

## **Fair Use Case Studies – In-Class Activity**

CA 459: New Media and Society

### **Objective:**

Students work in small groups to evaluate court cases that considered issues of copyright and fair use. The example court cases demonstrate how new media technologies are affected by regulation and law, and emphasize how new technologies are sometimes understood and interpreted by governments in unexpected ways.

### **Unit/Topic:**

This activity works well during the Policy and Regulation Unit, which takes place in the second half of the semester. Students should have some familiarity with US copyright law and Fair Use Doctrine. Ideally, this activity should take place immediately come after covering those topics during lecture to provide students an opportunity to apply what they have just learned.

### **Learning Outcomes:**

After this activity, students should be able to explain key criteria of Fair Use Doctrine; summarize the facts of a court case; identify the key issues in the court case; and compare their judgement of “fairness” to a court’s assessment of Copyright and Fair Use.

**Time Needed:** 20-30 minutes

### **Materials/Preparation:**

- Instructor should be generally familiar with the US Copyright Office’s Fair Use Index
- Instructor should read through the cases, and be generally familiar with the facts of certain cases in order to recommend cases for students to select. For example:
  - [O’Neil v. Ratajkowski, No. 19 CIV. 9769 \(AT\) \(S.D.N.Y. Sept. 28, 2021\)](#)
    - A celebrity reposted a photo that a paparazzi photographer took of her to Instagram, which was not considered Fair Use
  - [Solid Oak Sketches, LLC v. 2K Games, Inc., No. 16-cv-724-LTS-SDA \(S.D.N.Y. Mar. 26, 2020\)](#)
    - The inclusion of distinct tattoo designs for characters in the NBA 2K video game is found to be fair use.
  - [Furie v. Infowars, LLC, Case No. 18-1830-MWF \(JPRx\) \(C.D. Cal. May 16, 2019\)](#)
    - The artist behind the “Pepe the Frog” character sued Alex Jones’ company, Infowars, for selling a poster containing the character—this was not found to be fair use
  - [Atari Games Corp. v. Nintendo of Am. Inc., 975 F. 2d 832 \(Fed. Cir. 1992\)](#)
    - Atari attempted to reverse engineer a copy protection program that Nintendo developed for the NES. The case was not fully resolved, but did note that Atari could not use reverse engineering as an excuse to exploit the software.

### **Directions for Instructor:**

1. Show students the US Copyright Office's "Fair Use Index" (<https://www.copyright.gov/fair-use/fair-index.html>), which is a website that collates summaries of court cases that interpreted the Fair Use Doctrine. Be sure to show students that the list has many filtering options—which will be necessary to use when they select their own cases.
2. Break students into small groups (2-4 each)
3. Give student groups time to select a case from the Fair Use Index. Instruct students to filter the page to only list cases in the "Computer program" and/or "Internet/Digitization" categories to limit their options to cases that engage with new media.

For other courses, you may consider selecting different categories. The website also includes options to filter the page by jurisdiction(s), which may also be useful for sorting the available choices.

After ~5-7 minutes, announce that groups need to choose a case if they have not yet done so. After 10 minutes, check in with groups. If any group has not yet decided, choose a case for them

***Alternatively:*** You can choose to assign a specific case to each group. This can be beneficial to ensure that multiple cases are considered, but requires further advanced preparation.

4. Give groups time to read their chosen case. Students should work independently at this point, taking their own personal notes.

While students are working, go around the room and make note of which cases groups are analyzing. If necessary, use this time to pull up the associated case pages on the projector screen. Additionally, this is a good time to quickly skim the details in case you are not familiar with a particular case.

5. After ~5 minutes, let students know that once everyone in the group is finished reading, they can move on to discussing the questions as a group.

Guiding Questions (to be displayed on projector screen or provided to students):

- Who were the parties of the case? What was the nature of the dispute?
- What was the outcome of the case?
- Which principles of fair use were under consideration?
- What kinds of media were at issue? How did the nature of the media play into the court decision? How did the court understand/interpret the specific media technology?
- Do you agree with the decision? Why or why not?

6. After a set amount of time for groups to work and discuss (10-15 minutes recommended), regroup the entire class for groups to report back.

Option A (better for small classes): give each group a chance to present their thinking.

Option B (better for large classes): solicit input from a few groups.

For both options, during their report, each group should quickly summarize the details of their chosen case, and whether their group agreed or disagreed with the court's decision. Then, the group should explain how their understanding of the media technology compared to how the court(s) understood the technology.