

THE MAGAZINE OF THE LOS ANGELES COUNTY BAR ASSOCIATION

32nd Annual  
ENTERTAINMENT  
LAW ISSUE

# Los Angeles Lawyer

MAY 2016 / \$5

**LIFE  
RIGHTS**

**page 24**

**COPYRIGHT  
of ARTWORKS**

**page 30**

.....  
**On Direct:  
Janna Sidley**

**page 8**

**IP Rights in  
Bankruptcy**

**page 11**

## Fairly Simple

Los Angeles lawyers  
Michael C. Donaldson and  
Lisa A. Callif propose a three-question  
test for fair use in nonfiction

**page 16**

---

**MCLE ARTICLE AND SELF-ASSESSMENT TEST**

By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for credit, please follow the instructions on the test answer sheet on page 19.

---



2016 ENTERTAINMENT LAW ISSUE

by **MICHAEL C. DONALDSON** and **LISA A. CALLIF**

# FAIRLY SIMPLE

A three-question test may be used to gauge fair use in nonfiction

**FAIR USE** has existed as a court-created concept since 1841, and it has been memorialized in the U.S. Copyright Act since 1978. The four nonexclusive factors listed in the act,<sup>1</sup> however, have confounded many, which is understandable because the factors are designed to guide the courts in a myriad of circumstances ranging from mass digitization of every book on the planet<sup>2</sup> to using materials in films<sup>3</sup> or to decoding garage door openers.<sup>4</sup> This general test for fair use can be difficult to apply in specific cases.

However, academics have opined that examination of a subset of uses could produce a more predictable fair use test for that subset.<sup>5</sup> A review of every published opinion on fair use in nonfiction works produces a pattern that can be formulated into a simple three-question test to determine whether something is fair use in a nonfiction context. The following three questions define a safe

harbor for fair use in nonfiction works:

- 1) Does the asset illustrate or support a point that the creator is trying to make in the new work?
- 2) Does the creator of the new work use only as much of the asset as is reasonably appropriate to illustrate or support the point being made?
- 3) Is the connection between the point being made and the asset being used to illustrate or support the point clear to the average viewer?

The word “illustrate” in the first question is important because it obliges users of copyrighted material—in particular, nonfiction

---

**Michael C. Donaldson and Lisa A. Callif are entertainment attorneys and cofounders of the firm Donaldson + Callif in Beverly Hills. Their firm conducted the clearance work for the nonfiction films *EXPULSED* and *Catfish* and the fictional film *Once*.**

MICHAEL CALAWAY



filmmakers—to have a justifiable purpose in using the copyrighted asset. The asset must be used in a manner that demonstrates the commentary, critique, or argument that the filmmaker intends to make. The second question specifically ties length to purpose and ignores whether the amount of the copyrighted work used is very small or 100 percent of the asset. The relevant inquiry is whether the defendants only used what was reasonably appropriate to illustrate the point they were making in the new work. The phrase “reasonably appropriate” was used by Judge Pierre Leval in *Authors Guild v. Google*, which allowed copying of 100 percent of books in order to create a word-and-phrase search of all existing books.<sup>6</sup> He opined that “complete[ly] unchanged copying has repeatedly been found justified as fair use when the copying was *reasonably appropriate* to achieve the copier’s transformative purpose and was done in such a manner that it did not offer a competing substitute for the original.”<sup>7</sup> A filmmaker considering use of copyrighted material should make an honest assessment of when the illustration function is fulfilled. The safe harbor is not available for use that goes beyond illustration of a point and instead extends into the realm of viewing pleasure or, as the courts often say, “entertainment value.”<sup>8</sup>

In the third question, the “average viewer” implicates the intended audience for the new work. Legitimate journalistic effort is sometimes needed to make clear the connection between the material being used and the point being illustrated. If the answers to the three questions are ambiguous or only slightly negative, the test does not necessarily rule out fair use. Rather, it just means that the use could fall outside the safe harbor but still within the larger fair use doctrine, depending on how far from a firm yes the answer falls. A brief summary of case law involving nonfiction works demonstrates the safe harbor approach and how it applies in practice. Although the court opinions use the traditional nonexclusive four fair use factors, the three-question safe harbor test may be used to reach the same conclusion in terms that may be easier to apply to new situations.

In 2008, the feature documentary titled *EXPULSED: No Intelligence Allowed* was released in the theaters. At one point in the film, a person named Dr. Myers explains that science will push society “to that point where religion has taken that appropriate place, as [a] side dish rather than the main course.” Narrator Ben Stein intones, “Dr. Myers would like you to think he’s being original, but he’s merely lifting a page out of John Lennon’s songbook.” Then, for 15 seconds, the audience hears John Lennon singing his famous song “Imagine”: “Nothing to kill or die

for/And no religion too.” The clip of the song is accompanied by the lyrics on screen in subtitles and stock footage of totalitarian Russia. The music was unlicensed. Yoko Ono sued for copyright infringement.<sup>9</sup> The answer to the first question is clear: the song is being used to illustrate the point being made. Second, the filmmaker used only two lines from the song to demonstrate the point. Finally, the connection between the point being made and the use of “Imagine” was obvious. The trial court ruled in favor of the defense, finding fair use.<sup>10</sup>

In 1997, the Discovery Channel aired a program titled *Aliens Invade Hollywood*. The program explored the popular fascination with the idea of alien visitations and government cover-ups as expressed in Hollywood films. It used, among other items, three clips from a trailer for the film *Invasion of the Saucer Men* totaling 48 seconds. Susan Hofheinz held the copyright to the trailer, and she brought an infringement action against Discovery.<sup>11</sup> Discovery argued a fair use defense. The court not only affirmed Discovery’s position on fair use but also used language in the opinion that affirms the existence of a safe harbor for nonfiction works, explaining that “Discovery used the clips for various purposes, including: (1) to illustrate the theme of the government cover-up; (2) to demonstrate how, and with what special effects technology, aliens have been represented in film; and (3) to provide contrasts between the early science fiction films like ‘Saucer Men’ and more recent films.”<sup>12</sup> Turning to the second question of the safe harbor test, the court concluded that “the fleeting clips betray little of ‘Saucer Men’s’ plot, only the fact that aliens visited and the government tried to cover up the evidence.”<sup>13</sup> By focusing on the film’s critical interest instead of focusing on the 48 seconds of use, the court clearly implies that Discovery did not use more from the film than was reasonably appropriate to illustrate the point. Finally, the court affirmatively provided language in its statutory analysis that comports with the safe harbor approach, explaining that the clips were used for the “transformative purpose of enriching the commentary on the alien visitation genre” and that the clips enabled the viewer to understand and appreciate the commentary on the genre.<sup>14</sup>

*SOFA Entertainment, Inc. v. Dodger Productions, Inc.*, confirms that the safe harbor approach may be applied to any nonfiction medium, including scripted works such as stage plays or musicals. *SOFA* involves the wildly successful Broadway musical *Jersey Boys*, which tells a condensed and occasionally fictionalized version of the rise of the 1960s singing group The Four Seasons. At one point, a seven-second clip plays on a

large screen showing Ed Sullivan introducing The Four Seasons on national television.<sup>15</sup> *SOFA* owns the copyright to *The Ed Sullivan Show* and is in the business of licensing clips. *SOFA* sued Dodger Productions for copyright infringement, and the production company mounted a successful fair use defense. The court explicitly acknowledged that “the fact that *Jersey Boys* is a commercial production is of little significance.”<sup>16</sup>

The language in the opinion affirms the utility of analyzing nonfiction works using the three questions listed above that define a safe harbor. As the court observed, “Dodger references the Four Seasons’ performance on...*The Ed Sullivan Show* to mark an important moment in the band’s career. At that point in rock & roll history, many American bands were pushed into obscurity by the weight of the ‘British Invasion,’ which was kicked off by the Beatles’ performance on *The Ed Sullivan Show*. The Four Seasons, however, thrived.”<sup>17</sup> This observation addresses the first question affirmatively. The second question is also answered affirmatively, as “Sullivan simply identifies the group that is about to perform.”<sup>18</sup> The clip does not feature any of the Four Seasons’ actual televised performance—clearly a reasonably appropriate amount of use. As for the final question, the court noted that the clip strongly illustrates the importance of “Being selected by Ed Sullivan to perform on his show [as] evidence of the band’s enduring prominence in American music.”<sup>19</sup>

In 2013, the Weinstein Company released *Lovelace*, a scripted biopic about Linda Lovelace’s rise to cultural icon status through her role as the star of the famous pornographic film *Deep Throat*. *Lovelace* contains several re-creations of scenes from *Deep Throat* to tell the story of Lovelace’s formative years of her film career. Arrow Productions, which owns the copyright to the porn film, sued the Weinstein Company for copyright infringement. The court held that the use of three re-creations was a fair use.<sup>20</sup> The three-question safe harbor test produces the same result that the court found when it applied the four statutory factors. The re-creations were included in the film in order to illustrate the filmmakers’ point that Lovelace was an “unsuspecting amateur, anxious about her role in the film, and ultimately, susceptible to the influence of her domineering and manipulative husband.”<sup>21</sup> The re-creations were deemed to be fair use because “defendants did not copy any more than necessary to achieve its creative purposes,” and the average audience understands the connection between the film’s message and the re-creations.<sup>22</sup>

A final example in this category involves the 2010 Sundance hit *Catfish*. The film was listed by the festival as a documentary. Later,

# MCLE Test No. 257

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at <http://www.lacba.org/mcleselftests>.

1. Scholars have indicated that patterns can be found in subgroups of fair use cases to allow for more predictability in outcomes.  
True.  
False.
2. For nonfiction works, an affirmative answer to the three questions posed by the authors will predict fair use.  
True.  
False.
3. The safe harbor approach may not be applied to nonfiction films that include fictional elements.  
True.  
False.
4. An example of fair use is the incorporation of a copyright-protected item into the background of a film's scene in an incidental and fortuitous manner.  
True.  
False.
5. A commercial use is a dispositive factor in the court's fair use analysis.  
True.  
False.
6. One may never use 100 percent of an unlicensed asset pursuant to fair use.  
True.  
False.
7. Material used primarily for its entertainment value is permissible pursuant to fair use.  
True.  
False.
8. Courts have applied the fair use doctrine to fictional films that are based on realistic settings.  
True.  
False.
9. An unlicensed item may appear blatantly and prominently in a film but still be deemed a de minimis use.  
True.  
False.
10. If a filmmaker does not attempt to seek permission or a license before using a creator's copyrighted work, the court will find that the filmmaker acted in bad faith.  
True.  
False.
11. In *Gottlieb v. Paramount*, the court found that a film's inclusion of a pinball machine in the background of a three-and-a-half-minute scene was a de minimis use.  
True.  
False.
12. The statutory fair use factors listed in the 1976 Copyright Act are exclusive and exhaustive.  
True.  
False.
13. The fair use doctrine may not be applied to cases involving music, books, or software.  
True.  
False.
14. If a filmmaker looks for but is unable to locate the copyright owner of a copyright-protected asset, that asset is:  
A. An abandoned work.  
B. Public domain.  
C. An orphan work.  
D. Discarded property.
15. In *Amsinck v. Columbia*, the court found that Columbia did not "copy" the plaintiff's three-dimensional artwork when it used a mobile bearing the artwork because the mobile was different in nature from the plaintiff's copyrighted design.  
True.  
False.
16. The appellate court in *Ringgold v. BET* affirmed the lower court's holding that the defendant's use of the poster depicting the quilt was de minimis.  
True.  
False.
17. The first safe harbor question asks whether the asset does which of the following with regards to the point that the creator is trying to make in the new work?  
A. Distinguishes.  
B. Isolates.  
C. Presents counterarguments.  
D. Illustrates or supports.
18. The second safe harbor question uses the following language related to the permissible amount of the unlicensed asset used in the new work:  
A. Necessary.  
B. Reasonably appropriate.  
C. Reasonably requested.  
D. Up to 50 percent.
19. The clip of John Lennon's song "Imagine" as used in the documentary *EXPULSED* was not a fair use.  
True.  
False.
20. Judge Pierre Leval set the proper standard for determining the amount of an item that can be used pursuant to fair use as "reasonably appropriate" in *Authors Guild v. Google*.  
True.  
False.



FAIRLY SIMPLE

Name \_\_\_\_\_

Law Firm/Organization \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

Phone \_\_\_\_\_

State Bar # \_\_\_\_\_

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the \$20 testing fee (\$25 for non-LACBA members) to:

Los Angeles Lawyer  
MCLE Test  
P.O. Box 55020  
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
5. For future reference, please retain the MCLE test materials returned to you.

ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.  True  False
2.  True  False
3.  True  False
4.  True  False
5.  True  False
6.  True  False
7.  True  False
8.  True  False
9.  True  False
10.  True  False
11.  True  False
12.  True  False
13.  True  False
14.  A  B  C  D
15.  True  False
16.  True  False
17.  A  B  C  D
18.  A  B  C  D
19.  True  False
20.  True  False

it was categorized by the filmmakers as a “reality thriller” filmed in a documentary style. Plaintiff Threshold Media filed a copyright infringement action against defendant Relativity and the filmmakers for the unauthorized use of almost 49 percent of its song. The film’s protagonist, a young man looking for love on the internet, realizes his female correspondent is a fake by comparing a song she sent to him as something she was singing against other renditions of the same song found on the internet. Although the film has some fictional elements, the court still applied the fair use doctrine to the song “All Downhill from Here.”<sup>23</sup> The court reasoned that “how Defendants chose to label their film is not dispositive as to how it should be characterized.”<sup>24</sup> The court asserted that filmmakers must not feel obliged to alter the genre of their films to fall under the ambit of the fair use doctrine because “such alternatives artificially impinge upon the creative process” and “would force the filmmakers to sacrifice the film’s verisimilitude, its drama, or both.”<sup>25</sup> Thus, the fair use doctrine may be applied to films despite the film’s inclusion of fictionalized elements.

### Distractions

The three-question safe harbor approach also avoids certain distractions that have muddled the craftsmanship of some decisions and the utility of the statute for the practitioner. The language of the first statutory factor includes “whether such use is of a commercial nature or is for nonprofit educational purposes.”<sup>26</sup> However, commerciality did not affect the outcome in any case found in which the defendant relied on fair use in creating a nonfiction work.<sup>27</sup> Even when the use is purely for advertising or promotional purposes, the commercial component alone will not keep a court from finding fair use if it is otherwise appropriate to do so. In *L.A. News Service v. CBS*,<sup>28</sup> for example, the defendant, Court TV, used a few seconds of the plaintiff’s footage of the beating of Reginald Denny in on-air teasers promoting its coverage of the sentencing phase for the two men who were depicted assaulting Denny in the footage. LANS had already won a lawsuit against KTLA<sup>29</sup> and another against Reuters<sup>30</sup> for using that footage without permission. LANS was confident when it filed an infringement action against CBS, the owner of Court TV, but LANS lost. The court noted that Court TV’s commercial use is not dispositive, but rather is just one element of the fair use analysis.<sup>31</sup> After analyzing the remaining three factors, the court confirmed that the use was clearly fair use.<sup>32</sup> The three-question safe harbor approach reaches the same result.

Since the fair use doctrine is seen as a rule of reason, courts have long expressed

the notion that “fair use presupposes ‘good faith and fair dealing’”<sup>33</sup> and have discussed a defendant’s bad faith as a factor militating against a finding of fair use.<sup>34</sup> However, a deep analysis of pertinent case law reflects that this consideration is more of a distraction than a factor in the courts’ decisions. In *Harper & Row v. Nation Enterprises*, the U.S. Supreme Court held that the defendant’s knowing use of a purloined manuscript militates against a fair use defense.<sup>35</sup> Harper & Row owned the copyrights to President Gerald Ford’s memoirs and negotiated an exclusive prepublication excerpt licensing agreement with *Time* magazine. Before the *Time* article’s scheduled release, *The Nation* illicitly obtained and published the most interesting and most anticipated points by way of excerpts from Ford’s unreleased manuscript. The court rejected *The Nation*’s ill-conceived fair use defense, reasoning that “*The Nation*’s use had not merely the incidental effect, but the intended purpose, of supplanting the copyright holder’s commercially valuable right of first publication.”<sup>36</sup> While the defendant’s actions could not have helped, the case would have turned out exactly the same way if the court had relied solely on the four statutory factors or, for that matter, solely on the three questions—in other words, the outcome in this case would have been exactly the same whether the court had noted *The Nation*’s bad faith or not. The Supreme Court took the contrary stance on bad faith in *Campbell v. Acuff-Rose* in stating that “even if good faith were central to fair use, [defendants’] actions do not necessarily suggest they believed their version was not fair use.”<sup>37</sup> In spite of this precedent, some subsequent cases have continued to cite *Harper & Row* as requiring courts to consider the bad faith of the defendant when going through the fair use analysis.<sup>38</sup>

Plaintiffs commonly claim bad faith when defendants had not attempted to seek permission or a license before using the copyrighted work. Courts have rejected this proposition based on the language in *Campbell* that “[i]f the use is otherwise fair, then no permission need be sought or granted.”<sup>39</sup> The court in *Blanch v. Koons* went even further, asserting that “we are aware of no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith.”<sup>40</sup>

Some may opine that once posted on the Internet, content is available for use for anyone who happens upon it. That is not the law, and it certainly does not place the asset into the public domain or make the use of it necessarily a fair use. In the event that a filmmaker has diligently attempted to find a copyright owner in order to properly license a work but to no avail, the asset is called an orphan work, which has nothing to do with

fair use. The standard tests for infringement and fair use must still be applied. Fair use analysis should be thought of as a spectrum of possibilities, with some fair uses being clearly in the safe harbor and other uses not so clearly in the safe harbor, but fair use nonetheless. Of course, there are many uses that are so far from the safe harbor as to fall on the “not fair use” end of the spectrum.

### Fictional Films Based on Facts

Many films use real-world events in their scripted stories. Almost any war movie, for example, has a specific war as a factual starting point, and other films are very specific to a city, person, or event. These films can be thought of as hybrids because they involve real-world events that are used as a launching pads to tell fictional stories. The three-question safe harbor approach may be used in evaluating unlicensed materials used in the truthful portion of the picture.

Many independent films have relied on this logic, received errors and omissions insurance coverage, and been commercially released without a claim. Sony Pictures, however, was not so lucky after it used a famous quote from William Faulkner’s *Requiem for a Nun* in a movie titled *Midnight in Paris*.<sup>41</sup> The movie, which mixes fact with fiction in its portrayal of great artists and literary figures in Paris in the 1920s, was directed by Woody Allen. Faulkner’s literary rights agency sued and lost.<sup>42</sup> In the movie, the male lead, Gil, accuses his fiancée of carrying on an affair with a mutual friend. When his skeptical fiancée asks Gil where he might have gotten such an idea, Gil responds that he got the idea from “Hemingway, Fitzgerald, Gertrude Stein and Salvador Dali,” a notion that his fiancée “ridicules because they are all dead.” In response, Gil states, “The past is not dead. Actually, it’s not even past. You know who said that? Faulkner, and he was right. And I met him too. I ran into him at a dinner party.” The court found that the use of Faulkner’s famous phrase supported the movie’s point that Gil did, in fact, have a conversation with deceased authors and artists and also that the past is not dead because Gil can transport to the 1920s during the film’s 2011 setting.<sup>43</sup> Thus, question one is answered in the affirmative. The court found that the amount of the copyrighted material that filmmakers used was justified, as it was of minuscule quantitative importance.<sup>44</sup> This case confirms that the courts are willing to allow fair use in fictional films that are based on realistic settings. The three questions apply well to the films’ factual portions.

### Natural Settings and Soundstages

Completely fictional films shot in natural settings can be protected by fair use as far

as their natural settings are concerned. A 1976 House Committee Report that was written to educate members of Congress about the 1976 Copyright Act stated that one example of fair use is the incorporation of a copyright-protected item in a manner that is “incidental and fortuitous.”<sup>45</sup> To date, no court has defined what an “incidental” or a “fortuitous” use means in the context of fair use, so the plain language meaning of the two words are the only guide. “Incidental” means “accompanying but not a major part of something.”<sup>46</sup> “Fortuitous” is defined as “happening by chance.”<sup>47</sup> Applying this logic to film, the incidental and fortuitous inclusion of background settings in films fall within the doctrine of fair use. Shooting a scene on any commercial street in America could record material in the background that is under copyright. For example, the 2007 Oscar-winning musical film, *Once*, illuminates the point that fictional films with natural settings can be protected by fair use. The film’s protagonist plays a musician that performs in the streets and neighborhoods of Dublin. The film was largely shot on the public streets of Ireland, so many copyrighted images and murals incidentally appear in the background. Still, the film’s producers successfully distributed the film without any subsequent infringement suits.

Fictional films that are shot on a soundstage use a variety of decorative items, such as paintings or posters hung on the walls. These items may fall under fair use protection. Not many cases on this issue have been decided since 1976, but all federal trial court cases that were decided found fair use. The 1994 decision in *Amsinck v. Columbia Pictures Industries*,<sup>48</sup> for example, involves a graphic artist, Carola Amsinck, whose pastel colored teddy bear artwork was part of a baby crib mobile. Amsinck sued Columbia Pictures for copyright infringement because her artwork in the mobile appeared in Columbia’s film *Immediate Family*. The *Amsinck* court found that Columbia did not mechanically copy the artwork and thus did not infringe upon the artwork’s copyright, because the film’s display of the mobile was different from Amsinck’s copyrighted design.<sup>49</sup> The court further reasoned that the mobile barely visible, appearing for only seconds at a time, and was “fleeting and impermanent.”<sup>50</sup> The court hypothesized that even if there was an infringement by virtue of copying the art, the defendants would be protected by fair use.<sup>51</sup> The court based its fair use decision on the analysis of the four statutory factors, focusing primarily on the minimal effect that Columbia’s use has on the potential market for the copyrighted artwork.<sup>52</sup>

*Jackson v. Warner Bros.*<sup>53</sup> involves the film *Made in America*, a story about a single

mother in whose home artwork hangs. The artwork’s creator, Earl Jackson, sued Warner Bros. The art can be seen in the background of a scene for no more than 60 seconds. In its 1997 decision, the court found that Warner Bros. was protected by fair use for a number of reasons: the paintings were only briefly displayed and never became the focus of the scene or the film; *Made in America* did not use the paintings in a financially exploitive way; and the film did not adversely affect the painting’s potential markets.<sup>54</sup> Although Jackson would not have agreed to license the paintings to Warner Bros. because he considered the film to be culturally exploitive, the court found that he did not suffer demonstrable harm from the paintings’ use.<sup>55</sup>

A 1997 case, *Ringgold v. Black Entertainment Television*, involved a decorative quilt called by artist Faith Ringgold. A poster of the quilt appears in the final scene of an episode of BET’s sitcom *Roc*. The scene takes place in a church hall, with the poster hung on the back wall of the set. Because the poster of the quilt was never shot in the its entirety and not always in focus, the federal trial court in New York said the use of the quilt as set dressing was de minimis and fair use.<sup>56</sup> *Ringgold* went to the appellate level, where it was reversed after a long and detailed discussion concerning the de minimis doctrine. The appellate court reversed the lower court’s holding, finding that the 26 seconds in which the poster was used was not de minimis.<sup>57</sup>

In contrast to the *Ringgold* decision, however, the same appellate court reached the opposite result in considering 10 unlicensed photographs used for less than 36 seconds in a short scene in the film *Seven*.<sup>58</sup> In the majority of the shots, actors or furniture obstructed the photographs, and the photos were never in focus. The court embraced the de minimis argument that the “photographs as used in the movie [were] not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs, much less the style used in creating them.”<sup>59</sup> The court mentioned the factors it considered to determine de minimis use: the copyrighted work may appear fleetingly, be obscured, severely out of focus, and virtually unidentifiable to be deemed de minimis.<sup>60</sup> This de minimis rule may be considered in the context of nonfiction films as well.

Another example of de minimis use appears in the 2008 decision *Gottlieb Development LLC v. Paramount Pictures Corporation*. The case concerns Paramount’s film *What Women Want* and its inclusion of a pinball machine—the Silver Slugger—in the background of a three-and-a-half-minute scene.<sup>61</sup> The Silver Slugger was used as set dressing and only appears for seconds at a time, always in the background, and always

obscured to some extent by an actor or other set furniture. The court in *Gottlieb* ultimately found that the use of the Silver Slugger was de minimis because it appeared sporadically in the short scene, it was never in the focus or foreground of the scene or mentioned by the film’s characters, it played no role in the plot, and its designs were never fully visible or discernable to the “average lay observer.”<sup>62</sup> Although the Silver Slugger was chosen by production staff “because it fit in with the ‘sporty’ theme of the background of the scene,”<sup>63</sup> it was filmed in such a manner and appears so fleetingly that it was de minimis.

While the de minimis test and the statutory four-prong test are certainly to be considered in evaluating fair use, in the context of non-fiction filmmaking, the simple three-question test may also be applied to predict whether the use of copyright-protected materials falls within the doctrine of fair use. The three-question test may be used whether the non-fiction film is scripted or not scripted. In other words, the nonfiction film can be a live-action feature film or a documentary. Use of the three questions can clear away the complications of the four-question statutory test. Fictional films using facts as a starting place, for example, may be protected by the safe harbor if there is an affirmative answer to the three questions with regard to the factual portion of the film. Fictional films shot in realistic settings may use unlicensed materials in an incidental and fortuitous fashion. Typically this means that the material is seen fleetingly in the background of a shot. When a fictional film is shot on soundstage without a license, however, filmmakers are best advised to use a de minimis approach with regard to paintings, posters, and photographs. ■

<sup>1</sup> See 17 U.S.C. §107.

<sup>2</sup> See, e.g., *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 95 (2d Cir. 2014).

<sup>3</sup> See, e.g., *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D. N.Y. 2008).

<sup>4</sup> See, e.g., *The Chamberlain Group v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

<sup>5</sup> See, e.g., Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2537 (2009).

<sup>6</sup> *Authors Guild v. Google*, 804 F.3d 202 (2d Cir. 2015).

<sup>7</sup> *Id.* at 221 (emphasis added).

<sup>8</sup> See *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003).

<sup>9</sup> *Lennon*, 556 F. Supp. 2d at 316.

<sup>10</sup> *Id.*

<sup>11</sup> *Hofheinz v. Discovery Commc’ns*, No. 00 civ. 3802 (HB), 2001 U.S. Dist. LEXIS 14752, at \*1 (S.D. N.Y. Sept. 10, 2001).

<sup>12</sup> *Id.* at \*4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*6.

<sup>15</sup> *SOFA Entm’t, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273 (9th Cir. 2013).

<sup>16</sup> *Id.* at 1278-79.

## LAW FIRM FOR SALE

### Northern California Personal Injury Practice

Established firm with stable gross revenue of \$1.75 million/year. Multiple offices in Northern California and Central Coast. Experienced staff and marketing make this a turn-key opportunity.

For more information, call or e-mail:  
800.837.5880  
forsale@lawbizregistry.com

## BUSINESS OPPORTUNITY

Want to purchase  
minerals and other  
oil/gas interests.

Send details to:  
P.O. Box 13557  
Denver, CO 80201

## COURT QUALIFIED - AUTOMOBILE EXPERT WITNESS



### Jack G. Cohen 30 Years Experience in the Automobile Business

- ◆ Consulting with attorneys, dealers, consumers, insurance companies
- ◆ Industry standards
- ◆ New and used auto transactions
- ◆ Dealer fraud
- ◆ Vehicle sales and leasing
- ◆ Dealership practices
- ◆ Auto warranty issues
- ◆ Lender-dealer relationships
- ◆ Plaintiff and Defense
- ◆ Appraisals
- ◆ Finance documentation and analysis
- ◆ Wholesale and Retail
- ◆ Diminished value cases

OFFICE 747.222.1550 | CELL 818.445.5500  
jack@coheninv.com

# ERISA LAWYERS

- Long Term Disability
- Life Insurance Claims
- Health and Eating Disorder
- Long Term Care

*We handle claim denials under both ERISA  
and California Bad Faith laws.*

- ✓ State and Federal Courts throughout California
- ✓ More than 20 years experience
- ✓ Settlements, trials and appeals



818.886.2525

[www.kantorlaw.net](http://www.kantorlaw.net)

Referral fees as allowed by State Bar of California

Dedicated to Helping People Receive the Insurance Benefits to Which They Are Entitled.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1279.

<sup>19</sup> *Id.* at 1278.

<sup>20</sup> Arrow Prods., Ltd. v. Weinstein Co. LLC, 44 F. Supp. 3d 359 (S.D. N.Y. 2014).

<sup>21</sup> *Id.* at 368-69.

<sup>22</sup> *Id.* at 371.

<sup>23</sup> Threshold Media Corp. v. Relativity Media LLC, Case 2:10-cv-09318 (C.D. Cal. Mar. 19, 2013).

<sup>24</sup> *Id.*; see also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (“2 Live Crew need not label their whole album, or even this song, a parody in order to claim fair use protection.”).

<sup>25</sup> Threshold, Case 2:10-cv-09318, at 1889.

<sup>26</sup> See 17 U.S.C. §107.

<sup>27</sup> See, e.g., Castle Rock Entm’t, Inc. v. Carol Publ’g 150 F. 3d. 132. 141 (“No man but a blockhead ever wrote, except for money.”).

<sup>28</sup> L.A. News Serv. v. CBS, 305 F. 3d 924 (9th Cir. 2002).

<sup>29</sup> L.A. News Serv. v. KCAL-TV Channel 9, 108 F. 3d 1119 (9th Cir. 1997).

<sup>30</sup> L.A. News Serv. v. Reuters Television Int’l, Ltd., 149 F. 3d 987 (9th Cir. 1998).

<sup>31</sup> L.A. News Serv., 305 F. 3d at 939.

<sup>32</sup> *Id.* at 942.

<sup>33</sup> Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D. N.Y. 1968) (quoting Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832 (1968)).

<sup>34</sup> Rogers v. Koons, 960 F. 2d 301, 309 (2d Cir. 1992), cert. denied, 506 U.S. 934 (1992).

<sup>35</sup> Harper & Row v. Nation Enters., 471 U.S. 539 (1985).

<sup>36</sup> *Id.* at 562-63 (see also Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686, 690 (S.D. N.Y. 1974), *aff’d*, 500 F. 2d 1221 (2d Cir. 1974)).

<sup>37</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994).

<sup>38</sup> See, e.g., NXIVM Corp. v. Ross Inst., 364 F. 3d 471, 478 (2d Cir. 2004); Bouchat v. Baltimore Ravens, Ltd. P’ship, 619 F. 3d 301, 311 (4th Cir. 2010).

<sup>39</sup> Campbell, 510 U.S. at n.18.

<sup>40</sup> Blanch v. Koons, 467 F. 3d 244, 256 (2d Cir. 2006).

<sup>41</sup> Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc., 953 F. Supp. 2d 701 (N.D. Miss. 2013).

<sup>42</sup> *Id.* at 704-05.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 710.

<sup>45</sup> H.R. REP. NO. 94-1476 (1976).

<sup>46</sup> Oxford Dictionaries, at <http://www.oxforddictionaries.com> (last visited Feb. 1, 2016).

<sup>47</sup> *Id.*

<sup>48</sup> Amsinck v. Columbia Pictures Indus., Inc., 862 F. Supp. 1044 (S.D. N.Y. 1994).

<sup>49</sup> *Id.* at 1048.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1050.

<sup>52</sup> *Id.* at 1048.

<sup>53</sup> Jackson v. Warner Bros., 993 F. Supp. 585 (E.D. Mich. 1997).

<sup>54</sup> *Id.* at 588-590.

<sup>55</sup> *Id.* at 590.

<sup>56</sup> Ringgold v. Black Entm’t T.V. Inc., No. 96 Civ. 0290, 1996 WL 535547 (S.D. N.Y. Sept. 19, 1996).

<sup>57</sup> Ringgold v. Black Entm’t Television, 126 F. 3d 70, 77 (2d Cir. 1997).

<sup>58</sup> Sandoval v. New Line Cinema Corp., 147 F. 3d 215, 217 (2d Cir. 1998).

<sup>59</sup> *Id.* at 218.

<sup>60</sup> *Id.* at 217.

<sup>61</sup> Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d 625 (S.D. N.Y. 2008).

<sup>62</sup> *Id.* at 633.

<sup>63</sup> *Id.* at 634.