Long Arm of the Law, Indeed
Charleston Conference, Nov. 7, 2014 - Laura Quilter
Copyright

two jokes & one transformation in analysis
first sale
17 USC 109
true love torn asunder by licensing

Sophisticated and daring— an adult novel of stolen love!

AN AFFAIR TO REMEMBER

FIRST SALE: an affair to remember
Q: What's a genius way for getting around the used textbook market?
A: "Sell" licensed access instead! (WoltersKluwer Aspen)
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announcement
* boycott (300+ law profs)
* retrenchment
* next moves?
Q: When is an electronic good a copy?
A: When it's electronic. (ReDigi)
Capitol Records v. ReDigi (SDNY 2013)

- Apple iTunes MP3s -- no prohibition on resale
- ReDigi encrypted marketplace
- HELD: Digital goods are copies, so 109 inapplicable
- ReDigi 2.0: Download thru ReDigi for copy control
future of first sale

- textbook & ebook experiments
- secondary markets -- electronic & real
- licensing -- EULAs & negotiated
- Relax, Congress is on it. (gulp)
Mortal! I come offering a deal—

Read the sign.

"By entering this room, you agree to forfeit your own soul rather than negotiate with the mortal residing therein..."

Wait, you can't—

Too late.

Mephistopheles encounters the E.U.L.A.
fair use
17 USC 107
transformativeness triumphant?

- Leval, Campbell v. Acuff-Rose, SunTrust Bank
- history & coffee table books: Bill Graham, SOFA v. Dodger
- search engines: Perfect 10 v. everybody; HathiTrust, Google
- art, appropriative & otherwise: Cariou v. Prince
- news: Swatch v. Bloomberg
not so fast!

- What is "transformativeness" anyway? (HathiTrust 2d Cir; others)
- Even if not transformative, PURPOSE can be important.
- PURPOSE interacts with all other factors; "holistic analysis"
- Market effect still important! (Sconnie Nation 7th; GSU 11th)
GSU (Cambridge UP v. Patton)

- F1: non-transformative
- F1: nonprofit ed is a +factor
- F2 "nature": close read
- F3 amount taken: it depends
- F4: licensing relevant!
White v. West (SDNY 2014)

- **HELD:** briefs in law database is fair use
- **F1** diff purpose: legal search tool; + metadata & annotations
- **F2** nature of the work: publicly filed documents
- **F4** market: substitutability (i.e., purpose shifts market)
- **F4** market: transaction costs
More indexing/awareness fair uses!

- indexing TV news for commercial news service = fair use (Fox v. TV Eyes)
- sharing recording of business briefings = fair use (Swatch v. Bloomberg)
- law firm patent filings = fair use (AIP v. Schwegman, Winstead v. Wiley)
- indexing is "quintessentially transformative" & fair use (HathiTrust 2d)
- accessibility is not transformative but is a ++ purpose anyway (HT 2d)
Key Points of Cases

- Minimal "transformation" of content
- Different purpose / audience [F1/F2/F4]
- indexing/awareness, education, accessibility
- 100% not a problem in any of these
- hypothetical or impractical markets
transformative != purpose

- Maybe we've been too hung up on the word "transformative"; it's the PURPOSE
- and PURPOSE plus HOLISTIC ANALYSIS
- F2 "nature of the work": Public data? Intended audience?
- F3 "amount taken": Even 100%, depending on purpose
- F4 market important but focus on substitutions, realism, & non-circular
UPSHOT?
Transformativeness is not the only way to get a + on F1. "Purpose" interacts with all other factors, whether tf or not.