

Legal Issues for Authors: Copyright, Fair Use, Defamation and Rights of Privacy and Publicity

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Author Liability

- Representations and Warranties:

“The Work contains nothing that violates any right of privacy, is defamatory, or infringes or otherwise violates any intellectual property or other right of any kind of any person or entity, nor does the Work contain anything that is unlawful or deceptive.”

- Indemnity:

“Author agrees to indemnify and hold harmless Publisher and Publisher’s licensees of any edition of the Work against any losses arising out of any claim resulting from a breach of any of Author’s above representations and warranties.”

- You are on hook to the extent not covered by Media Liability Insurance – the publisher’s and yours, if any.

Copyright's Bundle of Rights

The Copyright Act identifies six specific rights that belong exclusively to the copyright owner:

- (1) Reproduce
- (2) Distribute
- (3) Prepare derivative works
- (4) Perform publicly
- (5) Display publicly
- (6) Digital audio transmissions of sound recordings

Exceptions/Defenses

- Defenses include: Fair use, independent creation, and de minimis copying.
- Fair use **favors criticism, commentary, news reporting, teaching, scholarship, and research.**
- **Four factor test:** factors are **guidelines, NOT rules.** Factors not all considered or given the same weight in every case.

Fair Use Factors

4 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.**”

First Factor

“The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”

- Fair Use favors nonprofit, educational uses.
- Commercial use is not *de facto* infringement.
- Whether the use is **transformative**.

Transformative Use

A key inquiry under the First Factor in Fair Use is **whether the secondary use is transformative**.

- Supreme Court in *Campbell v. Acuff-Rose* (1994): Transformative uses add “**something new, with a further purpose or different character, altering the first with new expression, meaning, or message.**”
- Based on 1990 article by Judge Pierre Leval.

Second Factor

“The nature of the copyrighted work.”

- More factual original works tend to weigh in favor of fair use, and more artistic original works tend to weigh against fair use.
- This factor is not generally determinative.

Third Factor

“The amount and substantiality of the portion used in relation to the copyrighted work as a whole.”

- Courts look at both *quantitative* and *qualitative* substantiality of the portion used:
 - Quantitative substantiality: how much of the original is used?
 - Qualitative substantiality: was the “heart” of the original work used?

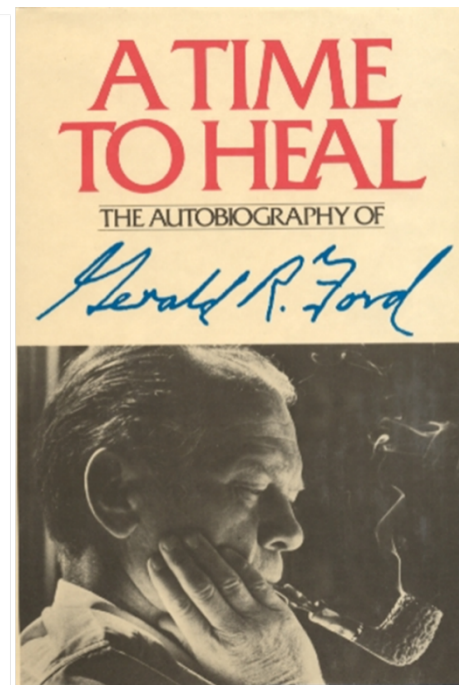
Fourth Factor

“The effect of the use upon the potential market for or value of the copyrighted work.”

- If the subsequent work serves as a substitute for the original or harms its value, it will weigh against fair use.
- This can include licensing market and other potential future markets.

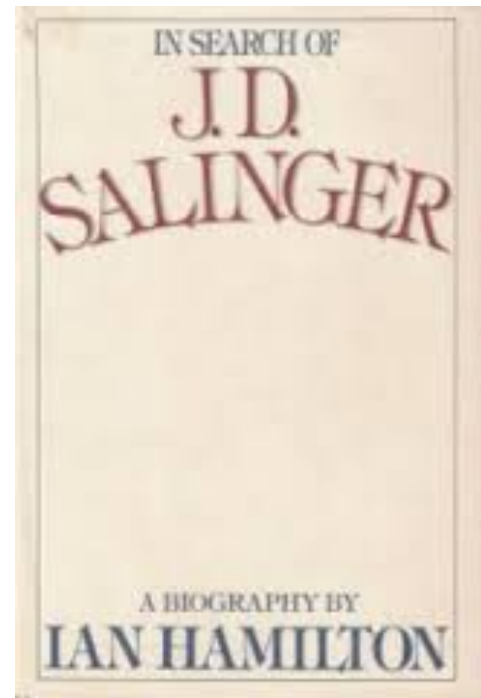
Harper & Row v. The Nation (1985)

“The Nation... actively sought to exploit the headline value of its infringement, making a ‘news event’ out of its unauthorized first publication of a noted figure's copyrighted expression.”



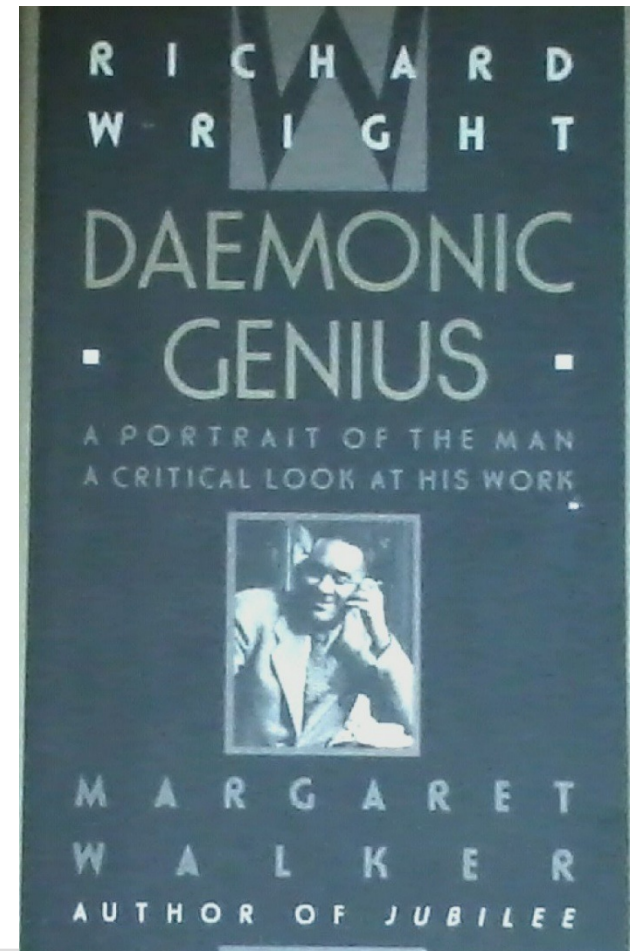
Salinger. V. Random House (1987)

- Hamilton wanted to do an authorized biography with Salinger, who refused.
- Found unpublished letters in academic archives; paraphrased large portions of letter in book – without permission.
- Court deemed letters were the “backbone of the biography.”
- On appeal, court held not fair use: letters were “more of a means of capitalizing on the interest in Salinger than in providing a critical study of the author.”



Wright v. Warner Books (1991)

- Richard Wright biography quoted from six unpublished letters and ten unpublished journal entries.
- Wright's widow sued.
- 1% of the letters were copied.
- Use was informational.
- Appeals court found **fair use**.



Campbell v. Acuff-Rose Music (1994)

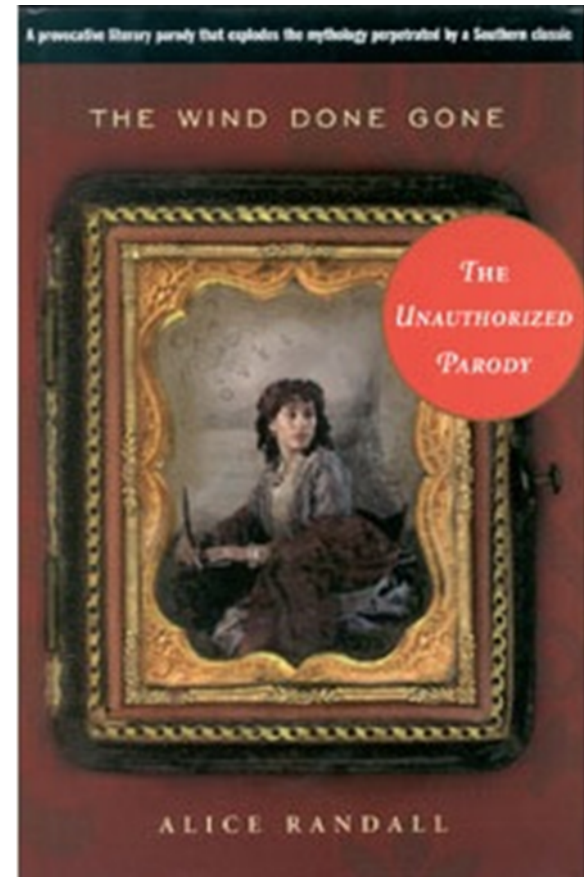
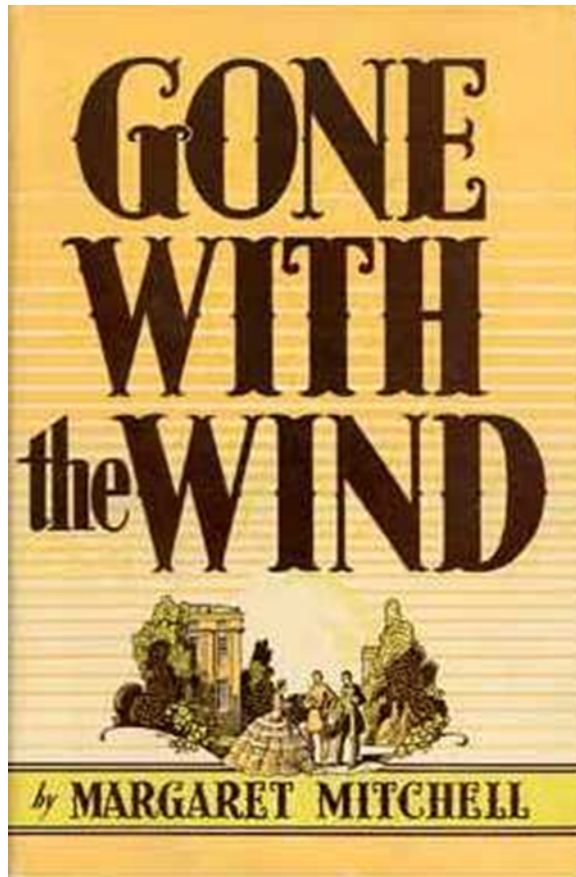


A transformative work does not “merely supersede” the original creation” but instead **“adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”**

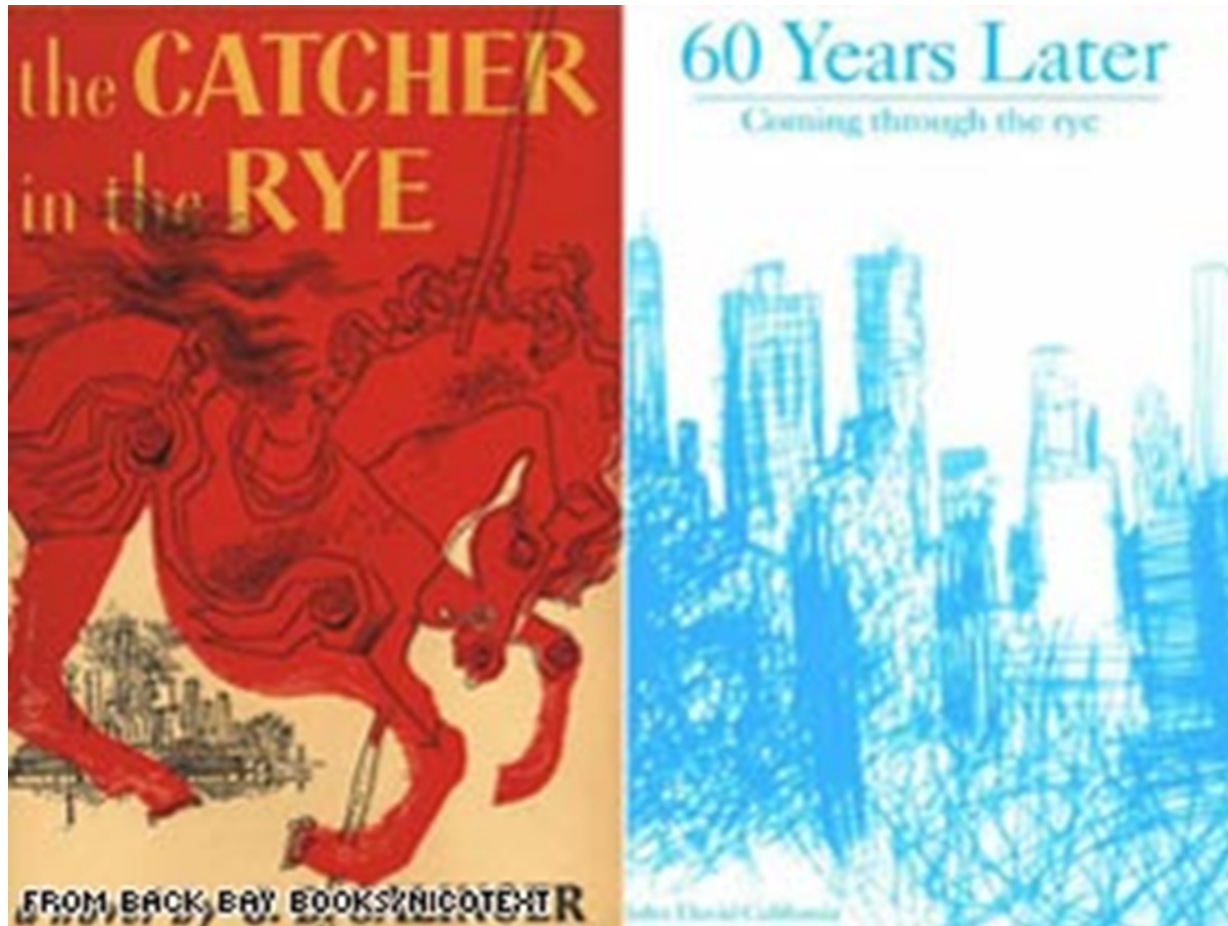
- “[P]arody has an obvious claim to transformative value... by shedding light on an earlier work, and, in the process, creating a new one.”



SunTrust v. Houghton Mifflin (2001)



Salinger v. Colting (2009)



Warner Bros. Entertainment, Inc. v. RDR Books (2008)



Warner Bros. Entertainment, Inc. v. RDR Books (2008)

- Harry Potter Publishers sued over The Harry Potter Lexicon.
- Court found too much quoted from books and **not enough commentary.**
- “Slightly transformative,” but not fair use.
- Defendant issued new version with less quotation, more commentary.

Rowling's: "I went to court to uphold the right of authors everywhere... The proposed book took an enormous amount of my work and added virtually no original commentary of its own. **Many books have been published which offer original insights into the world of Harry Potter. The Lexicon just is not one of them."**

Graham Archives v. DK Ltd. (2006)

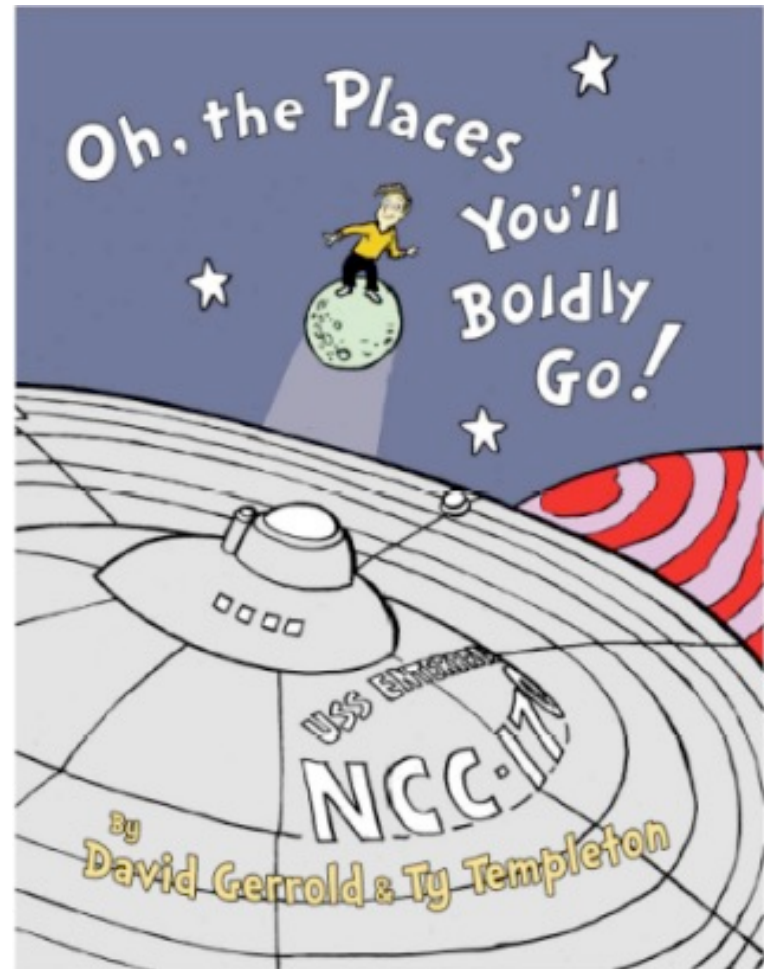
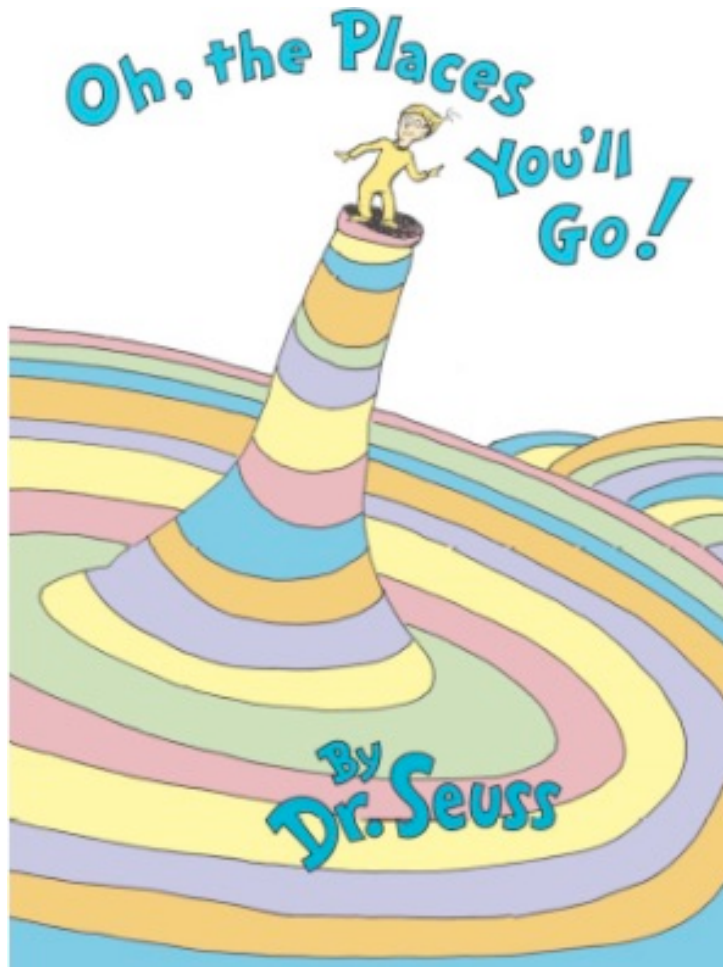


Original poster design, right; Subsequent book incorporating the poster, left.

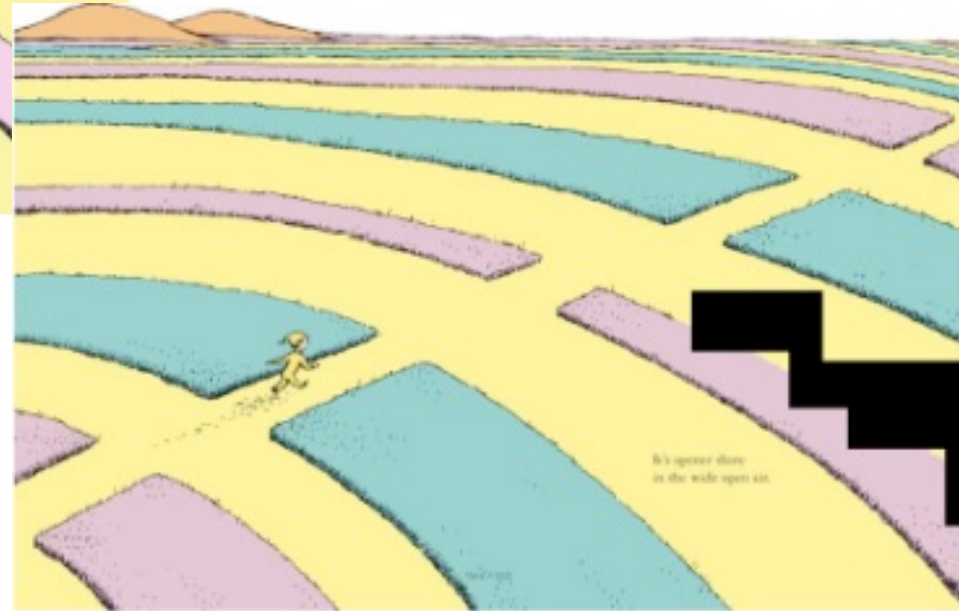
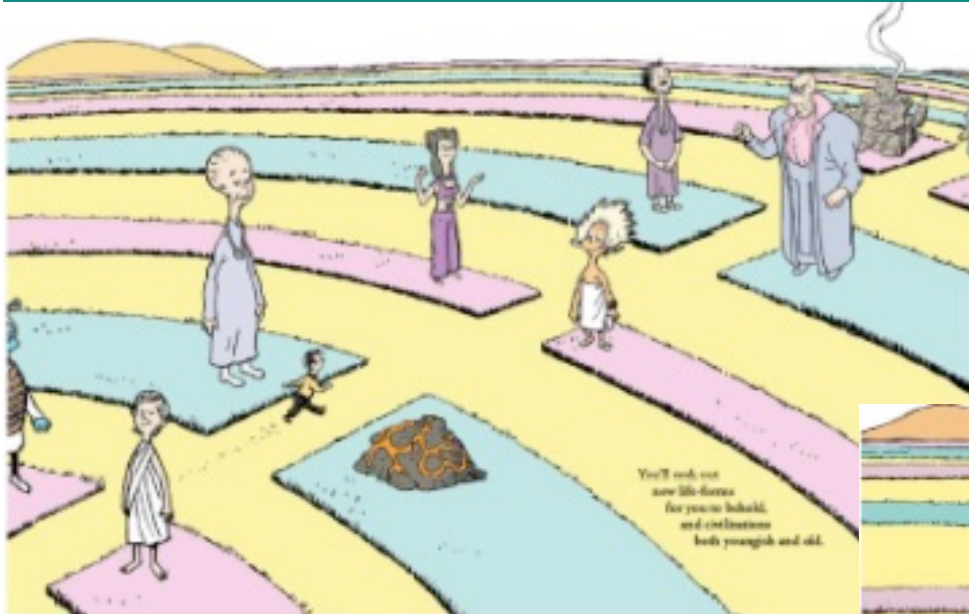
Penguin Random House v. Colting (2017)



Seuss Enters. v. Comicmix (2018) (on appeal)



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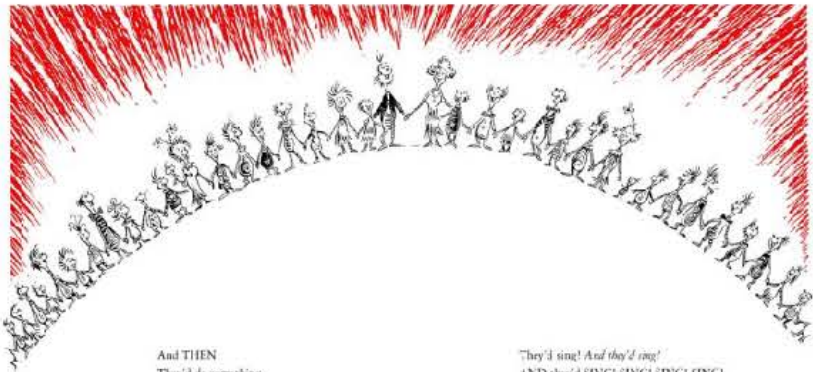


Seuss Enters. v. Comicmix (2018) (on appeal)



Seuss Enters. v. Comicmix (2018) (on appeal)

Dr. Seuss Work



And THEN
They'd do something
He liked least of all!
Every Who down in Whoville, the tall and the small,
Would stand close together, with Christmas bells ringing.
They'd stand hand-in-hand. And the Whos would start singing!

"They'd sing! And they'd sing!
AND they'd SING! SING! SING! SING!
And the more the Grinch thought of this Who-Christmas-Sing,
The more the Grinch thought, "I must stop this whole thing!
"Why, for fifty-three years I've put up with it now!
"I MUST stop this Christmas from coming!"
... *Dr. THEO!*"

THEO SEUSS

Infringing Work

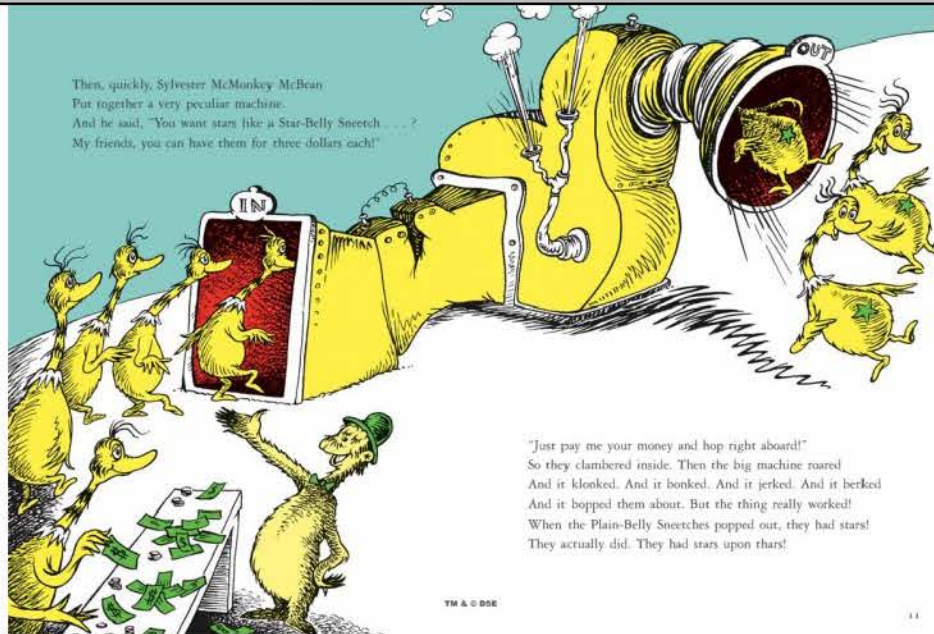


You'll make lifelong friends. You'll love them like brothers.
(Even when they cannot stand one another.)
You'll encounter lovers of every hue
(though they'll never be back for an episode two).

Weird things will happen,
and usually do,
to starship explorers
and their marvelous crew.

Seuss Enters. v. Comicmix (2018) (on appeal)

Dr. Seuss Work

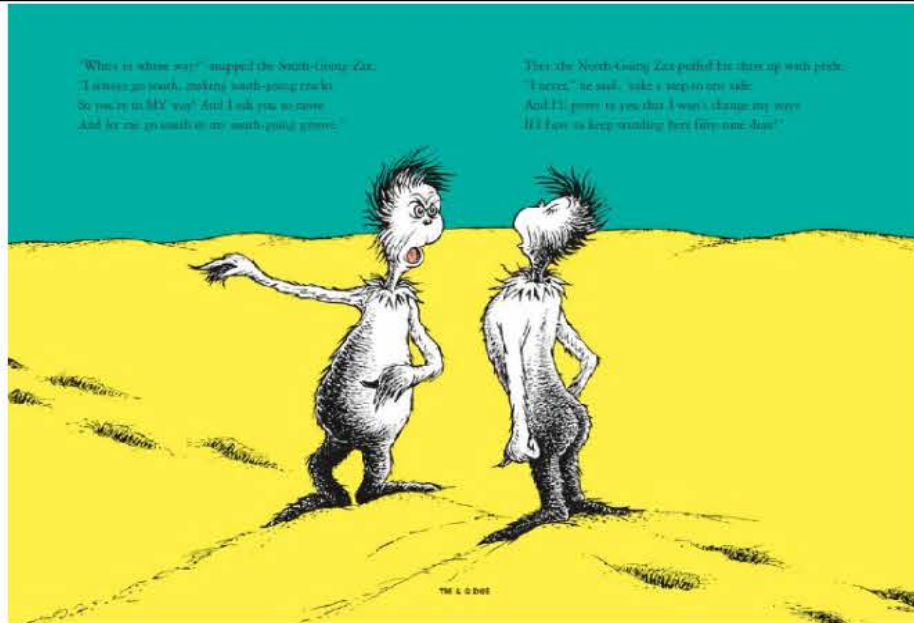


Infringing Work

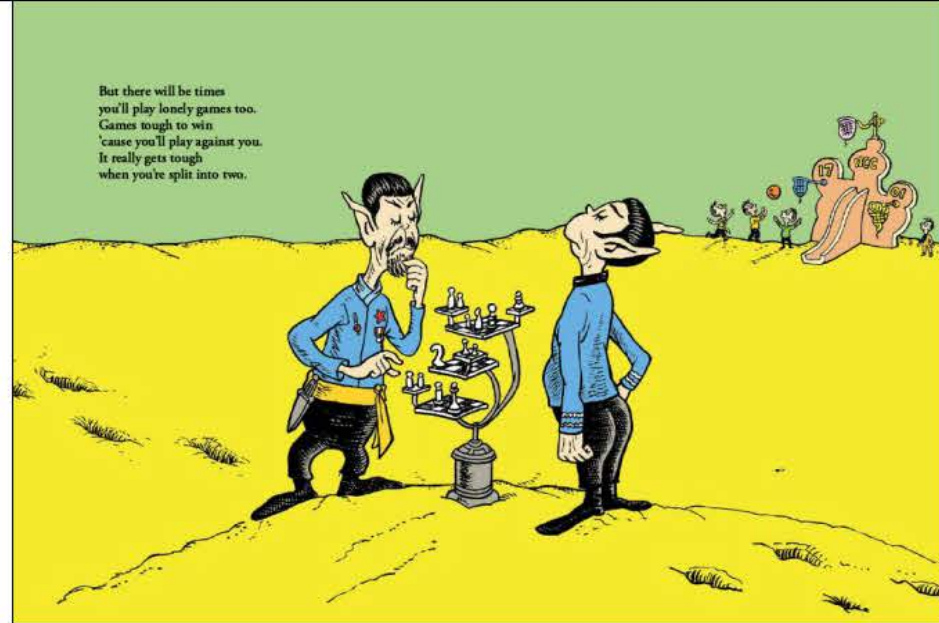


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Infringing Work



Takeaways

Fair Use is *never* an easy yes or no answer.

- The analysis is highly fact-intensive.
- The weight given to each factor will depend on the particular circumstances.
- There are two sides: Look at the arguments that can be made on both sides for each factor.
- Get legal advice.

Takeaways for Authors

- Don't take any more than you need to for the purpose.
- If an **image**, make the reproduction small and/or tie to the text; otherwise get permission.
- **Comment** on what you are excerpting.
- If you are taking only a **few sentences or a paragraph** here or there, use quotations and cite; no need for permission.
- If quoting from a **song or poem**, take only the lines you need to make your point.
- But don't take the "**heart**" of the work – unless a **parody** and you need to it conjure up the original.

Defamation and Right of Privacy

Libel

- Published, **false** statement of fact
- Harm to reputation caused by
- About a living (except Louisiana), identifiable person or entity
- Substantially false – actually false or creates false impression
- Made with fault – negligence for private people; malice for public figures

Libel Per Se

Certain false statements qualify as libel per se: where harm is obvious so no need to prove it.

- Criminal acts or unethical behavior
- Bankruptcy or insolvency
- Adultery, “unchastity” or teen pregnancy
- Loathsome disease (herpes or AIDS, not the flu)
- Sexual orientation (no longer defamatory in NY)
- Incompetent work or other false claims that negatively affect the person’s livelihood

Person Identifiable

If characters based on or about real people:

- Character has to be “so closely akin that the reader would have no difficulty linking the character to the person”
- *Primary Colors* case: Court held librarian described in book (as having a relationship with Clinton) not identifiable by description of a librarian with “great legs”
- But Clinton identifiable as president.

Opinion vs. Fact

- Opinion is protected:
 - Hyperbole considered opinion: e.g., saying a person is a shopaholic, paranoid, a narcissist where clearly not a clinical diagnosis; a conman, or scammer
 - But need to disclose facts basing opinion on.
 - Hypothesis –but need to present as hypothesis and again back up with facts .

Fault in Making Falsehood

- **Negligence** need to be shown for private people: Failure to follow good journalism standards of fact-checking.
 - May rely on reliable sources (e.g. AP), public records, court statements, but not less than reputable news organizations, Internet publishers or advocacy groups.
- **“Actual Malice”** need be shown for public figures: Had serious doubts about the truth or knew it was false.
 - Other countries do not have as high a standard for public figures, though UK getting closer.

Right of Privacy

- Vary by State, but generally 4 types:
 - Embarrassing Private Facts
 - False Light
 - Intrusion
 - Right of Publicity

Right of Privacy vs. Libel

- Harm is mental or emotional distress as opposed to harm to reputation.
- Many states have statutes (e.g., NY) relating to right of privacy and they are strictly construed; in other states it is based on common law.
- Right of privacy only applies to individuals, never corporations.
- Don't need to prove falsehood in all cases; for embarrassing private facts, needs to be true.

Disclosure of Embarrassing Private Facts

- Facts which are offensive and **not** of legitimate public interest.
- NY does not recognize, but CA and other states do.
- Facts stated must be true
- Plaintiff must be alive and identifiable
- Facts must be private (not in any public record) and not previously disclosed
- Cannot be of legitimate public interest – such as if the person is a public official
- Must be intimate and embarrassing to a normal person

Embarrassing Private Facts

- Examples where invasion found:
 - Head of student body had previously had a sex change
 - Has an embarrassing disease such as HIV
 - Where graphic sexual descriptions
- No Liability found:
 - Nick Lemann's *The Promised Land*: 3 invasion of privacy claims where the sexual references were not graphic enough and they were part of a social history story
- Disclosures that are newsworthy, educational, or of public concern are **protected**:
 - health of public official,
 - psychological problems of doctor accused of malpractice,
 - sexual activities of priests

False Light Invasion of Privacy

- Placing an individual in a false light, without it necessarily being defamatory
- Has to be an identifiable, living person
- Statements have to be substantially false – creating a false impression or expressly false
- Highly offensive (subjective)
- Calculated falsehood made by publisher/author

False Light Invasion of Privacy

4 types of claims in books/journalism:

- Distortion of facts
- Omission of relevant details
- Embellishment through invented dialog or details
- Fictionalization that presents an identifiable person in a false light

False Light Invasion of Privacy

- **Spawn case:** Juvenile biography about athlete Warren Spawn
- Said Spawn won the bronze star in war – not true (based on article)
- Spawn said people would think he lied. And said dialog presented him falsely.
- Won in lower court and appellate court.
- S. Ct – Remanded for fact finding on whether published with knowledge of falsehood or reckless disregard for truth.
- **Cantrell case:** (S. Ct.): reporter exaggerated her and son's poverty and living conditions after husband's death.
- Court said it was a calculated falsehood and gave a false impression about her.
- **Susanna Kaysen Memoir** (wrote *Girl Interrupted*) – Memoir talked about sexual problems with boyfriend.
- Court said that it was integral to her story and not an actionable.

Intrusion into Seclusion

- Entering upon or observing or acquiring secret or secluded private information, and
- Obtaining that by surreptitious means or by overt physical trespass
- Books entitled to first amendment protection.

Right of Publicity

- Exploiting a person's name or likeness in advertisement or endorsement.
- For public individuals where their name/likeness has value
- An economic, property right that allows public individual to control how their likeness is used.
- Survives death in many states.
- Books and journalism generally protected by First Amendment.
- But cannot use a fake endorsements or photos of famous persons (unrelated to content of book) to help sell book.
- **Does not prevent writing about a famous person.**

General Takeaways for Authors

- Keep good notes and remember sources.
- Use reputable sources; not internet facts.
- People who are upset may sue even if they do not have a good claim.
- Get releases from those you are concerned about; only let them review manuscript for factual error.
- Have sensitive books vetted by experienced attorney.

Takeaways for Non-Fiction

- Tell the Truth: truth is always a defense to libel.
- Do not exaggerate.
- Don't make claims of fact based on assumptions or present opinion as fact.
- Don't label people – a criminal, a pervert, etc., but describe them, tell a story and let the reader draw their own conclusions.
- Don't obtain information illegally.

Fiction

- Make real people non-identifiable; changing names not enough.
- If readers can identify the person from the context (e.g., a relative, a boss) or description , then they can still have a claim.
- Don't use identifiable, known personal quirks.
- Write as a parody.

Use A Disclaimer

- **Fiction:** “This is a work of fiction. Names, characters, businesses, places, events, and incidents are the products of the author’s imagination or used in a fictitious manner. Any resemblance to actual persons, living or dead, or actual events is purely coincidental.”
- **Memoir:** “This book is memoir. It reflects the author’s present recollections of experiences over time. Some names and characteristics have been changed, some events have been compressed, and some dialogue has been recreated.”
- The disclaimer alone won’t protect you.

QUESTIONS?

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