

Important Legal Developments for Online Publications

January 28, 2016



Davis Wright
Tremaine LLP

California's Correction Statute



California Civil Code § 48a

"1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

2. If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.

3. A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.”

Breaking Down California Civil Code § 48a

- Allegedly defamatory statement in a newspaper or radio broadcast: "plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast;"
- Normally, can recover general, special, and exemplary damages
- "General damages:" loss of reputation, shame, "hurt feelings"
- "Special damages:" must be proven, and include business damages and lost wages, and money spent as a result of the alleged defamation
- "Exemplary damages" to "punish" a defendant who has been proven to have made a statement with actual malice

Breaking Down California Civil Code § 48a

- To be effective, a demand for correction must be
 - Written
 - Served within 20 days after the plaintiff's knowledge of the allegedly-defamatory publication or broadcast
 - Served on the publisher or broadcaster at the place of publication or broadcast
 - Specify the statements claimed to be defamatory
- If a correction is made effectively, plaintiff can recover only special damages

Breaking Down California Civil Code § 48a

- To be effective, a correction must:
 - “[b]e published or broadcast in substantially as conspicuous a manner...as were the statements claimed to be libelous,” and
 - be “in a regular issue published or broadcast within three weeks after service of the demand for correction.
- (A correction is also effective if made before receipt of a demand for correction, and a correction made without demand shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.)

Assembly Bill No. 998

(Revised Corrections Statute)

“It is the intent of the Legislature to ensure that weekly and online publications are afforded the same protection under Section 48a of the Civil Code as is afforded to a daily newspaper to the extent that the weekly and online publications perform the same news-disseminating function as a daily newspaper. The Legislature finds and declares that the rulings in *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991 and *Condit v. National Enquirer, Inc.* (2002) 248 F.Supp.2d 945 do not fully recognize that the policy of Section 48a of the Civil Code to protect enterprises engaged in the immediate dissemination of news on matters of public concern, insofar as time constraints do not reasonably permit such enterprises to check sources for accuracy and stories for inadvertent errors, should extend to online publications and weekly newspapers, which publish breaking news on deadlines indistinguishable from daily newspapers.”

Burnett v. National Enquirer

144 Cal. App. 3d 991 (1983)

- "Boisterous Behavior"
- Argument with Henry Kissinger
- Retraction demanded and published
- Burnett awarded \$300,000 in compensatory damages and \$1.3 million in punitive damages

Burnett v. National Enquirer

144 Cal. App. 3d 991 (1983)

- Enquirer appealed jury verdict
- Enquirer argued that application of 48a depends on "the public's interest in the free dissemination of news" without reference to question of timeliness
- Court held Section 48a "applies only to a publication in a newspaper or by radio. Its terms are clear. The legislature conspicuously failed to include magazines in the protect group."
- Only those publications "who engage in the immediate dissemination of news" are entitled to the correction's statute limitation on damages.
- "the Legislature could reasonably conclude that such enterprises cannot always check their sources for accuracy and their stories for inadvertent publication errors."
- *Burnett*, 144 Cal. App. 3d at 1002-1005.

Burnett v. National Enquirer

144 Cal. App. 3d 991 (1983)

- The court held that Section 48a did not protect the Enquirer because:
 - “[i]t provides little or no current coverage of subjects such as politics, sports or crime;”
 - “does not attribute content to wire services;”
 - “in general does not make reference to time;”
 - “[n]ormal “lead time” for its subject matter is one to three weeks;” and
 - “[i]ts owner allowed it did not generate stories “day to day as a daily newspaper does.”
- *Burnett*, 144 Cal. App. 3d at 1000

Condit v. National Enquirer, Inc.
248 F. Supp. 2d 945 (E.D. Cal. 2002)

- Senator's former intern disappeared
- Enquirer alleged a "Furious phone call" was made by Senator's wife to former intern, soon before the intern disappeared
- No demand for correction made by senator's wife
- Enquirer moved to dismiss
- Court followed *Burnett*, holding that wife's failure to demand correction would not limit damage recovery

Condit v. National Enquirer, Inc.
248 F. Supp. 2d 945 (E.D. Cal. 2002)

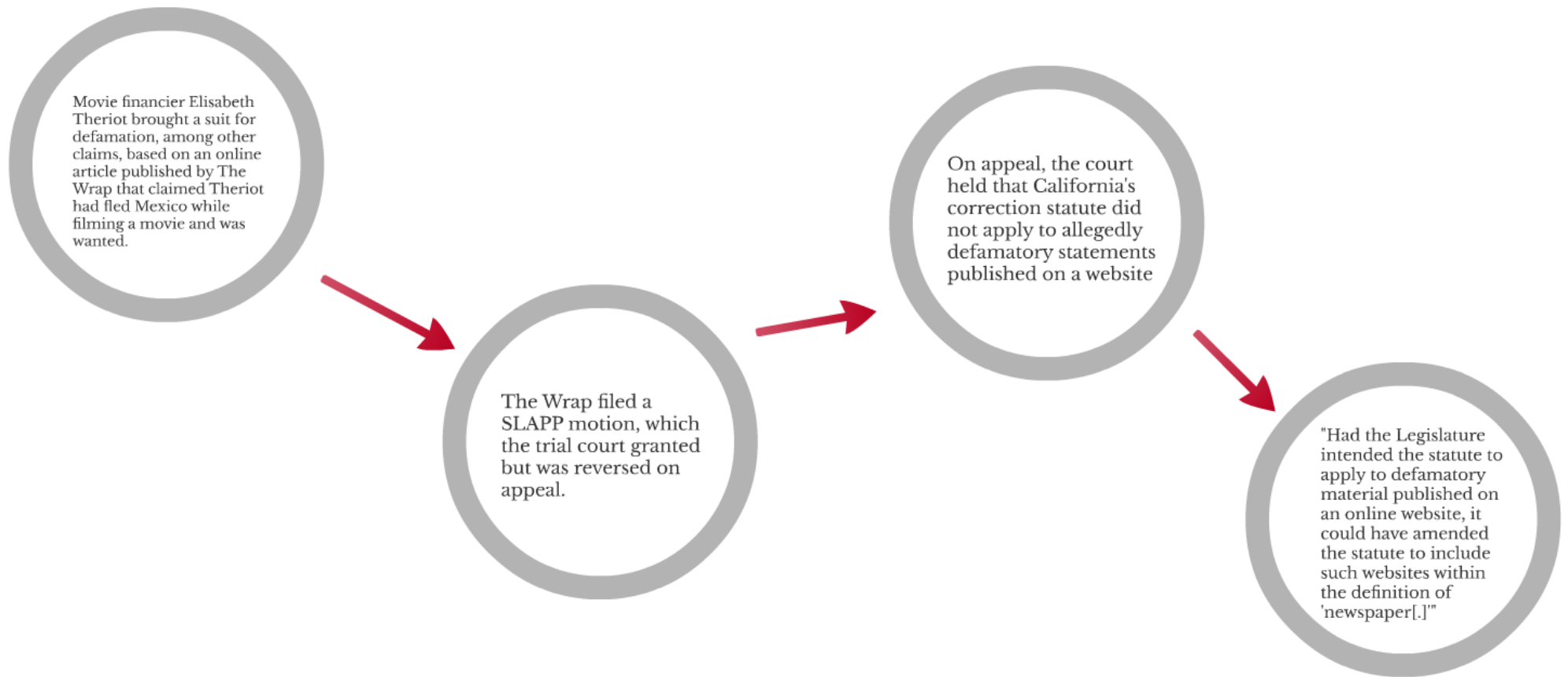
- “While the evidence show[ed] the 2001 Enquirer includes more crime stories than the 1976 Enquirer and that the 2001 Enquirer’s coverage of politics, sports and crime is more current and its lead time is shorter than the 1976 Enquirer, “[t]he record d[id] not evidence the Enquirer is under pressure to disseminate news while it is news.”
- “Section 48a contemplates a publication-based, rather than an article-based, determination of what qualifies as a ‘newspaper.’”
- *Condit*, 248 F. Supp. 2d at 958-959


Condit v. National Enquirer, Inc.
248 F. Supp. 2d 945 (E.D. Cal. 2002)

- “[e]xistence of a website does not necessarily increase the pressure for more rapid dissemination without information and source investigation or accuracy confirmation.”
- *Condit*, 248 F. Supp. 2d at 958-959


Theriot v. The WrapNews Inc.,


Cal. Court of Appeals, 2nd Appellate Dist., 4th Div. 2014






Movie financier Elisabeth Theriot brought a suit for defamation, among other claims, based on an online article published by The Wrap that claimed Theriot had fled Mexico while filming a movie and was wanted.






The Wrap filed a
SLAPP motion, which
the trial court granted
but was reversed on
appeal.



On appeal, the court held that California's correction statute did not apply to allegedly defamatory statements published on a website



"Had the Legislature intended the statute to apply to defamatory material published on an online website, it could have amended the statute to include such websites within the definition of 'newspaper[.]'"

Assembly Bill No. 998

"[T]o ensure that weekly and online publications are afforded the same protection under Section 48a of the Civil Code as is afforded to a daily newspaper[.]"

Legislature explicitly rejected the rulings in *Burnett and Condit*.

Effective January 1, 2016

Correction Statute Now

- "daily or weekly news publication" :
- "A publication, either in print or electronic form, that contains news on matters of public concern and that publishes at least once a week"

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Best Practices



California's Correction Statute



California's Correction Statute



**Fair Use in Light of
*Lenz v. Universal Music Corp.***

Lenz v. Universal Music Corp.

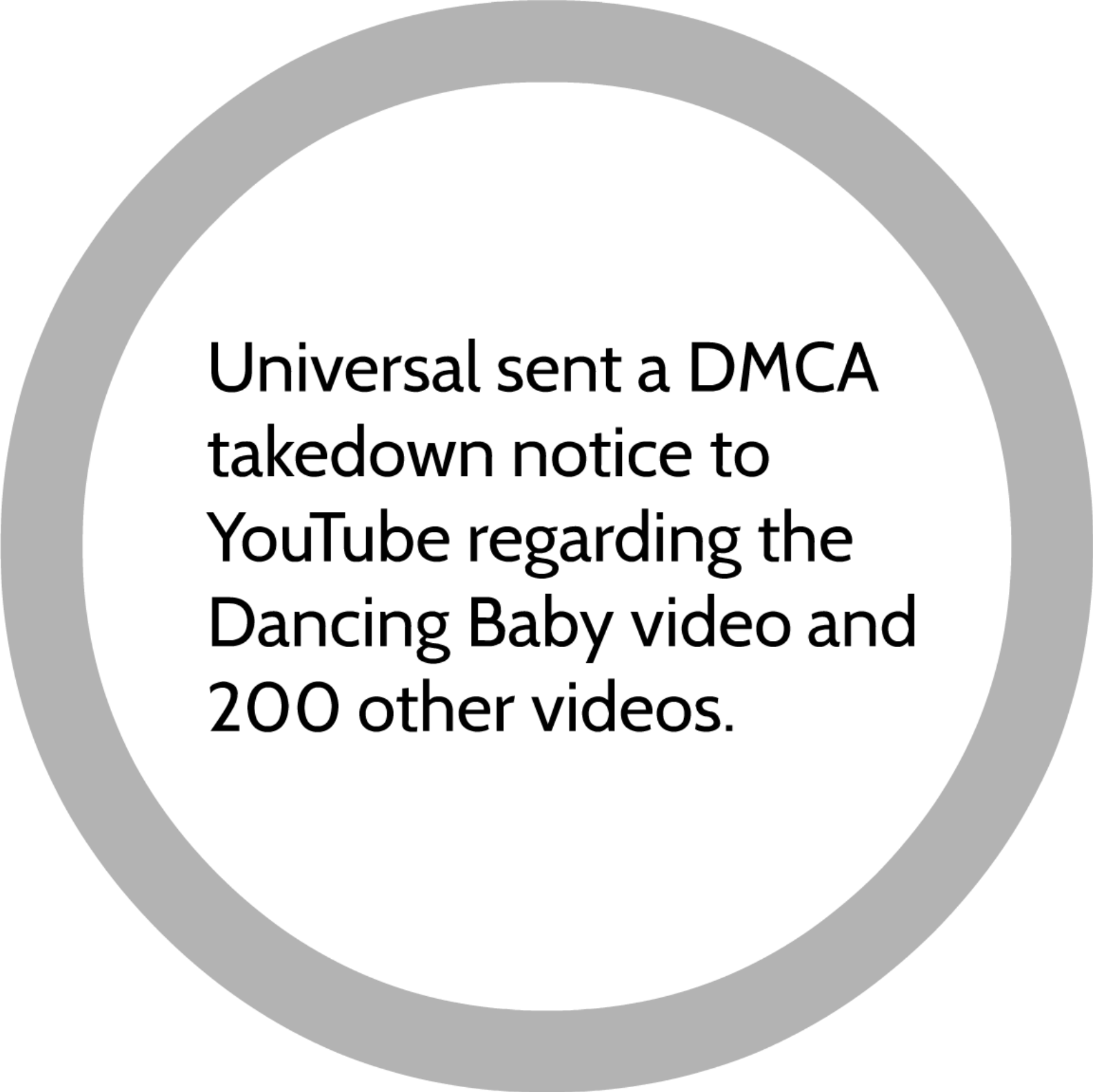
AKA the "Dancing Baby Case"

Universal sent a DMCA takedown notice to YouTube regarding the Dancing Baby video and 200 other videos.

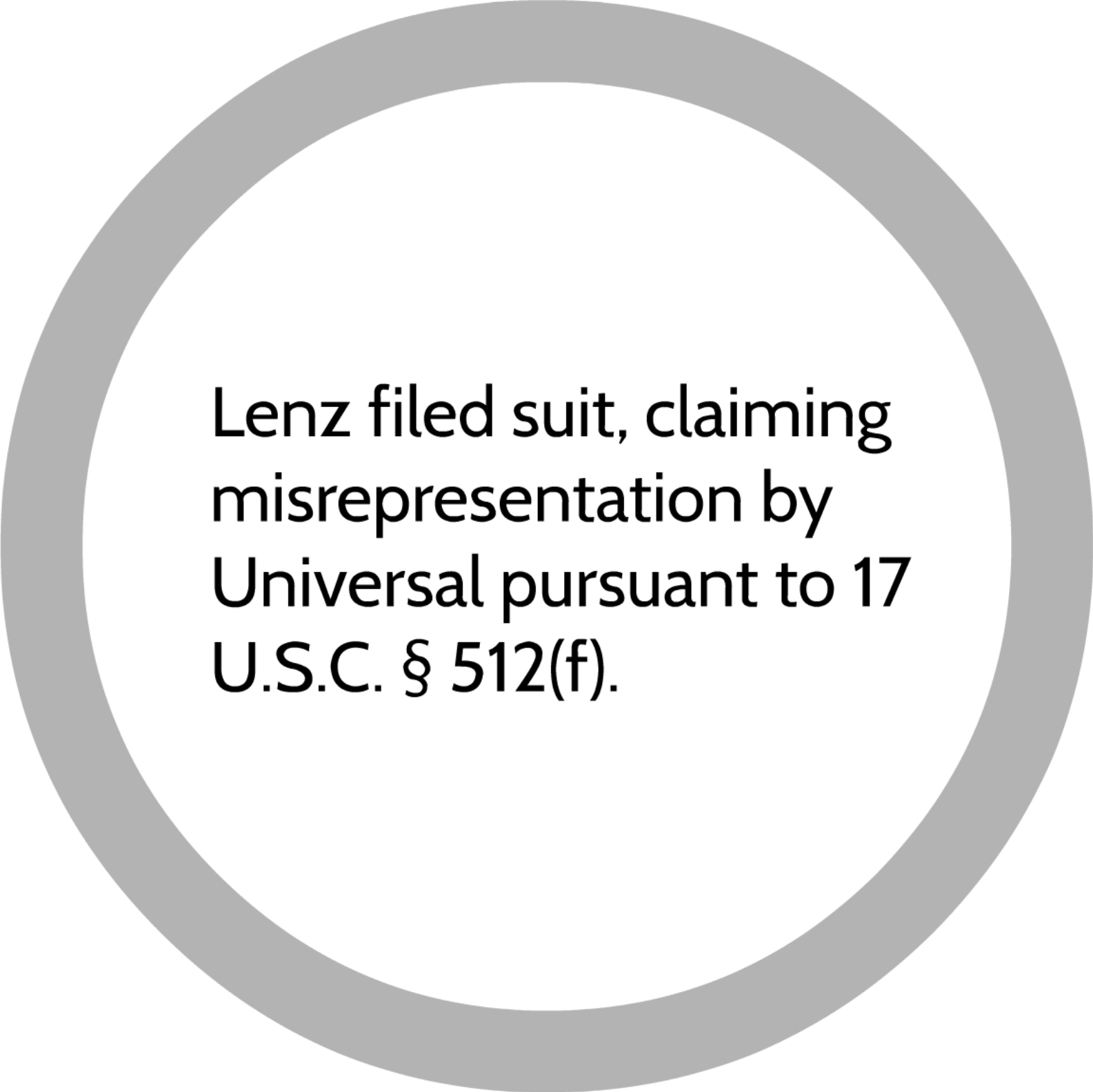
DCMA requires copyright holders to consider fair use before sending a takedown notification. Failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law.

Lenz filed suit, claiming misrepresentation by Universal pursuant to 17 U.S.C. § 512(f).

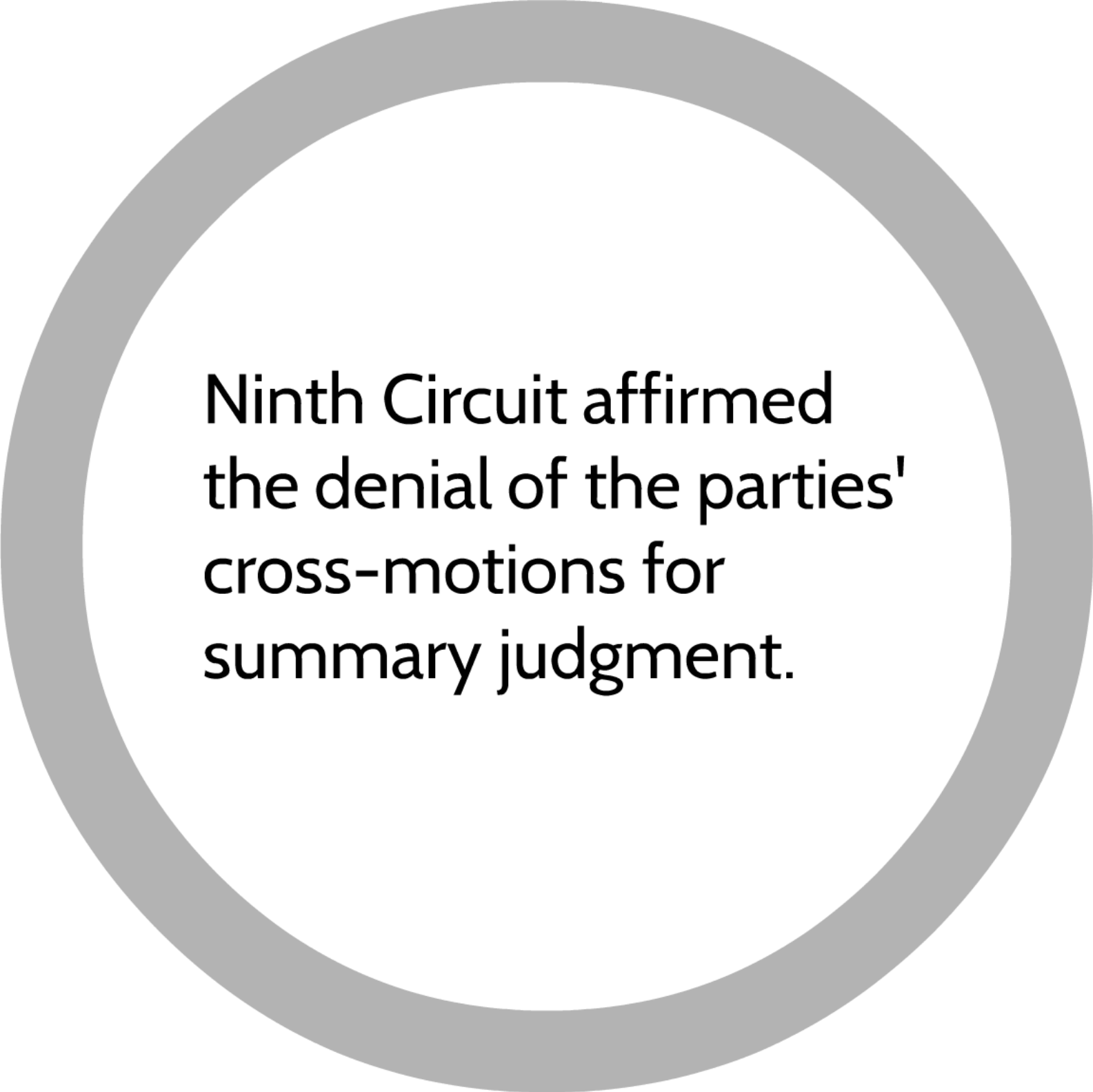
Ninth Circuit affirmed the denial of the parties' cross-motions for summary judgment.




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What is Fair Use?

17 USC § 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.”

17 USC § 107

·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**,
- (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**.

Transformativeness

Campbell v. Acuff-Rose Music Inc.

510 U.S. 569, 578-579 (1994)

“The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like...The central purpose of this investigation is... **whether the new work merely ‘supersede[s] the objects’ of the original creation..., or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’**”

Campbell v. Acuff-Rose Music Inc.

510 U.S. 569, 578-579 (1994)

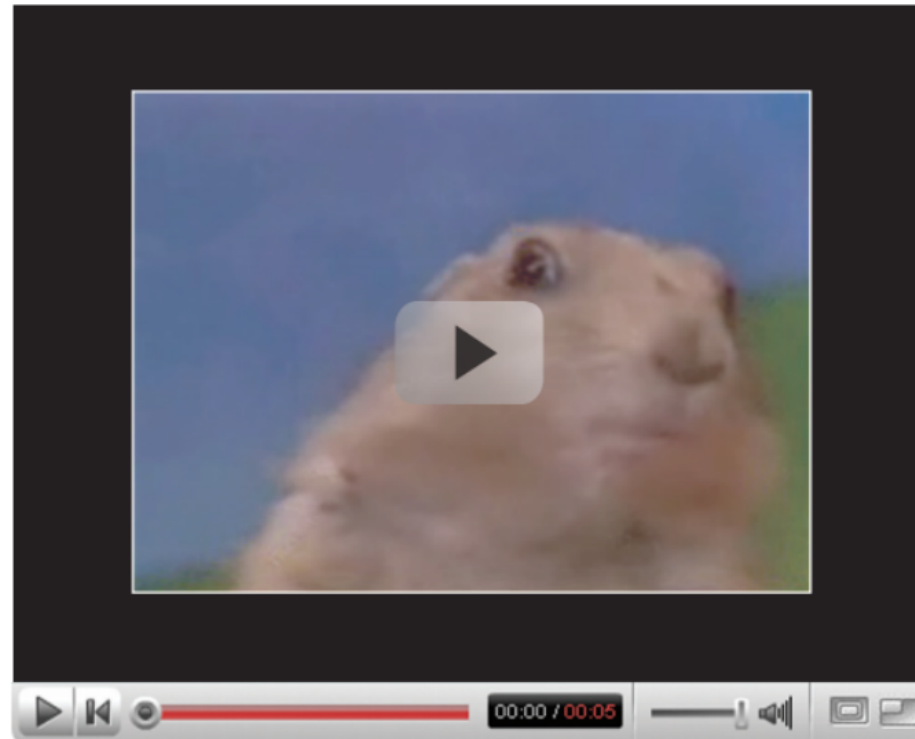
“Although such transformative use is not absolutely necessary for a finding of fair use, ...the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright..., and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”

Practical Guidance

June 2008



Code of Best Practices in Fair Use for Online Video



centerforsocialmedia.org/remix



A Future of Public Media Project, funded by the Ford Foundation

Code of Best Practices for Fair Use in Online Video

“In reviewing the history of fair use litigation, we find that judges return again and again to two key questions:

- 1.) Did the unlicensed use 'transform' the material taken from the copyrighted work by using it for a different purpose than that of the original, or did it just repeat the work for the same intent and value as the original?
- 2.) Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

If the answers to both questions are yes, a court is likely to find a use fair.”

Illustrative Examples of Fair Use

- **Commentary**
- **Illustration / Example**
- **Incidental Use**

Commentary

Limitations:

- Use only as much as is appropriate to express the commentary or critique; don't allow commentary to become a vehicle for satisfying the appetite for the thing being commented on
- Relationship between the work and the commentary should be clear (the “sleepy judge” standard)

Illustration / Example

Limitations:

- Should be drawn from a range of different sources (to create an overall pattern of illustrations) – not a single “illustration” that might satisfy appetite for that work
- Should be no longer than is necessary to achieve the intended effect
- Material should be properly attributed

Incidental Use

Limitations:

- Creator of use should not request or direct focus on work used (it should really be incidental!).
- The material should be integral to the scene or its action.
- The use should not be so extensive that it becomes the primary focus of the interest.
- Where appropriate, the material used should be properly attributed.

Equals Three, LLC v. Jukin Media, Inc.

2015 U.S. Dist. LEXIS 143389 (C.D. Cal. 2015)

- “Complicated inquiry requires this Court to make distinctions along the fuzzy boundaries between commenting on humorous videos in a transformative manner and simply exploiting them for their inherent humor without paying the customary price.”
- “There are no bright-line rules; fair use must be evaluated on a case-by-case basis by reference to the four statutory factors.”

Equals Three, 2015 U.S. Dist. LEXIS 143389 at *1, *16.

- **Summary judgment standard:** can defendant show that it is undisputed that the defendant will prevail on fair use as a matter of law, assuming all facts in light favorable to plaintiff

Equals Three, LLC v. Jukin Media, Inc.

2015 U.S. Dist. LEXIS 143389 (C.D. Cal. 2015)

- Plaintiff “Jukin is a digital media company that amasses a library of user-generated internet video clips to license on the clip creators' behalf. Jukin employs a research and acquisitions team of eleven people to scour the internet for videos likely to ‘go viral’... Jukin's employees then locate the videos' creators and enter licensing agreements with them... Jukin uploads these videos to its YouTube multi-channel network and to Jukin's own content-focused websites.”
- Defendant “Equals Three produces short humor programs which it broadcasts via YouTube. Its humor programs typically involve a host who gives an introduction, shows parts of video clips (which are usually shown in edited form and inset within a decorative graphical frame) and remarks about the events and people presented in the clip. In each episode, "the host weaves an originally crafted humorous story theme throughout the episode using multi-media content – text, graphics and animation, sound effects, voice overs, and video clips – to enhance and develop the story.”
- *Equals Three*, 2015 U.S. Dist. LEXIS 143389 at *3-6.

Equals Three, LLC v. Jukin Media, Inc.

2015 U.S. Dist. LEXIS 143389 (C.D. Cal. 2015)

Holding: most of the videos were fair use.

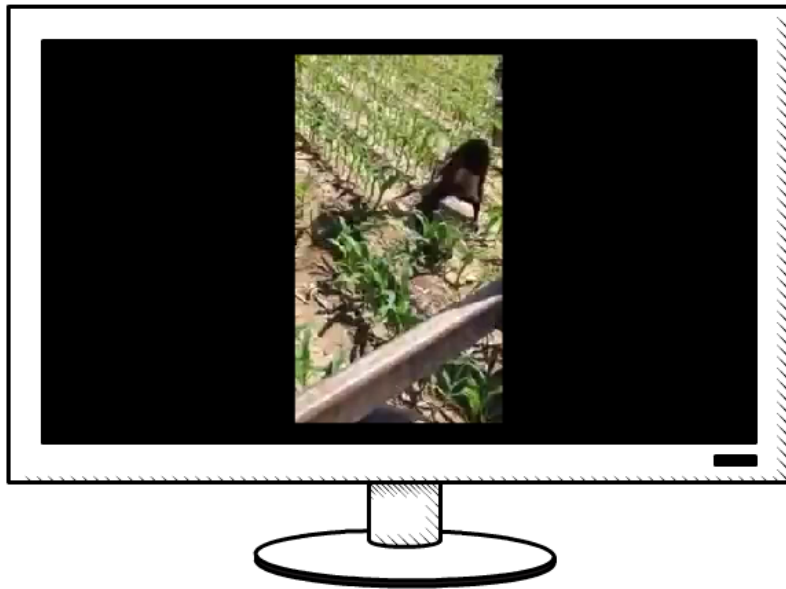
- “[e]ven if Equals Three's episodes are not parodies, the episodes comment upon or criticize Jukin's videos. [Except for Sheep to Ball] Equals Three's episodes directly respond to and highlight humorous aspects of Jukin's videos. The episodes do so via the host's reactions to the videos, jokes, narration, costumes and graphics. The host's narration does not simply recount what is shown in Jukin's videos; instead the host makes comments about Jukin's videos that highlight their ridiculousness by creating fictionalized narratives of how the events transpired, using similes, or by directly mocking the depicted events and people. Equals Three's episodes also repeat portions of Jukin's videos multiple times within the same segment.”

Equals Three, 2015 U.S. Dist. LEXIS 143389 at *17.

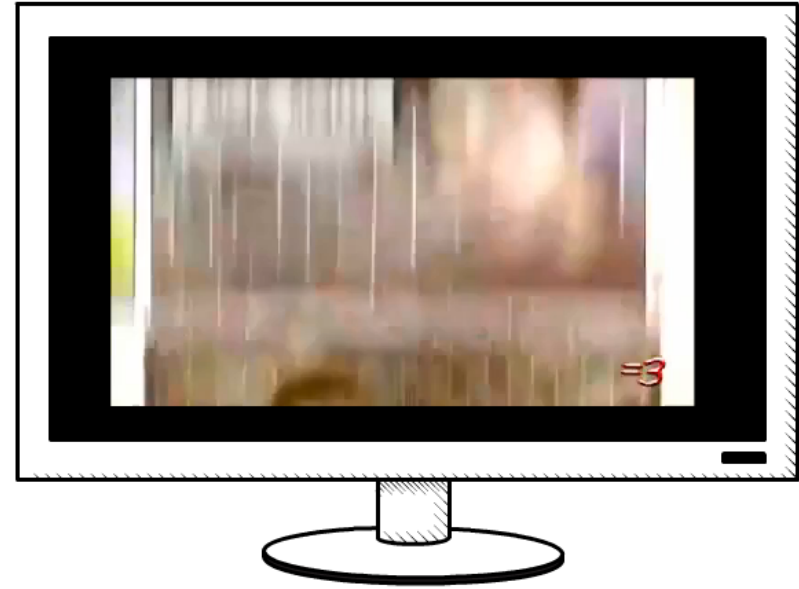
Equals Three, LLC v. Jukin Media, Inc.

2015 U.S. Dist. LEXIS 143389 (C.D. Cal. 2015)

Fair Use found

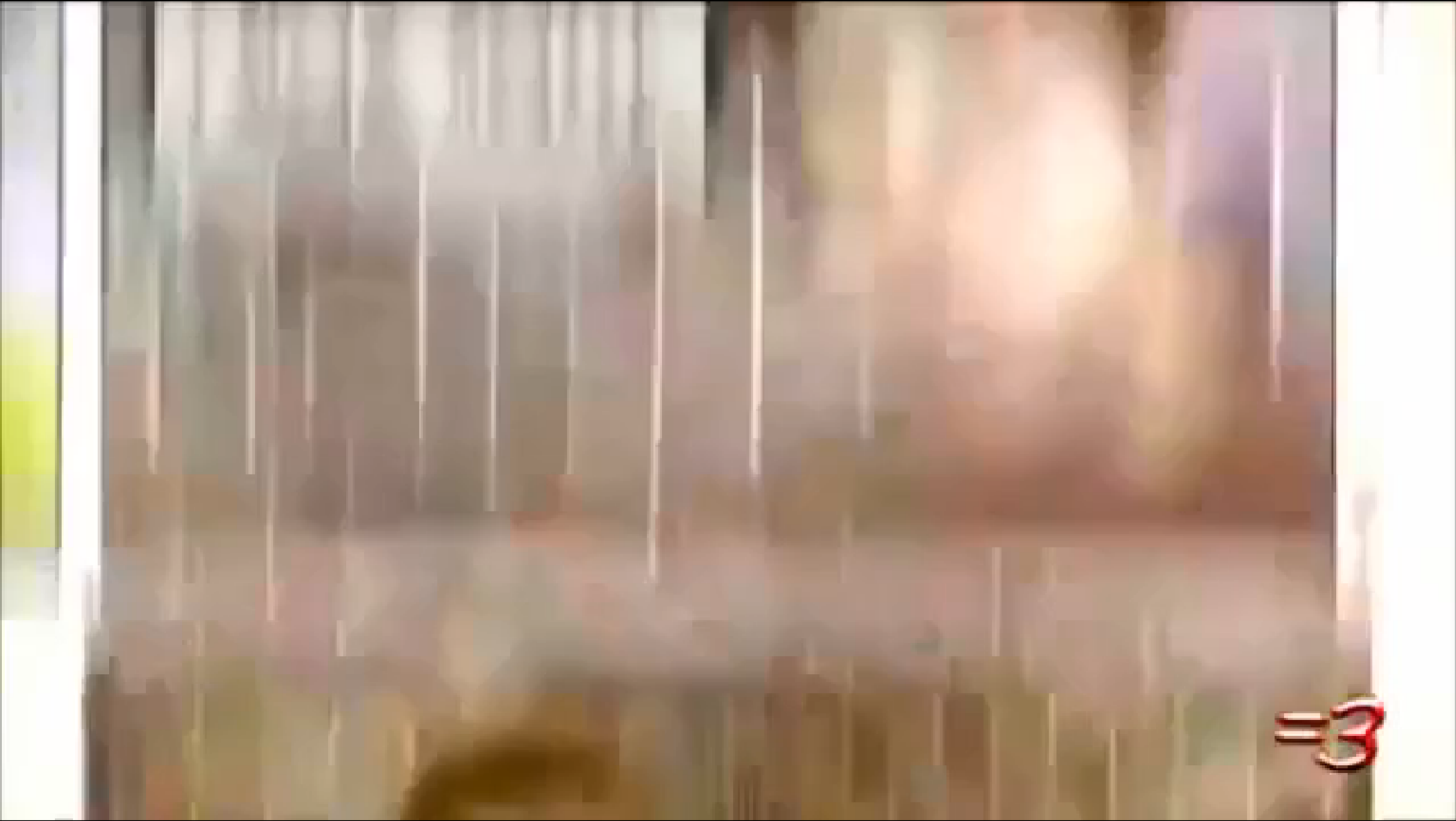


Black Bear Milk Jug Rescue
(Jukin's work)



The Resurrection
(Equal Three's use)





Equals Three, LLC v. Jukin Media, Inc.

2015 U.S. Dist. LEXIS 143389 (C.D. Cal. 2015)

Fair Use found

“Jukin's video [Black Bear Milk Jug Rescue] shows *inter alia* footage from a distance of the bear in a field, at least three attempts by a tractor's crane to grasp the milk jug on the bear's head, the crane successfully clasping and removing the jug from the bear's head, and the bear running away. The Resurrection [Equals Three's use of Jukin's video] shows, *inter alia*, some shots of the crane next to the bear with the jug on its head, one unsuccessful attempt by the crane to grasp the jug, the crane successfully grasping and removing the jug, and part of the footage of the bear running away. The host makes such comments as ‘playing the crane game at Chuckie Cheese's wasn't a waste of time’ and compares using a crane to remove a jug from a bear's head to ‘fishing with a hand grenade.’”

Equals Three, 2015 U.S. Dist. LEXIS 143389 at *19

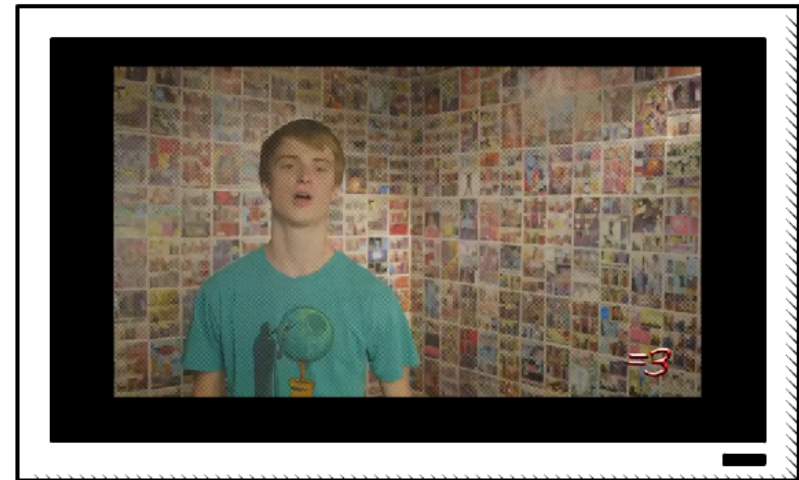
Equals Three, LLC v. Jukin Media, Inc.

2015 U.S. Dist. LEXIS 143389 (C.D. Cal. 2015)

Fair Use NOT found

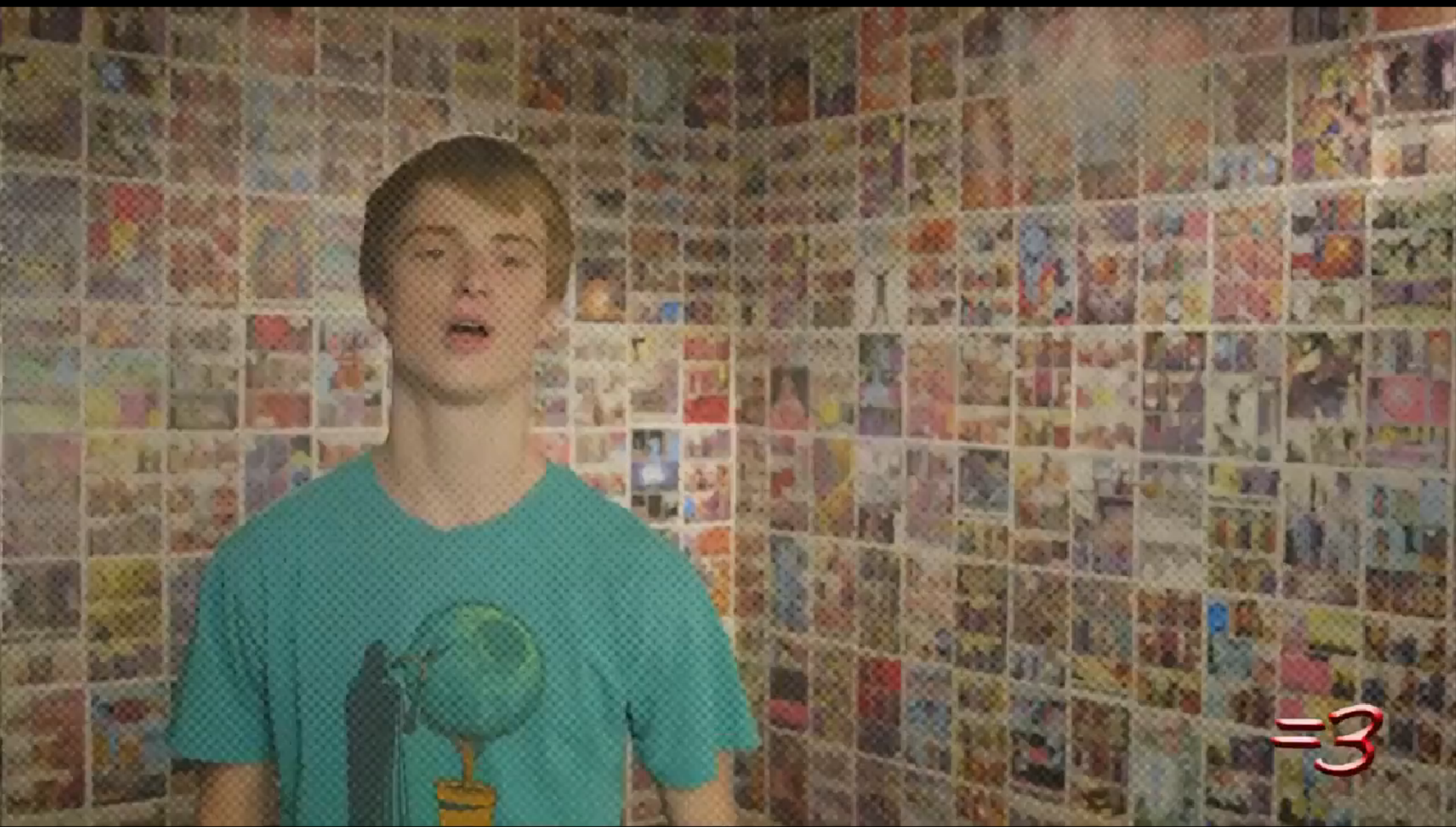


First Person to Buy iPhone 6
in Perth drops it on Live TV
(Jukin's work)



Sheep to Balls
(Equals Three's use)





Equals Three, LLC v. Jukin Media, Inc.

2015 U.S. Dist. LEXIS 143389 (C.D. Cal. 2015)

Fair Use NOT found

“The one exception to the aforementioned analysis is Equals Three's episode entitled Sheep to Balls. Sheep to Balls uses Jukin's video of the first person to buy an iPhone 6 in Perth dropping the phone. According to Equals Three, it used this footage for the purpose of making two points: (1) "don't be first at shit"; and (2) Apple Inc.'s method of packaging iPhones at the top of the box is absurd. Equals Three thus admits that its purpose of using Jukin's video was to make two general, broad points that were not directly aimed at criticizing or commenting on the video. The use of Jukin's footage to make these two points is akin to using news footage without adding anything transformative to what made the footage valuable—in this case a clear view of the first person to obtain the iPhone 6 in Perth dropping the phone upon opening its package.”

Equals Three, 2015 U.S. Dist. LEXIS 143389 at *21

Equals Three, LLC v. Jukin Media, Inc.

2015 U.S. Dist. LEXIS 143389 (C.D. Cal. 2015)

Applying the rest of the factors

Nature of the Work:

- “Here, the largely “point-and-shoot” videos do not exhibit the cinematic masterpiece of many famous film directors...[but], the Court cannot say that they convey mainly factual information...Nevertheless, the copied work's creative nature is not particularly important where the new work is highly transformative.” *Equals Three*, 2015 U.S. Dist. LEXIS 143389 at * 23

Amount and substantiality:

- “The Supreme Court has recognized that a parody may need to take a work's heart in order to conjure up the original and achieve its parodic purpose.... though *Equals Three* uses the arguable heart of Jukin's videos, it does not show more than is reasonably necessary to convey enough of the events to allow the host's jokes, comments, and criticisms to make sense to the viewer and resonate.” *Equals Three*, 2015 U.S. Dist. LEXIS 143389 at * 24 (quoting *Campbell*, 510 U.S. at 588-89).

Equals Three, LLC v. Jukin Media, Inc.

2015 U.S. Dist. LEXIS 143389 (C.D. Cal. 2015)

Applying the rest of the factors

Market Harm:

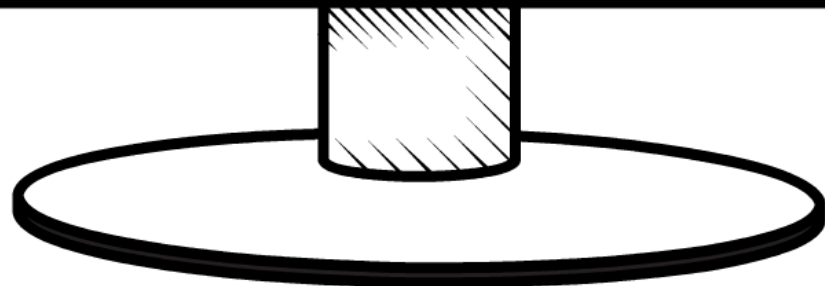
- “where a work is transformative, market harm may not so readily be inferred and there is no presumption of market harm...
- there is no cognizable derivative market for criticism.
- While the transformative nature of Equals Three's videos makes cognizable market harm less likely, the Court cannot say that it is completely implausible that at least some viewers would substitute Jukin's videos with Equals Three's videos. Both videos are meant to be humorous and the Court can imagine a fine line between the demand for the humorous original and the humorous new work commenting thereon. Nevertheless, there is no actual evidence of any such harm and...Equals Three's episodes do not take excessively from Jukin's videos. Thus, on this record, where any market harm remains hypothetical, the Court FINDS that this factor does not favor either party.” Equals Three, 2015 U.S. Dist. LEXIS 143389 at * 26-29.

Fair Use Hypotheticals

A few examples...

- A blogger quotes a headline to comment on the blogger's perception that news coverage is biased
- A blogger quotes three paragraphs from a six paragraph article to summarize the facts of a widely-covered news story
- A newspaper quotes two verses of rap lyrics to show an example of violence in hip hop
- A newspaper's online video website plays a two minute rap song continually, mixed underneath news commentary about violence in rap lyrics

**...And finally, did Stephanie Lenz
"go crazy" by posting a video of
her daughter dancing... or was it a
fair use of Prince's song?**





You Tube

Best Practices



Questions?

About the Speakers



Karen Henry Counsel

Litigating in state and federal court, Kaen maintains a broad and diverse practice focusing primarily on media, IP, and entertainment law. She has extensive expertise defending news organizations against subpoenas, in gaining access to court proceedings and records, in defending clients in business disputes against claims for breach of contract, fraud, unfair competition and other business torts, and in representing newspapers in adjudication proceedings.



Brendan Charney Associate

Brendan Charney has experience in a broad range of legal issues, and focuses his practice on media and intellectual property law. He has litigated motions in state and federal courts; counseled documentary filmmakers and other creative clients on fair use and other legal issues; drafted and filed appellate briefs with the Ninth and Eleventh Circuit Courts of Appeals; and represented clients before the Copyright Office in an administrative rulemaking under the Digital Millennium Copyright Act.



Diana Palacios Associate

Diana Palacios focuses her practice on media and First Amendment law. she has experience researching and drafting memoranda for a variety of legal matters across all stages of litigation, and recently worked as a law clerk for a federal court judge.