PROF: The differences between direct, vicarious and contributory liability, Section 512 in related matters.

Alright, now let's move on to the next question, which is criminal liability. You read some material on that. And the basic lessons that I want you to take from the material are the following. First, notice that federal copyright law does not impose criminal liability easily as ordinary laws of tangible property do. And I think that that's a good thing. Remember that guy in *Les Miserablès* who's pursued for stealing a loaf of bread. Stealing in the sense of copying one song would not make you liable for prosecution in the way described, if you didn't do it for financial ends.

All the things that are going on here? Well, you read the case which said you shouldn't use the general wire fraud, the general federal statutes for crimes involving the taking of a copyright because Congress was very careful to be modest in the way it described copyright crimes. And that's useful for you not only because if, you're ever in the situation where you have got a copyright infringer who's accused of wire fraud, you want to be able to show them the cases that say, "Hey, we can get rid of this lawsuit, maybe, or this prosecution."

But it's also interesting that some courts really are quite aware of the fine lines and distinctions within the copyright statute. The copyright is a different kind of property, it should be treated with a little less aggressiveness. But I want to mention one little irony. It's possible that other kinds of intellectual property that

are less carefully drawn, like misappropriation, might be sueable (sic) under a federal wire statute.

There's a case called *Carpenter v. The United States* about a reporter who traded on the information that he gathered for the Wall Street Journal, and traded on it like the day before he published it, and he was successfully indicted under a federal wire fraud statute. It's interesting that, had he been trading on something copyrightable, rather than on mere facts, conceivably, the prosecutor would have been relegated only to the copyright prosecution statute.

Alright, then, we're going then into "fair use." But any questions about the material just mentioned? [pause] Okay. The row we're in, I think we haven't quite finished with Luis. [in response to students] That's right, kind of you. Can you explain to me what fair use is?

LUIS: As I understand it, fair use is an exception to the exclusive rights to receiving(?) copyright?

PROF: Okay, can you tell me the structure of it within the statute?

LUIS: I'm not sure I understand the question.

PROF: Well, when you say, "It's an exception," is it mentioned separately? Is there any reference to it in Section 106 or 106(A)? How does the structure of the statute incorporate this thing? We know it used to be strictly a judicial doctrine,

but with the current statute, it's going to roll. And I just want you to tell us more about what that is.

LUIS: Where exclusive rights granted by one ...(inaudible) fair use in a period of other--

PROF: Okay, so in a way, the way Section 106 is laid out, the very first sentence says, "Subject to the accepted--" What page are we on for 106?

STUDENT: Page 18 ...(inaudible).

PROF: Alright. So the very first clause makes it clear that the grant of rights is like a swiss cheese, it's got holes in it. The grants of right does not include fair use. Some people, incidentally, use this structure to argue that fair use should not be something on which there is an affirmative defense, where the burden is on the defendant. Rather, that because it's taken away, it's not even part of the initial right a plaintiff has, these folks argue that plaintiffs should be required to prove no fair use.

At the moment, the law is rather complicated on this subject, but most of the burdens are actually on the defendant, and these commentators say, "No, look at the way 106 is written, it's up to Plaintiff to show that the exceptions don't apply." What about 106(A)? Can you have fair use to a act of what you might call "moral distortion?" Where somebody takes an original oil painting and puts a big "X" through it, or paints a moustache on a previously un-moustachioed character?

STUDENT: Well, the language under 106(A) says that it's still subject to your rights as a ...(inaudible) per use. So, I wouldn't say that you could distort work, but even ...(inaudible).

PROF: Okay, do you think they work identically? We don't have any cases, but what do you think? Would fair use, in the relation to the infringement of the reproduction right of 106.2, derivative work right, be subject to the same fair use standards as an infringement of the moral rights under 106(A)? What do you think?

STUDENT: No, I don't see it working--

PROF: Alright, I actually share your sense, although right now we don't have any real cases on moral rights fair use, but can you just explain to me why?

STUDENT: ...(inaudible) exclusive rights granted in 106 and 106(A) are different. And that 106(A) is more of a ...(inaudible) the U.S. copyright more to be in line with the European model that grants more rights ...(inaudible) with intent ...(inaudible)

PROF: That's interesting. So maybe the moral rights are a little stronger than the 106 rights? That's conceivable. Particularly since moral rights tend to apply to things that exist either in only one copy or very few copies. To allow somebody to make a parody of my painting by using the only copy is a lot more destructive of

the plaintiff's interest, than if the person was making a reproduction and then turning it into a parody.

So it's possible, for example, that the plaintiff would just be more injured by a violation of 106(A) than by a violation of 106.1. Now, where does fair use show up? Itself?

STUDENT: In 107?

PROF: Now, tell us a little about the relationship between the first part of 107, that rather fat paragraph, the middle factors, and that last sentence. We are now on page 20 in our soft cover.

STUDENT: Well, the first paragraph seems to outline ...(inaudible) educational settings. You kind of get the broad outline for criticism ...(inaudible) scholarship, research, those types of things.

PROF: And news reporting. Alright, when you say, "outlines it," what do you think the function is? Because outlining is one way to describe it. Say more. I mean, you have read some of the legislative history, as well as cases, discussing what all of this means.

STUDENT: By outlining, I think they return(?) to ...(inaudible) parameters for fair use in certain types of settings.

PROF: By parameters, then, you mean if it's not this kind of a setting, there should be no fair use?

STUDENT: No, of course not, because that's what the Middlesex ...(inaudible)

PROF: So tell me what's the purpose, if any?

STUDENT: The purpose is really to give one specific area to be attended to ...(inaudible)

PROF: So the sort of example, these are the kinds of things we had in mind, is that it? Okay. And sometimes examples can be very helpful. When we were discussing the derivative work right, we pointed to the examples in the definition. Dramatization, translation, abridgment. We noticed that they all had certain things in common, and maybe what they had in common could help us understand what the rest of the definition was about. Is there anything that all of these examples have in common, in that first paragraph?

STUDENT: There is something that they have in common. I'm searching for the common theme, but it seems almost like a public interest. There are some things that the public stands to gain from fair use ...(inaudible) in scholarships, research, teaching, news reporters. All of those almost kind of serve the public.

PROF: Alright, is there anything else? I agree with you. Anything else about the examples that they seem to have in common?

STUDENT: They also seem to have the First Amendment--

PROF: Alright, they have sort of First Amendment penumbra kinds of associations, free speech associations. Anything else? Can anybody else see anything that they have in common?

STUDENT: Non-commercial ...(inaudible)

PROF: What do you mean by "non-commercial?" I mean, teachers teach. B.U. makes an awful lot of money from your-- Well, let's think about this. [writing on blackboard] I think there's really something in it, but I'm not sure you're giving me the words that really capture what you're thinking. What Jason said is that all of these uses are non-commercial, not directly related to finance. But teachers get paid, B.U. would not be in existent if it wasn't making a lot of money.

People magazine, no less than *Time* magazine, no less than the *New York Review of Books*, all make money. They're all commercial. Now, sometimes teaching is just ilemacenary(?), that is, for free. But all of these people make money. So what do you mean when you say, "it's non-commercial" or "not directly related to finance?" There's something there, but those aren't the words that convey it to me well enough, given that all these things can be done for money.

STUDENT: It's more like educational ...(inaudible), enrich people ...(inaudible) knowledge--

PROF: [writing on blackboard] Well, although I agree with you, this stuff about knowledge, education, seems to be on the board already. So I'm having trouble understanding what's over here. I mean, don't you share his sense that there's something like that going on? But it's not really that they're non-commercial, because art can be commercial. What is it, then, about the role of money to these activities that's different than for the standard commercial activity? Because that's what you're getting at, right? There's something different, but what's the difference?

STUDENT: When the public interest outweighs the commercial aspects ...(inaudible) for allowing these people to use copyrighted materials outweigh ...(inaudible)

PROF: I think, in fact, that plays a role, but I'm not sure that really tells us anything about the commercial. Because, once again, lots of things which are in the public interest happen for money. There may not be a conflict. B.U. teaches you, supposedly you go off and you protect your clients' rights, everybody benefits in a First Amendment way. But Silber also gets paid a lot. So I'm not sure I see a necessary conflict.

Let me ask a quick question, did anybody here read the Barbie case yet? This analogy may be a little far-fetched, but I'm going to do something from the Barbie case to see if I can help. While I'm looking for it, you two tell me what you were going to say. Ramon first.

RAMON: The difference is with these activities the profit was from ...(inaudible) the use of the ...(inaudible)

PROF: But look at one of the examples, "Photocopies for classroom use." It's quite true that most of the examples are, as Ramon says, "transformative" and much of the value comes from the extra efforts that the defendant adds. You know, the critical review is usually valuable not because of the quotations from the copyrighted book, but because of the critic's own views. But I'm not sure it covers all of them. Anything more you want to say?

RAMON: Well, I think the third copy ...(inaudible), not necessarily the photocopy ...(inaudible) commentary ...(inaudible).

PROF: Alright, so there's some kind of "value added" notion, even when it's not transformative, these examples all have a lot of value added in them. Does that sound like it captures your insight? Okay, I'll go with that. I think that you're right about teaching as a context where, the mere reading of the stuff isn't enough, there's something more. You wanted to say something else? No? But I'm still puzzled about this stuff, before I go to my Barbie example. [pause] Yeah?

STUDENT: That's the main thrust of ...(inaudible)

PROF: Alright, now there I think we're getting closer. It's not merely commercial, it's not merely related to finance. Something else is going on. It's

something about, I think, motive. Since I tantalized you a little with the Barbie thing, let me tell you what was in the background there. The United States has something called an "anti-dilution provision" within the trademark law.

And when the Barbie people, Mattel, sued the makers of the song, one of the things they alleged was that the Barbie trademark was being diluted, weakened by its use in the music, okay? And the way the dilution statute is structured, "dilution" applies to commercial use--

[writing on blackboard] I'm not giving you this exactly, but it's close enough for our purposes. Dilutions can be used against commercial uses but then, there's an exception for non-commercial uses. Now, at first blush, that makes no sense. Why would there be an explicit exception for non-commercial uses, if the statute itself is never usable against anything except commercial uses?

Do you see the dilemma? I mean, why would Congress both say, "It's usable only against commercial uses," and, "There's an exception for non-commercial use" right? I mean, why would they say both things? Isn't that just the same? Well, one of the principles of statutory construction is to assume that Congress has some meaning, some purpose, for doing every sentence it has.

So, one of the ways in the Barbie case that Judge Kozinski interprets it, he says, "The word 'commercial' must mean something different in these two contexts." That basically 'commercial' in the *prima facie* case of dilution refers to anything involving money and commerce. But non-commercial, in the exception, must

mean those things that are done for money, but not just for money, that have a different real goal. Whose goals are more complex and more expressive. So I think using that, it gets back to very much what was being said here, the "not merely."

That was yours, Ramon, right? [pause] Whose was it? Oh, Boris. I'm so glad you came today. Okay, the notion that what's going on here isn't just motivated by money, it's not just oriented toward profit. Now that relates to one more issue. And Luis, you're not quite off the book, despite the nice job you have done. I'll be coming back to you in one moment.

I have said that sometimes there's no inconsistency between pursuing the public interest, getting the "value added" effort out of the defendant, and enforcing copyright. Tell me when there is no conflict between those. Give me an example or two where you can imagine that the public interest is served, the First Amendment and free speech is served, even when copyright is enforced.

LUIS: Are you talking about a type of work?

PROF: Sure. Give me an example of a type of work which you think can both-- A type of work or a type of use, where the use can happen, even if you enforce the copyright.

LUIS: How about Martin Luther King's "I Have A Dream" speech?

PROF: No fair use case I know of involved that, so you had better give me the example.

LUIS: In that particular instance, you could have a ...(inaudible) copyright ...(inaudible)

PROF: No, what I mean is, by enforcing the copyright, you're holding me to a high standard of language. I appreciate that. Let me rephrase that. Are there cases where you can enforce the copyright in the sense of denying fair use, and still have the public interest use be made? Can you think of situations where the public interest is served, even though the copyright is fully enforced in the sense of everybody involved negotiates and pays license fees? There's no unconsented use.

Let me try to give you an example, I must be confusing you. What I'm trying to get at, is the ordinary book, the ordinary movie, the ordinary work of scholarship, doesn't have to be used under fair use. People usually pay for it. That is, in the ordinary case, you get a license. Or you get a sale by a copyright owner. And we buy the books. In the ordinary case, then, which is all around us, we pay to see the movie. We pay to buy the music, well, not always. Alright?

You pay for the intellectual property you get. You're either licensing it, for example as when you sign up for HBO, or you're selling it. And sometimes, you get it for free. Sometimes it's free to you even though it's not free to the people who are supplying it to you. For example, included in your tuition is something to

support the library and the library pays very high subscription bills so that you can get so-called free copying.

All I'm trying to suggest is that, in the ordinary case, you get two things. You get enforcement of copyright, in the sense of permissions are required and their absence is not excused by fair use. In the typical case, you get full enforcement of copyright, and you get the public interest served. Right? I mean, doesn't that seem normal, natural?

For example, let's think about the guy who writes a book, and a whole bunch of movie studios are bidding on it. Now, it may serve the public interest for the movie to be made. In fact, it may serve the public interest for the best movie to be made. Well, for the book owner to enforce his copyright just means that all these different producers come to him with proposals. And he can choose among them.

And presumably, the producer best able to serve the public taste will offer the most money, and that's the one who will be chosen to make the movie. The public taste is served, and copyright is enforced. What does that mean? It means that in the typical case we get both dissemination and we get the added value of the user's efforts.

Remember we were talking about the transformative use? Well, the producer who makes the movie is adding value. We get this for the public, and we get incentives. And, we get reward. So when the copyright system is working in the normal case,

everybody's happy. The public interest gets served, the individual author gets paid, and over the long-term, you get incentives.

Is there anything about the initial number of examples in that first paragraph that suggests areas where the copyright system might not work this smoothly? What's in that list? Criticism, news reporting, teaching, photocopying for classroom use. If in the normal case enforcing copyright gets good results for everybody, is there anything about that list which suggests it's not normal case? Luis.

LUIS: Let me rephrase the question. Would it be meaning out in the ...(inaudible)

PROF: No, what I meant was something else. In the normal case, so-called market works very well. We might call it "market functions well." So in the ordinary case, I have a copyrighted work, you want to make some sort of beneficial use out of it. You come to me, we make a deal, you go off and do it. I get paid, you get the use. You and I share the profit from the extra use, the public's served.

And I'm asking about these examples. Are they examples where it doesn't look like that normal model was fit(?)

STUDENT: ...(inaudible) produce examples where there's market failure?

PROF: Well, how? Clearly, I'm leading you there because you guys have read my stuff so you know that that's one of the things I'm interested in. The label I'm

interested in is "market failure," but just because I believe it doesn't mean it's true. So I'm just asking you a question.

STUDENT: Let's say there's a teacher who--

PROF: Alright, now looking at the list in the first paragraph. Teachers, criticism --

STUDENT: I'm going with teaching. A teacher decides-- realizes that the day before, a few hours before class, there is something that he ...(inaudible) down the street from the classroom at that time, to go to the source of that article, or whatever, and ask for a ...(inaudible). So, there is no market for spontaneous ...(inaudible)

PROF: Alright, so one possibility may be spontaneity, as in the classroom context, makes licensing difficult or impossible. And spontaneity may, in fact, be a big part of what they were worried about when they said, "Hey, some photocopying should be allowed." Anything else?

STUDENT: Criticism. Just giving someone a license to criticize ...(inaudible)

PROF: Alright, which we talked about licensing happening a lot. But criticism, there might be refusals at any price. Before we go any further, what's wrong with that? Let me go back to the noticing of a functioning market. In a functioning

market, [writing on blackboard] we assume that the highest valued use will be the one to which the resource flows.

So if I have written *Gone With The Wind* and you were eight different movie producers, we assume that the one who bids the most for *Gone With The Wind* is the one best able to serve the public taste. Why? Because he's the one who can raise the most money, because he expects the most profit. Therefore, he can offer me the most. So he's the highest valued use.

Or consider this podium here. To some people it's useful, to some people it's not. Who's going to bid the most for it? The person to whom its useful. So the economic notion of a functioning market, a market that functions well, is to direct resources to their highest valued uses. Now let's go back to the example that was raised a minute ago.

[pause] You know, Brad, your picture on this doesn't look like you. Is this you?

MATT: No, I'm in Brad's seat today.

PROF: That's what I thought. You're Matt, aren't you?

MATT: Yeah. Brad's not here.

PROF: I just want to make sure I haven't been calling you the wrong name all the time.

[laughter]

PROF: Let's go back to the functioning market. Functioning market, it's goal is to get things to the highest valued use. To some extent it works correctly in copyright, in some extents it doesn't. Matt made the argument a minute ago that one of the places it doesn't work is in cases of criticism. Or, an example of criticism is parody is when you're making fun of somebody else's work that you think is idiotic, as happened in the case involving "Pretty Woman."

Now, let's say Erica's the person who wrote the original work, and Jason's the one who wants to do the criticism. And Jason says, "Let me buy a license to do the criticism, or let me buy a license to do the parody." And Erica says, "No!" And Jason says, "For a thousand?" She says, "No." He says, "Two thousand?" "No." He says, "Five thousand?" "No"

And Erica says, "Look, buddy. I have a perfectly good life, I don't want to be made fun of. Your money doesn't mean that much to me, there is no price at which I would license you." "Furthermore," Erica might say, "the highest valued use of my work involves silence regarding criticism." [writing on blackboard] How do we know that? "Because I value the silence of the critic more than you value going forward, because there's no amount of money that you can make."

I'm going to go back to Matt. Matt, you said, that in a case where you have a refusal to license at any price, that's a place we can't trust the market. But if the

purpose of the market is just to get things to the highest valued use, isn't Erica, the copyright owner, showing you what the highest valued use is when she refuses all the offers from the proposed licensor?

MATT: Yeah, but you say "highest valued use." I mean, if you only look at it through the eyes of Erica, that's fine. But if you look at it as an overall highest valued use, I said the value of the public information might outweigh a person like Erica.

PROF: Is there any reason why you think that the proposed licensee, the guy who wanted to do the criticism-- Is there any reason why you think the amount that he would offer doesn't represent the overall social value?

MATT: Yeah, ...(inaudible) person of limited funds.

PROF: So he's a producer, but he makes money by serving the public taste.

MATT: His offer is, again-- It's a value to him, not the value of society.

PROF: Well, economics is supposedly about allowing people to collect some of the value they give to society. Right? So what is it about a critic or a news reporter that might make it harder for him to have in his pocket money that reflects the social value? Harder for him than it would be, let's say, for a movie producer.

STUDENT #10: Maybe it's between the benefit ...(inaudible)

PROF: Yeah, there's something about the way the movie industry works that it brings a lot more cash to the producers than the reporting industry, or the critic industry. Or even the teaching industry.

Very often, people who do things like criticism, [writing on blackboard] teaching, news reporting, generate benefits for the world that they can't have represented by their own pocketbook. They generate what you might call "external benefits." So if you added up all the benefits that the criticism generates and you put a price tag on them, it might well outweigh Erica's reluctance.

But it's going to be very hard for somebody writing a criticism, a parody, or a news report, to collect the money from everybody who might get a kick out of learning the truth about this book. And remember, facts and ideas are not copyrightable. So let's say Jason writes a brilliant criticism which involves quotations that are very extensive from Erica's book. He may prove that Erica's contention, whatever it is in her book, is false.

People can read this, the word can spread; "The Marinelli Thesis is false, don't rely on it!" But there's no copyright infringement as this word spreads, they're just restating Jason's conclusion. There's no way Jason's going to be able to benefit monetarily from it. Therefore, Jason's ability to bid for the license is going to understate the extent to which he serves the public. Does this make sense? Sort of? Alright, in what way doesn't it?

Alright, let me finish this and let me go back to the market thing. So one of the reasons why, even in a case where you have a refusal to license at any price, you might say there's market failure. It might be because the person who's seeking to license gives external benefits. Another is, because the price Erica is willing to accept, or the price that she says will never be enough, comes from a position of strength.

If we give her the right in the law to say, "No," she can say no and not be disturbed. But if we made the law a little different and we said, "Nobody has the right to deny permission to make a parody," she would have to pay Jason to shut up. And when we asked her how much she would value to pay Jason to be quiet, that's not going to be such a big number because she's limited by her usual budget constraints.

When you have a divergence between what you might call a willingness to offer and the price that you would charge if you were selling, then that's another instance where you can't be sure the market is going to work right. The market functions well where the valuation you place on something is the same, whether you're the buyer or the seller.

Now for things that are fungible, let's say houses or cars, the value is the same. If I'm selling a used 2001 BMW, I look in "The Blue Book" to figure out how much I'm going to be able to sell my used car for. If I'm buying a BMW 2001, I look in "The Blue Book" to find out how much I should offer. For both the buyer and the seller, the price is the same.

For most things that are traded on a large market, you take the prices given. And that's the way the market usually works most efficiently. But you can't rely on the market to get you in good results where your price is going to be really different when you're the buyer and the seller, and that can happen when you have unique events, unique things. Not a mass-produced, mass-traded thing like an auto, but rather Jason's desire to do a parody, Erica's desire not to be parodied.

Let me just mention a couple of other ways in which these examples are problematic, if you're looking at them from a market perspective. Critics are notorious for not making a lot of money. News reporters are notorious for generating external benefits that they don't collect. I mean, think about it. You buy a newspaper for 50 cents and, with that, you can make career decisions or investment decisions worth millions to you.

Why? Because facts aren't copyrightable. And even if they were, the mere use of a fact isn't violating (Section) 106. Teaching is very much like that, also. You're communicating ideas that are very important to people, but there's no way that you, the teacher, can collect except by charging tuition, today. That's going to very much understate the value of the education you give over time.

So one of the arguments you would make is that this paragraph describes a lot of instances which aren't quite fully commercial, again using that notion, in the standard sense. They don't work just on markets, not all of the costs and benefits are internal. Now let's go back to Noel's more basic question about, "What is the

this stuff about markets, functioning and non-functioning?" Can you articulate the area of fuzziness so I know which way to go in?

NOEL: I don't know, I ...(inaudible)

PROF: You're not supposed to need it. So if I'm not doing it well enough for you to get it, I'm doing something wrong. Right? But I have got to know where the fuzziness is so I know how to explain it.

NOEL: Well, I kind of understood after you talked about ...(inaudible) having an increase for the buyer ...(inaudible)

PROF: Alright, and you understand this thing about a person who's a potential buyer that generate external benefits? Do you realize why requiring him to do a market bargain might not serve the public? He might give a million dollars' worth of benefit, but he only has a thousand bucks that he can collect from the public because maybe most of the benefit he gives is factual, or something like that.

So he could create a million dollars' worth of benefits, but he has only a thousand dollars with which to pay the license. The person who is deciding, "Where do I give the license?" won't give him one. Yet, if the market were perfect in the sense that he could internalize all the benefits he's giving to everyone, he could offer up to a million and he would buy the license. Does that make it any easier?

Let me also do one other thing that's really important about the market failure notion. When you ask what fails, [writing on blackboard] what fails is the market's ability to serve public interest. When the market is functioning, we say, "It's not only helping the individual market participants, it's serving the public interest."

How is it serving the public interest? By getting things to their highest valued use. You might say, "How is the public served if something goes to the highest valued use?" Well, if the movie goes to the best producer, we all see a better movie. If the podium goes to somebody who can use it, we're all probably going to be a little better off than if it gets sold to someone who's just going to burn it for firewood.

Think about your own use, yourself as a resource. Your highest valued use is probably not flipping burgers at a McDonald's. Not only you and your family, but a whole bunch of people, like your future clients, are going to be much better off because you invested in coming here. Right? Your highest valued use is not at McDonald's. I'm not sure it's law school, because my perspective is that law school is steps to a higher calling, rather than just being a lawyer. But we can talk about that another time, okay?

Now, there are things that keep people who are able to be great lawyers stuck flipping burgers. We all lose because we all miss out on their abilities. But there may be injustice, there may be problems in their families, there may be all sorts of things that keep them from being able to come here.

And the most fundamental one is imperfect knowledge. They have no way to demonstrate to a bank that they're going to be a successful enough lawyer to pay back their loans. Maybe. Okay? Well, lack of perfect knowledge is another thing that makes a market unable to get things to their highest valued use. Now, the phrase that's most often associated with this, [writing on blackboard] is a phrase from about 1776. But in England, not the United States. It's "the invisible hand."

Adam Smith argued that if you let individuals just bargain with each other, they wouldn't just help themselves, but in the long run, we'd all be better off because markets could actually serve social interests. And one of the reasons, by the way, modern economists like markets so much is that they use decentralized information effectively. I mean the example that sometimes comes up is in geographical differences in information.

In the Northeast corner of the United States, there may be a sudden shortage of toilet paper. Right? If we were a centrally-run economy, somebody would have to know this, figure out where to get the source(?), et cetera. But, if people in the Northeast, or Northwest, wherever I used my example, are suddenly willing to pay more for toilet paper, people somewhere else, where toilet paper is cheaper because not so many people want it, will transport it. So the notion is that markets satisfy needs through people using decentralized information.

Anyway, that's the optimistic take on markets. We all know that markets don't always work that well, we know they have got downsides. Copyright is a form of market enforcement. It's saying, "You can't use this without negotiating with the

copyright owner." But copyright is also supposed to serve the public interest. Right?

If enforcing the copyright will not serve the public interest, will not get something to its highest valued use, we begin to think, "Hey, maybe we shouldn't be enforcing this thing." And what's the result? Fair use. Is that clearer? Anybody else have residual fuzziness or questions or comments. Randy?

RANDY: Except for parody, it's like all those activities can still be done without infringement.

PROF: Sure. You can teach about Mark Twain by requiring everybody to buy all the books. And when the article comes out in such-and-such review last minute, without not photocopying and just summarizing it to the kids, you could. But on the other hand, it might be that if you were able to Xerox this thing that you read last night that's fresh in your mind, and have all the students read it, they could be educated better.

So the question really isn't, "Could it be done or not?" but, "What is the optimal amount of use?" If using the article spontaneously, the one you saw yesterday you want to give to your students today, contributes greatly to teaching, and allowing me to do it for free doesn't interfere very much with incentives or with reward, because if he could charge, the author of the article would charge a trivial amount, and if there's no logical way for a real license to happen, maybe we should just let it go forward.

So you're totally right, it's usually not an all-or-nothing choice. It's usually a question of whether we want to have more of this than would happen if we enforced the copyright strictly. Now the first place this came up was in a case involving medical researchers who were photocopying medical articles. They all worked out of the National Institute of Health, and the owners of copyright in the medical articles sued the library of the National Institute of Health.

The ensuing opinion about whether the photocopying was fair use or not had, what I thought was, one crucial sentence in it. It said, "We think that if we enforce the copyright, less reading and utilizing of these medical articles will happen. Medical science will be retarded. Because we don't think, implicitly, that if we enforce the copyright, suddenly there will be a great licensing system that springs into being."

"We think the library will just stop allowing photocopying. And that, that some doctors, faced with the choice between the hassle of negotiating for an extra copy or a subscription in advance, or copyright infringement, will say, 'Heck, I just won't read the article. My patients will just suffer'."

So it seems to me that in that case, the crucial thing was, the court thought the highest valued use of these articles was to have them read by the most doctors, and that wasn't going to happen if they enforced the copyright because no licensing scheme would be fluid enough to allow it to happen.

Any other comments? Did you want to follow up? [pause]

Alright, that's the basic notion behind market failure. It's not a technical thing. It's just recognizing that our usual system of property is a system that depends on buying, selling, licensing, and other transactions to get the goods spread out so that they benefit the public. And so that the owners get their rewards and their incentives. And when the system isn't working well, we might want to look at alternative institutions to get the stuff flowing, to worry about incentives, and the rest.

Okay, any questions? Alright, Luis, let's go back to you. What's going on, do you think, in the four factors that are listed after that first paragraph?

LUIS: I think that it kind of gives you ...(inaudible) things ...(inaudible).

PROF: And are these factors exhaustive?

LUIS: No, they're not. They shall include the ...(inaudible)

PROF: And how do we know that? I mean, we know that because you have read a lot of cases that say it, and that would be one perfectly good thing to reply to my question. But is there anything in the statute that reminds us that it's not exhaustive? Think (Section) 101. When in doubt, jump to a definition.

LUIS: So we're taking the definition of fair use in 101?

PROF: There isn't any definition of fair use in 101. How do we know from the statute that the list is not exhaustive? That those factors are merely illustrative? Yes?

STUDENT: If you look up the word "including" or "such as" in 101?

PROF: Absolutely. Page six of the soft cover.

STUDENT: It says, "The terms including 'such as' are illustrative and not ...(inaudible)

PROF: Okay, so we know that those are illustrative, both from the statute and, as Luis was depending on them, from the cases. What's the point of that last line? How did that evolve? You know about that from the notes following *Harper and Row*. What's the point of that funny last line? I mean, it seems like a strange last line. Let me read it to you: "The fact that a work is unpublished shall not, itself, bar offending(?) of fair use."

Now that's weird. I thought the whole point of the "including" being merely illustrative is that there's not just one factor. Why did Congress need to say that the fact of something being unpublished isn't itself enough to bar fair use? Isn't that implicit in everything that came before, that it's more than a one-factor analysis? What do you think is the history of that funny last line? Erica?

ERICA: Well, what I don't understand on 523--

PROF: (Page) 523 in the hard cover?

ERICA: Yes. In 1992, Congress ...(inaudible) acquisitions(?) and clarified the ...(inaudible) procedure ...(inaudible).

PROF: Basically, yeah.

ERICA: And then they go on to say--

PROF: Wait a minute, before you do the qualification, let me just mention a few little bit (sic) about that. After *Harper and Row*, which put a certain amount of weight on the unpublished nature of the memoirs that were copied by Navatski-- After that, lots of courts came out with decisions that put incredible weight on whether or not plaintiffs' work had been unpublished at the time the defendant quoted or otherwise used them.

And historians were getting frantic. "You mean I can't quote from an unpublished letter without permission from the author of the letter, or his great grandson? How am I going to write works of history from now on if there's no fair use at all for unpublished works?"

Partially because of this kind of concern, that last sentence was enacted to sort of turn back the tide of courts that were giving too much importance to the

unpublished nature of plaintiffs' work. Erica you were going to say something else, though.

ERICA: I still don't understand why they didn't make it ...(inaudible).

PROF: I guess they could, but that could be read as saying those cases were right. It was previously totally unmentioned in the statute, now it's mentioned. Judges have discretion over weight, so maybe it would look like they wanted to encourage judges to give a lot of weight to it.

STUDENT: They might as well, because the unpublished nature remains but(?) one factor.

PROF: And that's, in fact, the way the sentence is interpreted. All I'm trying to say is that, if the drafters-- If the historians were worried about this limitation on their fair use privilege, if the historians had asked that Congress put in a fifth factor that was unpublished works, that sort of makes every court look at it.

It sort of looks like it could be used to help the people who want to stress "unpublished." This way, all they're doing is saying, "Hey, if you want to look at that, fine. But make sure you don't give it too much importance." So that's why it was done as a drafting choice. Matt?

MATT: It's more like a qualification of the second factor, right?

PROF: Well, yeah. I think so. But make that explicit.

MATT: The second factor says that courts had taken into account the nature of the copyrighted(?) work. And then at the end says, "While taking the nature into account, don't give too much credit to the fact that the copyrighted work might be unpublished."

PROF: Let me ask you a quick question about *Harper and Row*. Luis, do you want it, or shall we pass it to Elisa?

LUIS: We can share it.

[laughter]

PROF: Alright, we'll go on. He's done his job. How much was actually a copyright infringement in that case? And what was the court's reasoning when they held it to be not a fair use? How much was actually taken? How much was actually copied in that case?

ELISA: Very little.

PROF: Alright, very little in both relative and absolute terms. Absolute terms, it was only about 500 words. Relative, it was only 500 in relation to an entire book. What about in relation to the defendant's article?

ELISA: I think it was about, what, 13% or more?

PROF: Alright, so it was more of the article, but still somewhat small. Okay. Why, given that context, was it found to be a violation of copyright rather than fair use?

ELISA: Because the court said that it went to the heart of the book, the very reason one would want to read this book. ...(inaudible) sections about why ...(inaudible) issues ...(inaudible) and that was very ...(inaudible).

PROF: Alright. Now, although she's saying that's incredibly accurate, think about Brennan's protest at the end. You know, the dissent? One of the things that he said, that they don't emphasize in the portion you have in the book, is that Brennan said, "Wait a minute. The heart of the book was historical fact. That's not something copyright is supposed to be about. The majority seems to be stretching copyright to give an historian copyright in the fruit of his labors. And that's not what copyright is for."

Some people, in fact, think that the *Feist* case, you know the one that said you needed more than labor, that we read? Some people think that one of the reasons the Supreme Court took *cert* in the *Feist* case was that they were afraid that their *Harper and Row* opinion might be read as saying, in fact, you should have copyright in labor.

So, we get this "heart of the book" stuff, but we have to beware of it, because we're not quite sure it's reliable. It may have been the heart, in terms of commercial value, but it might not have been a copyrightable "heart." It might have been facts. Okay? Now, why else did the courts say there was an infringement?

STUDENT: Well, they talked about the fact that-- They thought the most important factor was the effect on the market.

PROF: The effect on the market, exactly. In fact, most courts stress that. That's factor four. Tell us more about that. What was the effect on the market?

STUDENT: Well, the publisher had a licensed(?) agreement with *Time* magazine to publish excerpts ...(inaudible) came out. And because the ...(inaudible) *Time* backed out of it ...(inaudible)

PROF: Alright. Very rare you have such an incredibly obvious example of market value, market damage, as of some other publisher saying, "I'm not going to publish it now." Anything else? Think about this market functioning. If you had not enforced the copyright, and everybody concerned had gotten permissions, or Navatski unable to get a permission had held off, would the public interest have been served anyway?

ELISA: Yeah, they still would have gotten the information.

PROF: Absolutely. Why?

ELISA: Because it was available in the book.

PROF: And it was going to be published in a week in an excerpt, too. There's nothing about the behavior of these parties that suggests that the public needed the fair use doctrine in order to get access. The market was working okay. The book was coming out to disclose all this stuff, an advanced excerpt was coming out in *Time* magazine to disclose it. There doesn't seem to have been a market failure.

So that's another way you can look at the court's rationale for why they found an infringement. Navatski was doing something against the copyright law which wasn't necessary to get the public the information it needed. Anything else you want to add about this case before our break? [pause] Okay. Let's get back at 3:21(pm).

[Tape stopped; re-started. Following comments made during break]

PROF: [shouting to be heard] Excuse me! Erica just mentioned we should have mentioned, the "unclean hands" aspect that Brodsky had knocked(?) this copy. That always works against ...(inaudible), and it's not always fatal. But it's one thing that weighs against the defendant in a fair use case, if he did it sneaking around.

END OF SIDE A

[class resumed]

PROF: Jason, it is your time(?). I'm ...(inaudible) 2 Live Crew and the original (Roy) Orbison song ("Pretty Woman"), but I'm ...(inaudible). This is it. [plays song]

[song stops mid-way]

PROF: Excuse me. One of the things I wanted you to hear was that guitar riff, because that's one of the things the defendant's are alleged to have taken. [referring to the tape machine] This should do it again? I pushed the wrong button. What I wanted to do was play it again. Hold on one moment. [pause] Alright, does everybody know this song? Is this unnecessary? Who doesn't know the song?

STUDENT: Richard.

PROF: Never heard it before, right?

RICHARD: Of course I have.

PROF: Alright, so I don't have to belabor it. Now we're going to play, if I can ever get this thing open, 2 Live Crew's version.

[song plays at varying speeds; class laughs]

PROF: Wait a minute, I thought I was doing the volume. I was doing the speed controls. I think we're giving this-- Could you re-run it? Make everything normal and loud, please? Comic relief.

[song plays]

PROF: [quoting song lyrics] "Two-timin' woman." ...(inaudible)

[song ends]

STUDENT: ...(inaudible) people, like, came out with an entire ...(inaudible) somebody said something like, "Oh, this would be a great song--"

PROF: As far as I know, the answer is they just thought this was a disgusting song and fun to rip off, rip on, whatever the word is. I don't really know enough of the background. Why would it make a difference to your analysis?

STUDENT: Because it seems to me a ...(inaudible). Remember the ...(inaudible) of parody? It's easier to buy that they were saying it's a parody. That the guy

that's in the group heard the song, or something, but-- And like thought of this jerky, perverted way of ...(inaudible) putting some gross words to it.

PROF: Rather than somebody saying, "Weird Al Yankovich has a good thing going, let's us try it, too, as a commercial venture."

STUDENT: Well, like the producer saying, "Oh, you're ...(inaudible) funny if you did this." Playing(?) to them that way.

PROF: That's interesting, the question of personal motive. You seem to think that motive would make a difference. Let's go through the case and see if it will. And let's say you're still on deck. Give us the basics, the facts.

Just to get you started, is there in your mind any *prima facie* violation of (Section) 106.1, 106.2, et cetera, here. If it wasn't for the fair use doctrine, would this be a copyright infringement?

STUDENT: Well, ...(inaudible) doesn't talk about it very much, but it sounds like there was because ...(inaudible) the actual guitar riffs that they took.

PROF: What if they didn't sample? What if they just imitated the guitar riff? Remember our description of the sound recording copyright. That depended upon actual taking of a riff. What if there was no actual taking? What if they just imitated the riff, and did that sort of stuttering effect? Well, then there would be

no liability under the sound recording copyright. Would there have been anything left for Roy Orbison to sue on?

STUDENT: There's like a little bit of overlap in the lyrics, like the--

PROF: Oh, wait a minute. So when you talk about lyrics, do you mean there's a poet somewhere suing? I don't think you mean that. So make clear why the overlap in the lyrics would be relevant. If it's not a sound recording copyright we're talking about, then it's a-- Look at 102, the list. Where they used all the things you could have copyright in.

STUDENT: Well, I guess the literary work ...(inaudible).

[professor makes sound like "no"]

STUDENT: Musical work ...(inaudible)

PROF: Yeah, I think "musical work" is better, unless the works were done-- Give me the definition of "musical work" from (Section) 101, or 102, or wherever we want to find one.

STUDENT: Doesn't look like there's a "musical work" definition.

PROF: But is there one back in 102?

STUDENT: In 102?

PROF: Yeah. It's, "A musical work, including any accompanying words." Okay? So it looks like when, at least, the music was written at the same time as the lyrics, merged into an inseparable whole, the two things together are "musical work." How do you know that we have an infringement on a musical work here? What in the facts tell you that? [pause] (Page) 504.

STUDENT: Well, I guess, I mean, Orbison and someone else wrote the song at the same time, and then transferred the ...(inaudible) set, too.

PROF: Alright, what was the language the court would have used in those first couple of sentences if it was the sound recording that was at issue? How might it have described what was going on?

STUDENT: One, they're talking about the writing of the song, and then they talk about the recording of it.

PROF: Exactly! They would say, "Orbison and Dees recorded this song, and then they signed the rights in the recording, the sound recording." But that's not the language. So the fact that the guitar riff was taken would be relevant to a sound recording copyright, not a musical work copyright. And just for brief review, how do we know that it's not an infringement to imitate a sound recording copyright?

Take a quick look at the statute, you can find it in just a second. Why is it not an infringement to imitate sound for sound, style for style, a sound recording copyright? [pause] You know, of course, we're looking in (Section) 107 and following where all the "user's liberty of copying" shows up. And if you can't find it right off, of course, you should look in the Table of Contents to see where exclusive rights in sound recordings are limited. And you should ask your friend. [laughs]

STUDENT: ...(inaudible) in (Section) 114.

PROF: Alright, what's it say in 114? I mean, the title tells you it's a good place to look. We examined this, you may remember, back when we did the statutory exercise. I hate to remind you, but you're responsible for the stuff we did back then. Why is it okay to imitate a sound recording when closely imitating other copyrighted works give rise to potential infringement?

STUDENT: Isn't that only a violation ...(inaudible) of the actual sound?

PROF: I agree. And where are you getting that from?

STUDENT: (Section) 114.

PROF: What part of 114? [laughs]

STUDENT: Oh, sorry. (Section) 114(B).

PROF: That makes it very clear. The exclusive right of the owner of copyright in a sound recording, under Clause 1 of (Section) 106. Now that's Clause 1 of 106. You had said there might be a derivative work of the riff. That's 106.2. And does (Section) 114 say anything about derivative works made out of sound recordings?

STUDENT: It says that the exclusive rights of the owner of copyright in a sound recording, under Clauses 1, 2 and 3 of Section 106, does not apply to a sound recording ...(inaudible).

PROF: We're talking about, what if Fisher and Dees had a sound recording copyright as well as a musical work copyright? Could they sue if these rap artists sampled, physically took their music, and distorted it, under 106.2?

STUDENT: It says, under 114, that the right of 106.2 doesn't extend to recordings that they found were to imitate or simulate the copyrighted sound.

PROF: Alright, that's one thing that's very helpful. It makes it clear that if these guys, the defendants, imitated the guitar riff, and then did a distortion using their own guitar, they would not have violate (sic) the 106.2 right of the original recorders. If you look at 114(B), it also says--

This is the second sentence: "The exclusive right of the owner of copyright in a sound recording, under Clause 2," that is the derivative work right of 106, "is

limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are re-arranged, re-mixed, or otherwise altered."

So, to the extent that 2 Live Crew did their own music, that is, they actually had their own guitar, they are immune from liability under 106.2 sound recording copyright. You see why? Yes. No? Yes. Okay, so that's clear.

That's why they're suing under the musical work copyright, perhaps. Maybe 2 Live Crew did actually merely imitate, not physically take or sample. And if that's true, wouldn't have to worry about fair use. (Section) 114 makes it clear there would be no liability.

Alright, let's go back now to the facts as we have them. Whereas Plaintiff is suing for the violation of copyright in a musical work. Randy?

RANDY: With (Section) 115, can't they make-- Don't they get a compulsory license?

PROF: Compulsory license extends to people who want to make covers of musical works. That's a great question. Can somebody look in 115 and answer why 2 Live Crew could not have taken shelter under the compulsory license provision? [pause] Quick hint: sub 2 at the top of page 63 of your supplement.

RANDY: Wouldn't that involve a negative implication?

PROF: No, but read me what-- The first answer to why they couldn't get a compulsory license appears in (Section) 115, which says--

RANDY: "The arrangement shall not change the basic melody or ...(inaudible) character of the work."

PROF: Right. Seems like they did. So Boris and Randy are making roughly the same point. That the compulsory license is intended not to cover such unusual departures from the original. But Randy, you wanted to make a negative-pregnant type argument. Where are you going?

RANDY: Well, in (Section) 115 they say that the exception of 115 is limited to people who stay true to the original musical work.

PROF: The privilege of getting a license is limited to persons who stay relatively true, yes.

RANDY: It seems like it follows that if you diverge from staying true, that that's important.

PROF: Right. That's why you need fair use to excuse your infringement. You wouldn't have to talk about fair use if they got a compulsory license.

RANDY: Did Congress want that to be an exception to the print in what they would do(?) in 115?

PROF: I'm not sure why they would have to. I mean, it's an interesting argument, but given that (Section) 107 is a defense to everything, why did they need to repeat it every time? I mean, you could make that argument. And if you had some good legislative history, you know, where Congress thought about all these different things, maybe you could beef it up. But I just don't see how it would work.

(Section) 115 says sometimes if you want to make a record of somebody else's music, you can do it even if they don't like you, even without being hassled, just by doing a compulsory license through the following procedure. And I told you how that was born. It was born because, in the appeals from the music roll(?) case at the turn of the century, all of the rights over music reproduction had been centralized in one company.

And so Congress, at the same time as they gave rights over the duplication of music, made a compulsory license available so that one company wouldn't have a stranglehold. So it seems to me their limitations were only about the compulsory license. And they really weren't thinking about changing the fundamental character, except to say, "Hey, we're giving you a fundamental, we're giving you a compulsory license, but that's not part of what we're thinking about."

I don't think they came to a conclusion about forbidding changes. But that raises another issue that Randy's question implicitly does. There's a conflict between moral rights notions and fair use notions. Because fair use is all about defendant's

who do unusual and irreverent, and sometimes nasty, critical or parodic things with the original. And what's moral rights about? Protecting the feelings of the author from being insulted, his reputation from being attacked.

So we have a bit of a conflict between the European tradition of moral rights, and the sort of robust iconoclasm of our First Amendment principle which(?) sees great romance in rebellion. Okay, back to Elisa.

ELISA: ...(inaudible). And I guess their manager went to ...(inaudible) Rose, which was the copyright owner. And ...(inaudible) the song and asked ...(inaudible) let them know that they were willing to pay for the ...(inaudible) to use of the song on their next album. ...(inaudible) Rose to give them permission, and then they put it on their album anyway.

And after the record was released, and again, selling rather well, they brought ...(inaudible) in for infringement. And 2 Live Crew was granted ...(inaudible) judgment.

PROF: Alright, now that's pretty interesting. What does the court say about this request for permission that was denied? Hint: footnote 18, page 507. Now, we're not talking about the district court, which you had just said granted fair use. We're not talking about the intermediate appellate court, which reversed. We're talking about the Supreme Court. What is the impact of asking for a license and being denied?

ELISA: Well, the defendant wanted to argue that their request ...(inaudible) the original should be ...(inaudible) filing for fair use.

PROF: Right. Sort of like, "There was a functioning market here, and you said 'No.' So you should obey what happened." The plaintiff was sort of saying, "Hey, 2 Live Crew implicitly admitted that it knew it needed a license. It implicitly admitted it wasn't fair use because they came to us for a license.

Plus, the fact they came to us for license suggests ...(inaudible) under those problems, like spontaneity, that makes it hard for people to bargain with each other." And what did the court say?

ELISA: Well, they rejected the argument. They said, basically, that 2 Live Crew could have just been trying to avoid the possibility of litigation. They felt that they had fair use.

PROF: Okay, Boris, did you want to add? [student declines] Okay. Now that's very important because the court is saying you can't hold it against people to offer to pay a license. It's not an admission that they have to pay a license, it's just avoiding problems. You should know that an awful lot of licensing pre-dates legal recognition.

You can look at contracts for Shirley Temple back in, whenever she was popular, 1922, and they talk about all sorts of rights that she was given that weren't yet recognized by law. Like rights of publicity. What very often happens is that as

licensing practices evolve, the law gets a little bit more sophisticated. And the court doesn't want the licensing practices to be frozen by people being afraid to ask for them.

It also doesn't want a parodist who works in good faith like this to be worse off than one who was hoping to sneak it under the radar. Okay, anything else we need to know about the case? Ramon?

RAMON: Let me just ask about ...(inaudible). Do you sort of see them as ...(inaudible).

PROF: I can't-- I heard the word "retreating" but then I heard wind.

RAMON: ...(inaudible)

PROF: Absolutely, but where is footnote 18? I've lost track. [finds footnote] I don't know how that has to do with-- Let me backtrack. I said "absolutely" without realizing you were talking about the same thing. I'm not sure I understand your question, Ramon. Could you repeat it again? I misunderstood.

RAMON: I guess I'm wondering if the leaving open the question of who did copying(?) bad thing ...(inaudible)

PROF: Of course you can. The classic example there is *Time v. Geiss*. I said right when you were leaving that Erica had made the point that if you were really a

sneaky defendant, it works against you, but it's not necessarily fatal. *Time v. Geiss* is a situation where a scholar wanted to copy the films of the Kennedy assassination for use in a book about the Kennedy assassination.

Time Life wouldn't let him copy them, so he got a job at Time Life and he snuck in one night to the file room and made his copies. He nevertheless got his fair use judgment. It worked against him, but not against him enough to make him lose.

There's another footnote that I have no idea why they didn't give you, but I want you to know about. It's the "absent" footnote 10. In footnote 10 of the full opinion, the Supreme Court says, basically-- Affecting the eyeballs from sun assault, right? [closes the blinds]

Alright, let me tell you about footnote 10. Pretending he's not doing that. Footnote 10 says that, in these kinds of cases, it may be appropriate to allow the defendant to go forward, but charge him something. Deny Plaintiff an injunction, but have a reasonable royalty or some other kind of result. Where the incentives and reward functions get satisfied by making the defendant pay, and the public profits by having the work go forward that might otherwise be forbidden.

Judge Kazinski has written an article exploring this notion. And on Tuesday, that's one of the things we will probably be talking about. By the way, I'm also planning on Tuesday, if the technology works right, to show you a video of the Barbie song and to ask you whether it infringes the Barbie copyright. If you want to read his opinion on Barbie, you'll see it only covers the trademark issue.

Because Barbie isn't just a copyrighted sculpture, she's also a trademark, as is her name. So it's not an issue covered in his opinion, but the opinion may help you think about it. But again, that depends on technology. We have yet to display something from the (Inter)net in class. We're hoping it will work.

Alright, let's go back to the case. What else goes on in the case? Well, I mean, you've told us that they made this version, that they asked permission, it was denied. Are there any other facts we need?

STUDENT: Just that the fact that they-- when they used ...(inaudible) a tribute ...(inaudible).

PROF: Alright, there's no hiding. They said this is a version of their song, that sometimes helps in a fair use case. Is there any fact we don't know that the court says is going to be important to find out on remand?

STUDENT: ...(inaudible) analyzing the impact on the market, and they mentioned that 2 Live Crew didn't present any evidence on the impact of their song on the potential(?) market for derivative craft(?) ...(inaudible).

PROF: Alright. So maybe there is a market for derivative rap versions. Maybe it was injured(?) and, if so, that might work against them. Although the court didn't necessarily say it would or wouldn't. In the end, it would be fatal to fair use, it

would certainly be evidence worth collecting that would be relevant. So, did they get fair use or did they get a remand?

STUDENT: Well, they seemed to get a remand, at least around(?) that final issue.

PROF: And what, then, is the test? What can you tell us about when it's okay to do a parody without permission? [pause] Or, Luis, when it's okay to do a song parody without permission? [pause] Let me ask you a couple of specific questions, okay? In an earlier case, the Ninth Circuit had said you could only take enough to conjure up the original.

No, that was the Second Circuit. The Ninth Circuit said in another case, "You took too much." What does this case suggest about the implied rule that to do a parody you can only take teeny-weeny little bits?

STUDENT: ...(inaudible) to imply that a parody depends on its ability to invoke the original. So, you can use as much as what's necessary--

PROF: Did they use as much as was necessary, or did they use more? You heard the 2 Live Crew's version.

STUDENT: I don't think they exactly(?) ...(inaudible)

PROF: I know they don't, but you heard it. There's at least two plays of the guitar riff. I think they took more than they actually needed to. And the court

doesn't seem to talk about that. So I think that's a silent fact that's worth noting. They were able to make a good parody, not just the "minimally sufficient to conjure it up" parody. Erica? Yeah, you had a question.

ERICA: I thought it was interesting that when ...(inaudible) in the back, when ...(inaudible) sent the letter back to 2 Live Crew and it says, "I must warn you that we cannot permit the use of a parody of 'Pretty Woman'." You know, everyone knows it's a parody.

PROF: Actually, in some cases, the question does come up whether or not it's a parody, and this court spends much too much time talking about it. How do they end up defining a parody for fair use purposes? By the way, the conception (sic) that it's a parody in a letter is not quite the same thing as saying, "For legal purposes and under fair use, it counts as a--" et cetera. So what is the kind of parody for which fair use is intended to be a shelter? Yes?

FEMALE STUDENT: ...(inaudible) better use of ...(inaudible) comment of an original...(inaudible)

PROF: I'm not sure, let me give you an example. You know "Legal Follies" that happens at the end of the semester? Usually, they take a common song and they make fun of law school through it. Right? Colloquially speaking, when somebody takes, let's say, "I Love New York" and turns it into "I Love B.U." we call it a parody.

Is it a parody in the same sense? Would they get fair use on the grounds of Acoff Rose? Or would they have to get fair use on the grounds of spontaneous use and non-profit, and all that stuff?

FEMALE STUDENT: It seems like it's going farther than what 2 Live Crew is doing.

PROF: It's going farther than what they're doing in the sense of--

FEMALE STUDENT: At least from the court's--

PROF: But what do you mean by "farther?"

FEMALE STUDENT: Well, from the court's analysis, 2 Live Crew ...(inaudible) is saying they took key elements that may be-- That guitar riff, which is infinitely recognizable, it's incredibly ...(inaudible), and as soon as you hear it, it conjures up the original "Pretty Woman." But then they built off of that and did other things.

PROF: I'm still trying to figure out what kind of parody. I mean you did just say something useful to remind us this case is a qualification on the rule in *Harper and Row* that it's going to be very bad for Defendant if you take "heart of the work." This court seems to say, "If you take heart of the work, but you need to because that's the whole point of a parody, that may be alright."

So that was useful. But I still want to know what about these two kinds of parodies. We have the 2 Live Crew parody, and we have "Legal Follies" which takes "I Love New York" and turns it into "I Love B.U." Do they have the same status under the fair use doctrine?

MALE STUDENT: I don't think so, because to make fun of B.U., you don't need this particular song.

PROF: Exactly. Plus, to make fun of B.U., the author of "I Love New York" may not be incensed, may not be angry, may not feel his feelings hurt. He's not the subject of the attack. So he's more likely to give permission. So the kind of parody for which fair use is most appropriate is the kind where the plaintiff's material is itself the subject of the criticism.

See what I mean, Elisa? Because that is, among other things, the place where you're least likely to get a permission. Also, as Boris says, if what you're doing is using somebody else's material as a vehicle for doing something else altogether, like making fun of school, there's probably a million other vehicles you could use. But there's very few things as effective as "Pretty Woman" for making fun of "Pretty Woman."

MALE STUDENT: ...(inaudible) courts go that way, though? I mean, if someone wanted to sue "Legal Follies"--

PROF: I think that "Legal Follies" might be fair use, but on other grounds. Give me the grounds. I don't think it would be fair use on the grounds that it's-- ...(inaudible) Rose. I think it would be fair use, if anything, on the grounds that it's educational, it's teaching, it happens only one night, or two nights. It's non-commercial, "blah blah blah."

Plus, you might even find some specific exemption for face-to-face activities in a class context. I think there's lost of things you could use to try to defend it, but I don't think this is it. And it's also possible that some day it will be held to be infringing. I mean "Capitol Steps" sometimes, I believe, gets licenses. I'm not sure about it, though, I just heard that rumor. "Capitol Steps" is a group that commercially does political satire using ordinary songs.

Okay, any questions? Yes.

STUDENT: ...(inaudible)

PROF: Okay, we have two kinds of parody, roughly speaking. We have a parody that is used as a vehicle to criticize other things, like "I Love New York" being used as a vehicle for making fun of B.U. Then we have parodies which target the actual work that's being parodied. Like, "I'm making fun of this particular song, how inane it is."

One of the judges on one of the levels talks about, "Gee, 'Pretty Woman' sounds all romantic, but if you listen to what's really going on, the character who's singing

meets a woman on the street and picks her up. Probably a prostitute. What's romantic about that?" One of the things that the 2 Live Crew does is that it takes the romance out and makes it cruder so you can see the original song for what it really is. A guy trying to romanticize his lust, or whatever.

Now, [writing on blackboard] a better example of "target." Because I think it stretches it a little to say that 2 Live Crew really was targeting "Pretty Woman." I think they were targeting a type of music, of which "Pretty Woman" is one. But a better example of the target is the example we've talked about occasionally in class. A woman named Alice Randall did a book called, "The Wind Ungone" which was an Afro-centric version of *Gone With The Wind.* And she really was doing it to criticize *Gone With The Wind.*

Primarily, in her version, you see how the White people were basically manipulated by the Black people, and that the Black people really ran everything, et cetera, et cetera. Plus, you get a really nasty view of slavery, which you don't get in *Gone With The Wind.* She wasn't using *Gone With The Wind* as a vehicle to make some sort of general point, she wanted to break the spell that *Gone With The Wind* cast on people that made them see the pre-Civil War South with the slaves as a nice place.

She really wanted to target the book itself. As you may know, that case-- District court level initially had taken the books off the shelves, had found it a copyright infringement. And on appeal, it was found to be a parody like the Acoff Rose type,

and that it settled before it was completely resolved. But it was found a least to be potentially a fair use. Yes?

STUDENT: Question regarding the relationship between Ronald(?) ...(inaudible). Can you, in other words, have another lawful exception on their(?) ...(inaudible) and the following ...(inaudible).

PROF: Yes, there's been some confusion about that, but I think the legislative history is pretty clear that-- Let's say you're a library. You've got a special provision just for photocopying in libraries called (Section) 108. If you do something that makes a lot of sense from a public interest perspective, but doesn't exactly fit all the technicalities in 108, I think you should still be able to call upon 107.

Now, there's some doubt as to that, for exactly the reason that Randy mentioned before. If Congress was thinking in such detail about how much photocopying libraries should be able to do, and this was a statute passed after that old case I mentioned which gave fair use to the libraries, a lot of people think of 108 as embodying that case. "Well, if Congress thought so much about it, maybe they didn't want to give anymore." So the argument is still alive, but I think that people who say that 107 exists as an additional resource, I think they have the slight better of the argument.

Okay, let me tell you where we're going next. Now, do I have you for two days next week, or just the one? Next week is not Thanksgiving yet? Good. Okay.

You should finish reading the "fair use" chapter before Tuesday, and let me tell you why. Even though we will be going through the rest of the chapter, you know, in a sort of ordinary way on Thursday, Kazinski loves fair use cases. And he's also a natural teacher.

So some of the cases we will be covering with him, and we'll be bouncing around in the chapter. So since you got to read it anyway for Thursday, read the whole fair use chapter. In addition, of course, read the things by Kazinski. Are any of them going to be absolutely necessary for you to understand the discussion? I don't think so, but there's two reasons for you to read them.

First, they will make it easier to understand the discussion, and how many times do you have a genuine Ninth Circuit judge to talk to? You know, that's pretty cool. You can ask him questions about his opinions. You always wanted to ask these judges why they did things, you can ask him! Second, the very last topic we're going to be covering is something you've already seen. Pre-emption. You know, pre-emption is the question of whether state law causes of action survive.

Well, since some of the stuff that is in the Kazinski opinions I gave you has to do with state law causes of action, it will help you understand some of the things that border copyright. And so that's another reason why it might be somewhat useful. Particularly the Vanna White right of publicity stuff. To what extent, you could ask, might giving her a right to sue someone who imitates what she does on a copyrighted show interfere with the rights of the owner of copyright in the show? She's asserting a sake(?) right.

In any event, it's a lot of reading, but I think you probably pretty much finished the fair use chapter anyway. All I'm really saying is make sure you finish it and, in addition, try to read the Kazinski stuff. I think you will find it interesting and fun. And I'll see you Tuesday, thanks. Oh, and there should be a copy of this available from A.V. if you know a friend who couldn't come today.

END OF SIDE B