

## Fair Use, Cultural

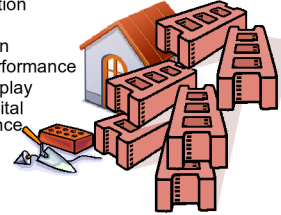
Professor Wendy Seltzer

<http://wendy.seltzer.org/brooklaw/07copyright/>

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## Author's benefit

- Exclusive rights over original expression
  - Reproduction
  - Derivative
  - Distribution
  - Public Performance
  - Public Display
  - Public Digital Performance



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## Public benefit



- Creation and distribution of new works
- Access to ideas
- First sale
- Fair use of expressive elements

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## Litigating Infringement

- Plaintiff must prove:
  - Ownership of a valid copyright
  - Infringement of an exclusive right
    - if Reproduction:
      - Copying
      - Unauthorized appropriation of copyrightable expression
- Defendant may show “authorization” by permission or by law

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## Authorization by law

includes

- First Sale, § 109
- Library or archive, § 108
- Compulsory “cover” license, § 114

Most general:

- Fair Use, § 107

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## § 107 Limitations on exclusive rights: Fair use

- The 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.... [T]he 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- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

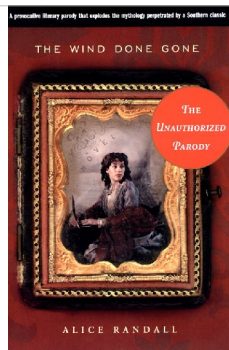
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## Fair or Unfair?: *The Wind Done Gone*

Margaret Mitchell's 1936 novel tells its bestselling story of the Civil War South through the story of Scarlett O'Hara



Alice Randall's *The Wind Done Gone* (2001) recounts the same episodes through the eyes of "S"'s slave-born half-sister, Cynara



1. Purpose and character of the use?
2. Nature of the copyrighted work?
3. Amount and substantiality of portion used?
4. Effect on the market?

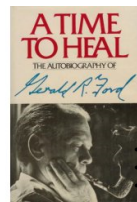
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## The Four Factors

1. purpose and character of the use
2. nature of the copyrighted work
3. amount and substantiality of the portion used
4. effect of the use upon the potential market for or value of the copyrighted work

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## Harper & Row v. Nation



**The Nation.**

- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality of portion used
- Effect on the market

"the Framers intended copyright itself to be the engine of free expression"

## Compare:

- Celebrity baby pictures scooped on the web

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WORLD U.S. 31% BUSINESS TECHNOLOGY SCIENCE HEALTH SPORTS CRIME

MEDIA & CULTURE WORLD BUSINESS TOURISM REAL ESTATE POLITICS COMBAT RESEARCH

### In Web Era, Big Money Can't Buy an Exclusive

By JEFF KATZMAN  
Published: March 12, 2008

After surrendering the very expensive rights to the first photographs of British Princess Kate Middleton, the editors of *People* magazine learned a publicity lesson. After her no-strings-attached interview with Matt Lauer on the "Today" show, she gave the photos to the tabloids, which will run them in full color on their front pages. Then, on Friday, release the pictures in glossy form to the world on newsstands everywhere, for an increased cover price of \$3.99.

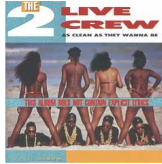
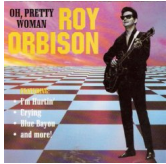
Instead, days before their related publication, the pictures of Angelina Jolie and Brad Pitt cooing their two-year-old infant first appeared on Gawker, *Entertainment Weekly* and about two dozen other online sites and Weblogs. Some photos were taken from a hardy copy of *Rolling* magazine, which had obtained the rights in 2004 to the photos for a reported \$5.5 million. Others that appeared later were from copies of *People* that the magazine says may have been stolen before official distribution. Within an hour of the first postings, lawyers for the magazine began sending cease-and-desist letters to the offending Web sites.

But did the Internet publication of the pictures really undermine *People*'s publicity plan?

Magazine analysts say the blogs may have actually done the magazine a favor by drawing in readers more likely than they may translate into higher circulation sales. But the

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## Campbell v. Acuff-Rose



- Purpose and character of the use
  - Nature of the copyrighted work
  - Amount and substantiality of portion used
  - Effect on the market
- "When parody takes aim at a particular original work, the parody must be able to 'conjure up' ... that original"

[link](#)

## The Four Factors

1. the purpose and character of the use
  - profit/nonprofit
  - transformative use
2. the nature of the copyrighted work
  - fact/fiction
3. the amount and substantiality of the portion used
  - proportion, "heart"
  - used only so much as necessary
4. the effect of the use upon the potential market for or value of the copyrighted work
  - substitution
  - licensing market

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## The Four Factors

- Fair use is not a numerical sum or tallying of votes. A strong showing of transformative use or a minimal effect on the market can be enough.

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## Fair or Unfair?

- Unauthorized biography of L. Ron Hubbard  
*New Era v. Carol Publishing*
- Seinfeld Aptitude Test  
*Castle Rock Entertainment v. Carol Publishing Group, Inc.*
- Newspaper reprint of photograph of Miss Puerto Rico  
*Núñez v. Caribbean International News Corp. (El Vocero de Puerto Rico)*

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