

Fair Use Basics

How Copyrights, Trademarks, and Fair Use effect web content and social media sharing. Get the basic Do's and Don'ts for your business! A little knowledge up front can reduce risk and improve damage control systems.

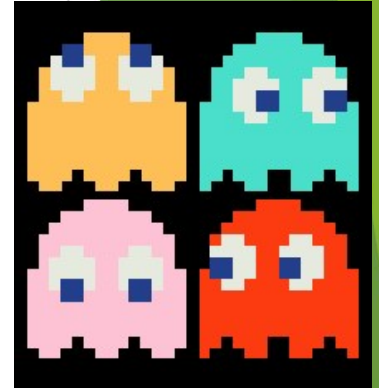


Genna S. Hibbs and Hibbs Law, LLC

- ▶ Intellectual Property Boutique firm. Founded 1Jan2013.
- ▶ Small business and individual needs: Patents, Trademarks, Copyrights, Unfair Competition, Trade Secrets, Infringement enforcement and litigation, licensing, entity formation, and business transactions.
- ▶ Background in Biotechnology and Genetics, small business and government.
- ▶ Substantial dedication (20-30% target) to *pro bono* legal services: low-income health center, consolidated school district prevention program, public education presentations, and others.
- ▶ Personal volunteer activities.
- ▶ Kansas, Japan, Washington, ... Now here!

1. What is Fair Use?

- ▶ A FIRST AMENDMENT interest that checks/balances an existing **Intellectual Property** right.
- ▶ Intellectual Property is **intangible** property rights created from a 'person', 5 types: Patent, Trademark, Trade secret, Copyright, and Right of Publicity.
- ▶ If otherwise infringing use is legally 'fair', then it is a defense to an accusation of infringement.
 - ▶ Infringement not covered in-depth in this presentation!
- ▶ Different types of Fair Use, depending on which category.
- ▶ FU: Also generic term used to refer to other defenses (not in this topic).
 - ▶ Patent Ex: consent, laches, estoppel, waiver, unclean hands.



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...so when does this come up?

How might an infringement risk be encountered? PLAIN ENGLISH:

Marketing

- Social Media
- Domain names
- Website Content
- Traditional Ads

Clients/Customers

- Bringing in infringement in the scope of your services

Products/ Services

- Your goods/services
- Counterfeit product from 3rdParties

...what is the process?

The Enforcement Process: Rights Holder v. Defense

Rights Holder Become aware of other user

Research (RH)
Cease & Desist Letter
Offer terms
Other actions (walk away or rebrand)

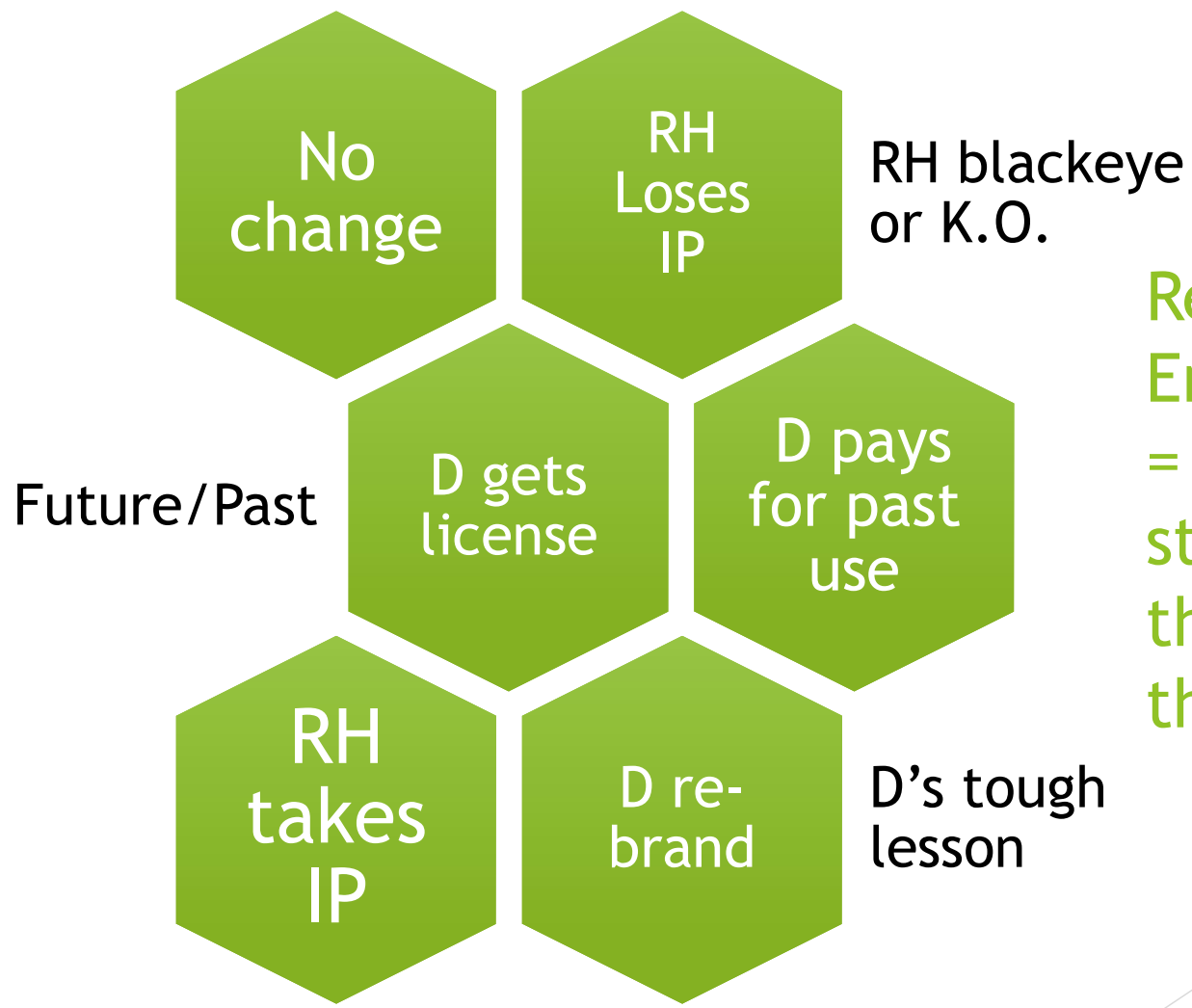
Cease & Desist Letter Response

Research (D)
Refutation &/or
Negotiations for
settlement
Other actions
(preemptive rebranding)

Formal process

ADR
USTPO PTAB/TTAB
Court (classic)
ICANN (domains)
USITC (imports)

...what results are possible?



Results of Enforcement = a lot at stake, including the cost to get there.

When Does Fair Use Apply?



THE CARLYLE GROUP

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Trademark

Copyright

Right of
Publicity

Trademark Fair Use: Nominative or Descriptive?



The Key Take Away for Trademark Fair Use: Keep it clear!

- No confusion as to who is who;
- Avoid misrepresentation;
- Order a clearance search before adopting new marks, product names, slogans, or taglines;

Nominative FU for Trademarks

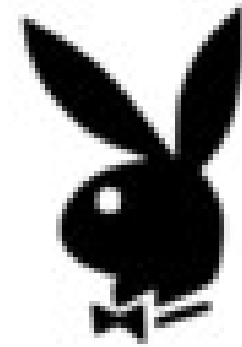


Allowed to use another's trademark to describe them, but only so much as necessary.

Especially when referring to true events, awards, etc.

Includes references like news, reference materials, history.

Often comes up in comparative advertising.



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Descriptive: 1. not using as a TM, 2. use is descriptive, and 3. good faith

Looking at placement/
prominence.



Descriptiveness limits, other
options?



What is Copyright Fair Use? Sec. 107

Sec. 107 “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- ▶ (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- ▶ (2) the nature of the copyrighted work;
- ▶ (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- ▶ (4) the effect of the use upon the potential market for or value of the copyrighted work.
- ▶ The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

Copyright Fair Use: commercial nature of the use is important

Categories:

- ▶ Criticism,
- ▶ comment,
- ▶ news reporting,
- ▶ teaching (including multiple copies for classroom use),
- ▶ scholarship, or
- ▶ research

Factors:

- ▶ 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- ▶ 2) the nature of the copyrighted work;
- ▶ 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- ▶ 4) the effect of the use upon the potential market for or value of the copyrighted work.

The Getty Roll:

- ▶ Getty and the Carlyle Group has aggressively pursued multi-billions in image acquisitions to enforce copyright use.
 - ▶ Usually just send a demand letter for hundreds, sometimes thousands of dollars.

The New Fad:

Movie/Show rights holders initiating lawsuit against multiple defendants for illegal downloads based on IP numbers → subpoena ISP for identities → cash in on settlements (nuisance claim).

Right of Publicity: Intellectual Property in your person

1st Amendment v. an individual's right in their person/-ality

- Commercial aspect of the use is important (again)
- The purpose being informative or cultural is FU,
- Merely exploiting the individual is not FU.

- Use not protected as FU if no artistic relevance, OR if it still has artistic relevance but the use explicitly misleads as to the source/content of the work.

- Not FU if simply a disguised commercial ad for goods/services.

- Whether the celebrity likeness is one of the 'raw materials' from which original work is made, or whether it is sum and substance of the work.

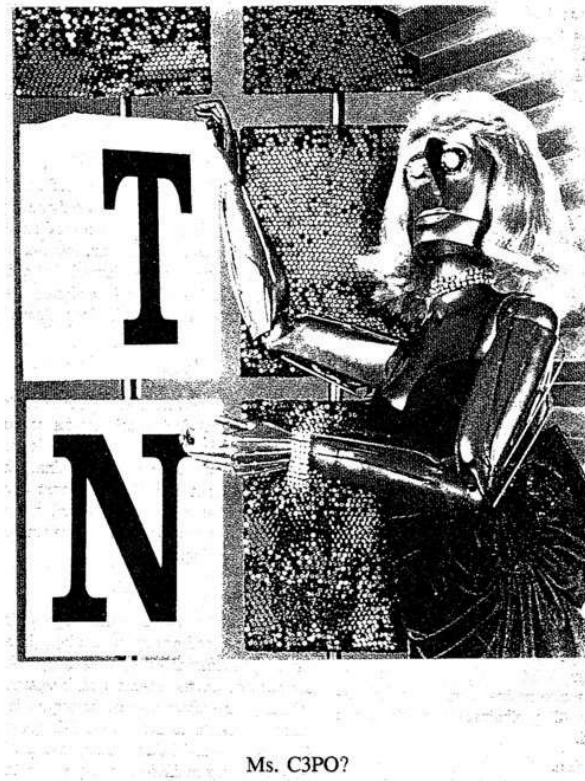


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Barbie and Vanna White, Bette Midler and Rosa Parks!



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Ms. C3PO?

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Preventative Measures:

- ▶ Terms of service agreements include prohibitions and indemnities for infringement.
- ▶ Use your own photographs, or pre-licensed media (CCL, .
- ▶ Get releases from event photos.
- ▶ Share from reputable news and blog sites, keep an eye out for copyright credits on images.
- ▶ Credit sources.



QUESTIONS?

