of the utopian society depicted in the original work
- Little likelihood of harm to the market



Case Studies - Photograph

Leibovitz v. Paramount Pictures Corp.

- Neilsen's photo with a smirking face had a **contrasting dissimilarity** with the serious expression of Moore which may be perceived as commenting on the 'seriousness', and 'pretentiousness' of the original;
- The **contrast** achieves the effect of ridicule that the Court recognized in Campbell would serve as a **sufficient 'comment'** to tip the first factor in a parodist's favor."



Case Studies - Satire vs Parody

Rogers v. Koons

- “String of Puppies” is a satirical critique of our materialistic society.
- Parody comments on the specific work used.
- Satire uses another’s copyrighted work to make a statement on some aspect of society at large.



Any Questions?



THANK YOU

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