



SHOW ME THE MONEY! OR NOT?

MAKING SENSE OF THE 4TH FACTOR OF FAIR USE



TODAY

- A review of fair use
- Four fair use cases
- Discussion
- Questions
- We are excited to share information about the law with you, but cannot provide legal advice!

PANELISTS

Kathleen DeLaurenti

Head Librarian, Arthur Friedheim Library
Peabody Institute of the Johns Hopkins
University

kdelaurenti@jhu.edu

Yuan Li

Scholarly Communications Librarian
Princeton University Library

YL7@princeton.edu

Tomas Lipinski

Dean and Professor, School of
Information Studies
University of Wisconsin Milwaukee

tlipinsk@uwm.edu

Laura Quilter

Copyright and Information Policy
Librarian
University of Massachusetts Amherst

lquilter@library.umass.edu



Fair Use Review

17 U.S.C. 107

FAIR USE

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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 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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.



American Geophysical Union v. Texaco
60 F.3d 913 (2d Cir. 1994)

Yuan Li

CASE BACKGROUND

Texaco is a for-profit corporation. Texaco employs between 400-500 researchers nationwide, conducting scientific research and seeking to develop new products and technology primarily to improve its commercial performance in the petroleum industry. Texaco subscribes to many scientific and technical journals and maintains a sizable library with these materials. Texaco also purchased a CCC photocopy license.

CASE BACKGROUND-CONT.

- American Geophysical Union (Plaintiff) and other publishers (Plaintiff) of scientific and technical journals brought a class action claiming that Texaco (Defendant) infringed their copyright with unauthorized photocopying of articles from their journals.
- Texaco, Inc. (Defendant) claimed it did not infringe a copyright by unauthorized photocopying of scholarly articles as it was a fair use.

COURTS' CONCLUSION

- In 1992, the U.S. District Court for the Southern District of New York concluded that Texaco's use was not fair use.
- In 1994, United States Court of Appeals, Second Circuit, affirmed the district court's conclusion.

SECOND CIRCUIT COURT FAIR USE ANALYSIS



- The purpose and character of the use (in favor of publishers)
- The nature of the copyrighted work (in favor of Texaco)
- The amount and substantiality of portion used (in favor of publishers)
- The effect on the market for the copyrighted work (in favor of publishers)

AN OVERLY ECONOMIC APPROACH TO FAIR USE



“The court's rejection of Texaco's claim of fair use relied, in part, on its consideration of the fourth statutory fair use factor—the effect of Texaco's copying on the potential market for the copyrighted work—and ultimately on the existence of the CCC. Because Texaco could have paid for its copies under a CCC photocopy license, the court reasoned that the journal publishers had demonstrated the existence of both a “workable” market in photocopy licenses and a substantial harm to the value of their copyrights based on lost licensing revenue attributable to unauthorized copying.”

DISCUSSION ON UNSETTLED ISSUES

- What is considered as transformative use and commercial use?
- What is the extent of permissible copying?
- When does a Personal use exemption apply?




“The Supreme Court has held that the ultimate goal of copyright law is not to promote new markets or economic growth, but rather to advance learning and thereby further the public good. As a mechanism to achieve this goal, the copyright law provides financial incentives to encourage authors and artists to create and disseminate their original works. In applying the copyright law, then, courts must be careful not to favor the mechanism at the expense of the goal.” - Nicole B. Cásarez



“Fair use is intended to balance copyright owners' right to reasonable compensation with the public need for wide dissemination of information." A pure market approach to fair use balances the public interest right out of the fair use equation by creating a user's tax on access to information... Courts can help achieve a proper balance between the rights of copyright owners and those of information consumers by truly considering non-economic factors in applying the fair use doctrine. “ - Nicole B. Cásarez

RESOURCES

- Nicole B. Cásarez, Deconstructing the Fair Use Doctrine: The Cost of Personal and Workplace Copying After American Geophysical Union v. Texaco, Inc., 6 Fordham Intell. Prop. Media & Ent. L.J. 641 (1996). Available at: <https://ir.lawnet.fordham.edu/iplj/vol6/iss2/5>
- American Geophysical Union v. Texaco Inc., 802 F. Supp. 1 (S.D.N.Y. 1992) <https://law.justia.com/cases/federal/district-courts/FSupp/802/1/1650145/>
- American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1995) <https://openjurist.org/60/f3d/913/american-geophysical-union-v-texaco-inc-texaco-inc-academic-press-inc>



Bill Graham Archives v. Dorling Kindersley
448 F.3d 605 (2d Cir. 2006)

© Tomas A. Lipinski, 2019

Bill Graham Presents in San Francisco

DANCE CONCERT

PROFESSOR PHOENIX

SIGNATURE DANCE
GIG MAMA MAE ANDERSON
TIM ROSE
DECEMBER 9 10 11
FILLMORE AUDITORIUM

© 1966, kept alive by...

TICKETS SAN FRANCISCO: City Lights Bookstore; The Psychodic Shop; Neandika; Baby Lo (Ureka Square); The Town Squa (1318 PAW); S. F. State College; BERKELEY: Campus Records; Sloucent Records; Shakespeare & Co.; MILL VALLEY: Yarets Art's; SAUSALITO: The Times Bookstore; MENLO PARK: Kozler's Bookstore.



TRANSFORMATIVE USES AND MARKETS

- Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).
- “[S]even artistic images [] depicted on Grateful Dead event posters and tickets” of group Grateful Dead reproduced, reduced in size and distributed with other images of artifacts, photographs, etc. producing a “cultural history” entitled *Grateful Dead: The Illustrated Trip*. Id. at 607.
 - “480–page coffee table book ... timeline running continuously through the book, chronologically combining over 2000 images representing dates... with explanatory text.” Id.
- The backstory: Unsuccessful prepublication negotiations and post publication demands.

TRANSFORMATIVE: ILLUSTRATION OR EXAMPLE

- **First Factor:** Different, transformative purpose.
 - Original purpose: “dual purposes of *artistic expression* and *promotion*.”
 - DK’s purpose: “*historical artifacts* to document and represent the actual occurrence of Grateful Dead concert events [] on [] timeline.” Id. at 609.
- **Second Factor:** “*images are creative* ... core concern of copyright protection, the second factor has *limited weight*.” Id at 612-61.
- **Third Factor:** Use of posters “tailored to further its transformative purpose ... reproductions of [] images *in their entirety* displayed the *minimal image size and quality necessary*...” Id. 613.

TRANSFORMATIVE USES AND MARKETS

- “[P]arties agree” there is no impact on **primary market** (“sale of the poster images”). *Id.* at 614.
- Question: is there an impact of “the potential to develop a **derivative market**”? *Id.*
- **Loss** of potential *licensing revenue* automatically **≠ negative impact** to the Fourth Factor. Otherwise “the fourth fair use factor would *always* favor the copyright holder.” *Id.*, quoting *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930, n. 17.

TRANSFORMATIVE USES AND MARKETS

- No “harm to BGA’s license market merely because DK did not pay a fee for BGA’s copyrighted images.” *Id.* at 614.
- Again citing *Texaco*, 60 F.3d at 930, focus instead on the “impact on potential licensing revenues for ‘traditional, reasonable, or likely to be developed markets.’” *Id.*
 - DK did pay license fees to copyright owners of other images used in *Illustrated Trip*.
 - BGA did license its images to others.
 - Paying a license fee for a work does not preclude making a fair use of that work. *Id.* at 615.

TRANSFORMATIVE USES AND MARKETS

- “Neither of these arguments shows impairment to a traditional, as opposed to a **transformative market**.” Id. at 614.
- The “copyright holder **cannot prevent** others from **entering fair use markets** merely ‘by developing or licensing a market for **parody, news reporting, educational or other transformative uses** of its own creative work.’” Id. at 615, quoting *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132, 146, n. 11 (2d Cir.1998).
- **Transformative use = Transformative Fair Use Market.**

TRANSFORMATIVE FAIR USE MARKETS

- **Fourth Factor:** “Since DK’s use of BGA’s images falls within a **transformative market**, BGA does *not suffer market harm* due to the loss of license fees.” Id. at 615.
 - This is not a market (Fair Use Market) the owner would expect (“Traditional Market”) to enter.
 - The incentive to create is not impacted by use of the work in these markets, e.g., parody, criticism, or review.
- **Transformative and other Fair Use markets are outside the control of the copyright holder!**

Estate of James Oscar Smith, et ano., v. Cash Money
Records, Inc. et al.

No. 1:14-cv-02703 (S.D.N.Y. May 30, 2017)

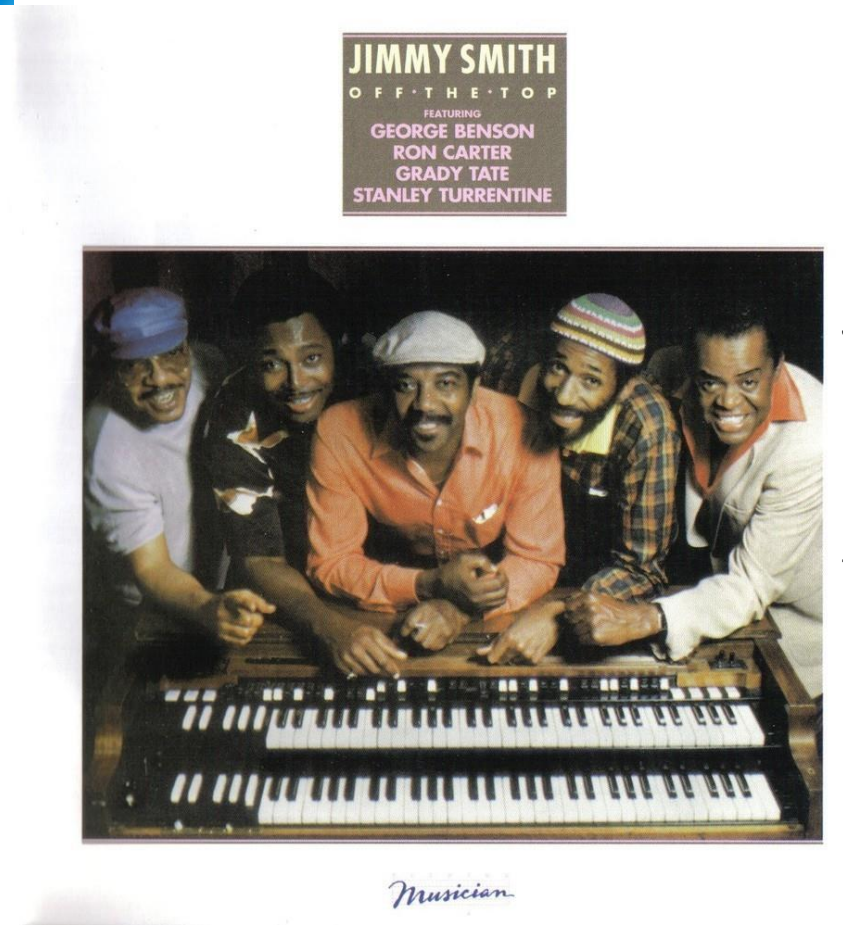
© Kathleen DeLaurenti



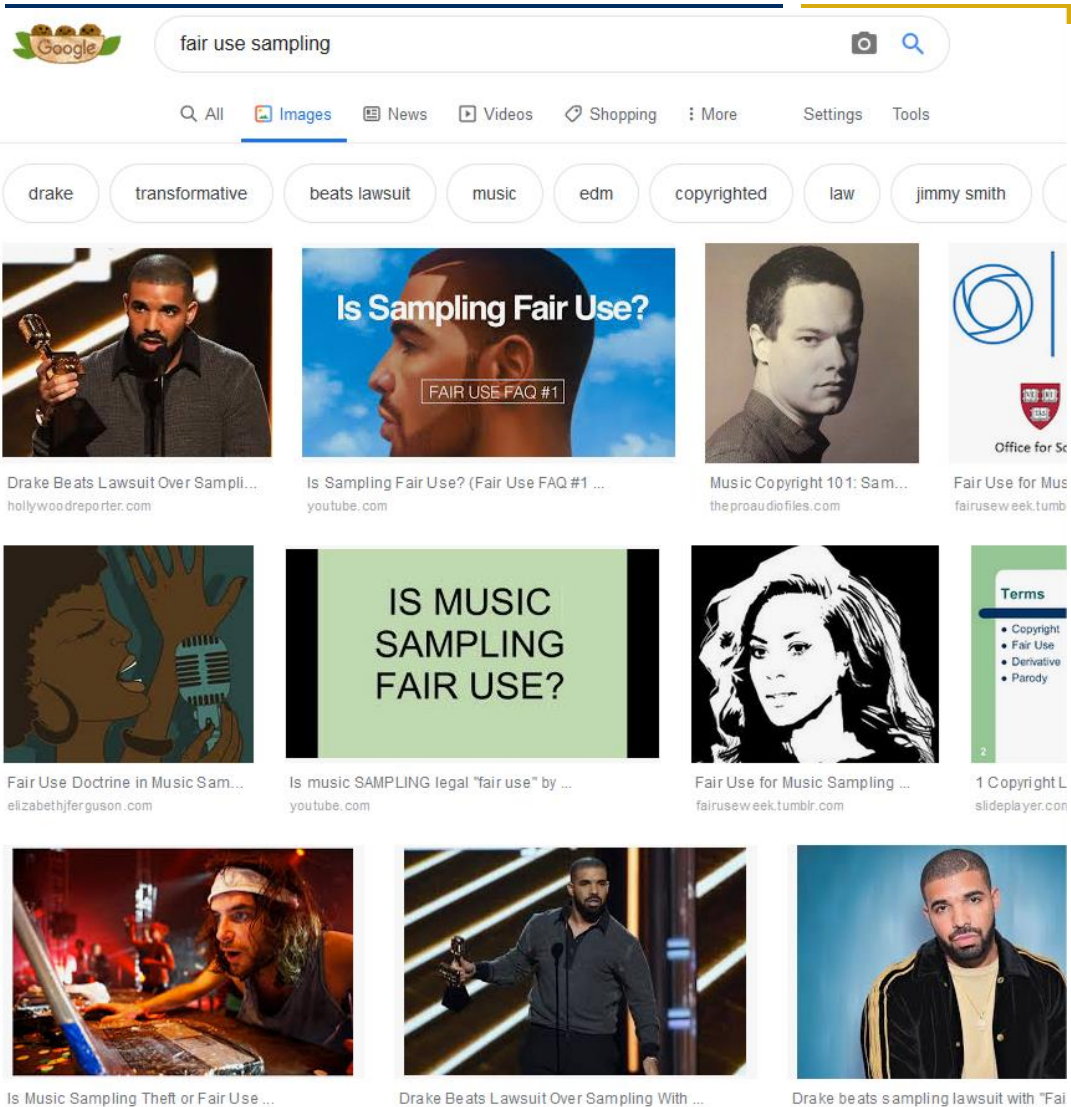
Pound Cake/Paris Morton Music 2 by Drake



Nothing was the same cover art from pitchfork.com



Jimmy Smith Off the Top cover from Genius.com



Use of the Jimmy Smith recording was ruled a fair use before going to trial by Judge William H. Pauley III in the Southern District of New York!

Google image search results for fair use sampling 6/18/2019



Original spoke word text:

"Jazz is the only real music that's gonna last," states the lyrics. "All that other bullshit is here today and gone tomorrow. But jazz was, is and always will be."

Line in Drake's track:

"Only real music's gonna last," states the sampled portion in Drake's track.
"All that other bullshit is here today and gone tomorrow."

Drake also re-arranged some of the spoken word text, presenting it in a different order than it appears on the original "Off the Top" record.

FACTS:

- The sample was included without any manipulation of the original recording other than stretching the final word tomorrow
- Some of the excerpts were re-arranged and presented in a different order
- Cash Money Records (Drake's label) obtained a license for the recording, but *not the underlying composition!*
- The copyright for the underlying composition was not registered until October 23, 2013 (one month after the Drake album was released)

RECLAIMING FAIR USE

“Was the use of copyrighted material for a different purpose, rather than just reuse for the original purpose?”

Was the amount of material taken appropriate to the purpose of the use?

Was it reasonable within the field or discipline it was made in?”

(p.135, Jaszi and Aufderheide, *Reclaiming Fair Use*, 2012)

DECISIONS FOR DRAKE: FAIR USE

“Ultimately, fair use analysis asks a simple question: Is this the type of use that furthers the essential goal of copyright law and should be excused from liability for infringement?”

Fourth Factor Analysis is tied to the first factor:

“The fourth factor is also, however, closely linked to the first, in the sense that “the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.” Authors Guild, 804 F.3d at 223; Castle Rock, 150 F.3d at 145”

START AT THE VERY BEGINNING: THE FIRST FACTOR

First Factor: Judge Pauley turns to Authors Guild and *Campbell v. Acuff-Rose*

“[t]he more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright’s goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives.” *Authors Guild*, 804 F.3d at 214.

“merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579.

DISMISSING DISMISSALS AS TRANSFORMATIVE FAIR USE

“Defendants’ use of JSR, by contrast, transforms Jimmy Smith’s brazen dismissal of all non-jazz music into a statement that “real music,” with no qualifiers, is “the only thing that’s gonna last.” Thus, Defendants’ “purposes in using [the original work] are sharply different from [the original artist’s] goals in creating it.” *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006). This is precisely the type of use that “adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579.”

FOURTH FACTOR!

“[Does] the copy bring to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.”

citing Authors Guild, 804 F.3d at 223; Cariou, 714 F.3d at 708–09



FINE PRINT IN THE DECISION


“Further, Plaintiffs never attempted to establish a market for licensed derivative uses of the JSR composition copyright until Defendants used the recording on the Album. See *Campbell*, 510 U.S. at 592 (“The market for potential derivative uses includes only those that the creators of original works would in general develop or license others to develop.”).”

TRANSFORMATIVE FAIR USE IS STILL A THING!

“These considerations, coupled with the finding that Defendants’ use is highly transformative, forestalls the conclusion that Defendants took such “sufficiently significant portions of the original as to make available a significantly competing substitute.” Authors Guild, 804 F.3d at 223. Thus, the fourth factor favors the Defendants.”

TO READ THE DECISION:

[Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737 - Dist. Court, SD New York 2017](#)

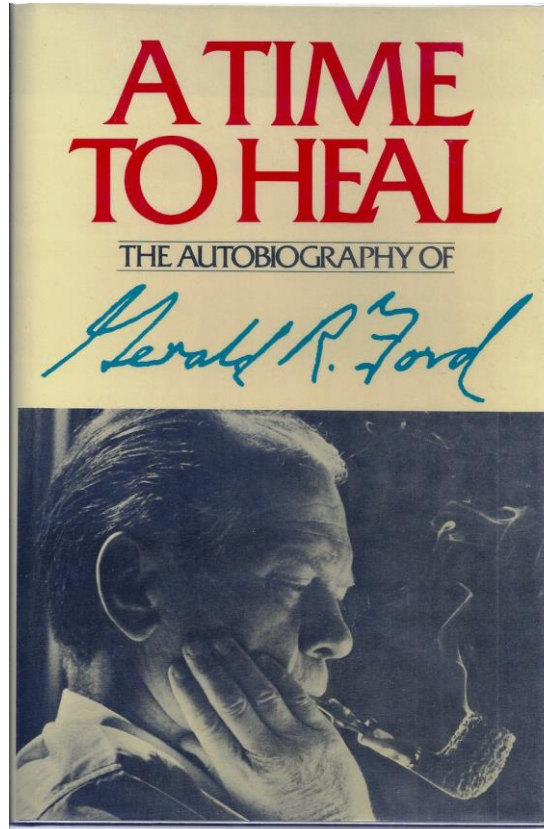


Harper & Row v. Nation
471 U.S. 539 (1985)

Laura Quliter

MARKET EFFECT “MOST IMPORTANT” FACTOR ?

The Nation ran an article scooping *Time*'s serialization of Ford's memoir, *A Time to Heal*; *Time* canceled its contract with Harper & Row; and (of course) Harper & Row sued *The Nation*. Lower court found infringement; 2nd Circuit reversed & found fair use.



Key facts

- Short excerpt (300-400 words of a full-length autobiography)
- *The Nation*'s short article embedded the quotes in a news article with commentary

MARKET EFFECT “MOST IMPORTANT” FACTOR ?

Supreme Court granted cert and reversed:

NO FAIR USE.

6-3; O'Connor maj. op.;
Brennan dissent



The New York Times Feb. 18, 1983

Why wasn't this fair use?

- Important news (did Ford bargain pardon for presidency?) embedded in analysis / commentary
- Short excerpt (300-400 words of a full-length autobiography)
- Non-fictional & the specific words are important

MARKET EFFECT “MOST IMPORTANT” FACTOR ?

Hot takes at the time:

- Heart of the work! (cited in some cases, important in “Under Pressure” case); Ford snark
- 4th factor most important! (used by many cases)
- Unpublished works can’t be fair use! (used by subsequent courts in *Salinger v. Random House*)



The New York Times Feb. 18, 1983

Long take:

- Scooping doesn't really create new works, and it harms original creator(s)
- HOW (purpose & character) you use authors' unpublished works is really important!

MORE READING / LISTENING:

- *Harper & Row v. Nation*, at Oyez (oral argument recording available, including Floyd Abrams, celebrated First Amendment attorney arguing for *The Nation*): <https://www.oyez.org/cases/1984/83-1632>



Cambridge University Press v. Becker / Patton
(various)

Laura Quilter

FAIR USE AND CLASSROOM USE : GSU

- GSU case: Copyright Clearance Center (licensing company) & publishers association recruited academic publisher plaintiffs Cambridge University Press, Oxford University Press, and Sage, to sue Georgia State University in **2008** for their electronic reserves.
- Important holdings early on: GSU is a state entity, and so cannot be sued for \$\$ damages, but only injunctive relief
- Key opinions:
 - May 11, 2012 - 1st trial court opinion on fair use: CUP v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. May 11, 2012), with remedies on Aug. 10, 2012
 - 11th Cir., Oct. 17, 2014 (Cambridge Univ. Press v. Patton)
 - 1st remand to N.D. Ga., April 14, 2016 (amendment of March 31), remedies July 29, 2016
 - 2nd 11th Cir. Oct. 19, 2018

FAIR USE AND CLASSROOM USE : GSU

- Personal advice (not legal advice): Do not read. The District Court opinions are long, and the 11th Circuit opinions are not very helpful. Okay, you probably have to read some of it, but do it at the beach.
- Key holdings by District Court, affirmed by 11th Circuit:
 - Nonprofit educational use is a plus on 1st factor
 - Lack of available license for relevant electronic excerpts is a plus on 4th
 - The “classroom guidelines” and the coursepack cases do not control
 - E-reserves (& course management uses) are not per se copyright infringement. Sorry, CCC.
- Also (11th Cir):
 - Analysis must be “holistic” & “qualitative” not “mechanical” & “quantitative”
 - Price of original is not a factor (hmmm)

MORE READING / LISTENING:

- Laura Burtle, GSU librarian, LibGuide to the case:
<https://libguides.law.gsu.edu/gsucopyrightcase>

Includes invaluable timeline (this case is now 11 years running), plus links to opinions, commentary and analysis.



Putting it all Together





Final thoughts.....



AND WITH THANKS TO...

- The ACRL staff
- Billie Peterson-Lugo, Associate Professor and Director of Digital Library Services and Systems, Baylor University Libraries (our session recorder)
- Carrie Russell, Director of Public Policy and Advocacy, the American Library Association
- The members of ALA's Copyright, Legislation, Education, and Advocacy Network

HOW DID WE DO?

- Please complete a session evaluation:
<https://www.surveymonkey.com/r/ACRLeval>
- QR Code is available on the bookmarks that were distributed

BE SURE TO ATTEND

Fear the Law No Longer: Fun, Fabulous, and Flexible
Fair Use!

Monday, June 24

4:00 PM - 5:00 PM

Location: Washington Convention Center, 143A