

LL4177/LL5177/LL6177  
**ENTERTAINMENT LAW:  
POPULAR ICONOGRAPHY & THE CELEBRITY**  
(Semester I: AY2013-2014)

---

*Seltzer v Green Day*

---

**Matric No:** A0086948H  
**Word Count:** 1988  
**Word Count (with footnotes):** 2683  
**Citation Style:** Bluebook

## I. Introduction

Fair use plays a critical role in calibrating copyright's balance between granting exclusive rights to creators and ensuring that it does not stifle new sources of creativity. Given the rapid pace of change in cultural and community norms, and individuals' enhanced capabilities to "create, collaborate, remix and distribute"<sup>1</sup> their works in new media, challenges to antiquated legal frameworks invariably occur.

In *Seltzer v Green Day*<sup>2</sup>, the Ninth Circuit's Court of Appeals had to deal with the question of whether the rock band Green Day's unauthorised use of artist Dereck Seltzer's artwork, *Scream Icon*, in the band's video backdrop for its live concerts constitutes fair use. In deciding so, the Ninth Circuit upheld the district court's summary judgment in favour of Green Day and regarded the added spray-painted cross on *Scream Icon* as conveying "new information, new aesthetics, new insights and understandings"<sup>3</sup> "in the context of a song about the hypocrisy of religion"<sup>4</sup>. Having established transformative use, the subsequent consideration of other fair use factors led to the holding that fair use was marginally found in what the court regarded as a "close and difficult case"<sup>5</sup>.

This case is significant in at least two respects: first, it reaffirms the primacy of the 'transformative use' paradigm in fair use; second, it represents a progressive shift in judicial ideology towards favouring fair use, even in cases where the secondary work uses most or all of the appropriated work. It also indicates a harmonisation of law in the two most "influential"<sup>6</sup> Circuits with regards to fair use, particularly in the area of cultural expression, given that *Seltzer* was decided merely four months after the similar appropriation art case of *Cariou v Prince*<sup>7</sup> in the Second Circuit.

---

<sup>1</sup> Pan C Lee, et al, *Introduction to the Copyright Reform Act*, Public Knowledge, February 13, 2010, <http://www.law.berkeley.edu/files/IntroductiontotheCopyrightReformAct.pdf>.

<sup>2</sup> *Seltzer v Green Day Inc*, 725 F 3d 1170 (2013).

<sup>3</sup> *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994) ('*Campbell*'), at 579.

<sup>4</sup> *Seltzer*, 725 F 3d 1170 at 1174.

<sup>5</sup> *Id.*, at 1179.

<sup>6</sup> Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 554 (2008), at 554 ("the Second and Ninth Circuits dominate our fair use case law").

<sup>7</sup> *Cariou v Prince*, 714 F 3d 694 (2d Cir 2013).

However, *Seltzer* also exposes the recurring problems inherent in fair use, such as the difficulties in determining the legal standard of ‘transformativeness’ without bright-line rules, and how this flexibility may lead to judicial manipulation.

## II. The ‘Transformative Use’ Paradigm

The fair use doctrine, which codifies the common law position<sup>8</sup> under s 107 of the US Copyright Act<sup>9</sup>, defines “the contours of the private and public domains of human expression and in so doing, directly impact[s] our capability for human flourishing”<sup>10</sup> by considering a non-exhaustive list of factors. Following the Supreme Court’s decision in *Campbell v Acuff-Rose Music*<sup>11</sup>, which adopted Leval’s clarification of fair use,<sup>12</sup> the touchstone of the statutory defence has become the ‘transformativeness’ inquiry.<sup>13</sup>

As a preliminary note, apart from the ‘transformativeness’ inquiry, the application of the other fair use factors appears uncontroversial: (i) the ‘nature of copyrighted work’ factor favours *Seltzer* because *Scream Icon* is clearly a creative work and is therefore “closer to the core of intended copyright protection”<sup>14</sup>; (ii) the ‘amount and substantiality’ factor is neutral because the court has found that wholesale appropriation is justified if “no more than... necessary” of the original

---

<sup>8</sup> The fair use doctrine at common law was first established in *Folsom v Marsh*, (9 F Cas 342, 348 (CCD Mass 1841).

<sup>9</sup> Section 107 of the US Copyright Act provides:

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.

<sup>10</sup> Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes? Evidence From the Fair Use Case Law*, 31 Colum. J. L. & Arts 517, 522 (2008).

<sup>11</sup> *Supra*, no 3.

<sup>12</sup> Pierre N Leval, ‘Toward a Fair Use Standard’ (1990) 103 *Harvard Law Review* 1105

<sup>13</sup> 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05 [A][1][b] (2011), at 13-168.

<sup>14</sup> *Campbell*, at 586.

work is taken, which was the case in *Seltzer* because “Scream Icon is not meaningfully divisible”;<sup>15</sup> (iii) the ‘market harm’ factor favours Green Day because using *Scream Icon* on its video backdrop does not “perform the same ‘market function’ as the original”, and that Seltzer failed to satisfy the burden of proving any impact the secondary use had on “traditional, reasonable, or likely to be developed markets”<sup>16</sup>.

#### *A. The Ninth Circuit on ‘Transformative Use’*

The Ninth Circuit began its ‘transformative use’ analysis by acknowledging the contentious nature of transformation, and sought to avoid similar confusion by reference to the *Campbell* formulation. In applying the test, the court first appears to dismiss Green Day’s infringing use as incidental (“although *Scream Icon* is prominent, it remains only a component of what is essentially a street-art focused music video about religion...”<sup>17</sup>). Subsequently, the court juxtaposed the nebulous nature of the original artwork against the religious themes of the secondary use and held that the use was sufficiently transformative.<sup>18</sup> In establishing this, it relied on Seltzer’s deposition that the secondary use has “tainted the original message of the image”.<sup>19</sup>

Two questions arise: Has too much judicial discretion been granted in ascertaining ‘transformativeness’? Was the court correct in approaching the ‘transformativeness’ inquiry from the author’s perspective as opposed to that of the audience’s?

#### *B. Judicial Discretion*

---

<sup>15</sup> *Seltzer*, 725 F 3d 1170 at 1176.

<sup>16</sup> *Id.*; *Ringgold v Black Entertainment Television, Inc.*, 126 F 3d 70, 81 (2d Cir 1997).

<sup>17</sup> *Seltzer*, 725 F 3d 1170 at 1174.

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

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

The ‘transformativeness’ inquiry has often been criticised for its unpredictable outcomes<sup>20</sup>, primarily because the courts failed to clarify how the test can be applied, thus “leav[ing] unclear whether either, both, or some combination of transforming content and transforming message are required to constitute a transformative use”.<sup>21</sup>

While courts generally find fair use for purposes of parody, biography, history, and other distinct categories<sup>22</sup> that have different expressive purposes from the copyrighted work, the legal *standard* of ‘transformativeness’ remains elusive without dispositive *rules* on “how broad the relevant categories of expressive purpose should be”<sup>23</sup> or “how different the defendant’s expressive purpose must be from that of the author to qualify as a transformative use”<sup>24</sup>. The lack of bright lines to assist judges in characterising the author’s or defendant’s expressive purpose has elicited criticisms that ‘transformative use’ has simply replaced ‘market harm’ “as the favored moniker to characteri[s]e judicial balancing and justify the result *post hoc*”.<sup>25</sup>

This is reflected in *Calkins v Playboy Enterprises, Inc*<sup>26</sup>, where the photographer sued *Playboy* for misappropriating his high school yearbook portrait of a girl who subsequently became a *Playboy* model. In finding ‘transformative use’, the court regarded the photographer’s purpose as creating “gifts for family and friends”, and *Playboy*’s use as “inform[ing] and entertain[ing]”.<sup>27</sup> However, “a court that wished to find that *Playboy*’s use was not transformative could... broadly characteri[s]e the high school yearbook portrait as informational or biographical, while narrowly characteri[s]ing *Playboy*’s choice... as serving an informational and

---

<sup>20</sup> *Princeton University Press v Michigan Document Services, Inc*, 99 F 3d 1381, 1392 (6th Cir 1996) (“so flexible as virtually to defy definition.”); *Henley v DeVore*, 733 F Supp 2d 1144, 1163 (C D Ca 2010) (“a sort of rough justice”); David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, 66 Law & Contemporary Problems 263 (2003), at 287 (“[i]n the end, reliance on the... factors to reach fair use decisions often seems naught but a fairy tale”).

<sup>21</sup> Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark L Rev 715, 746 (2011).

<sup>22</sup> Statutorily protected categories include criticism, comment, news reporting, teaching, scholarship, and research.

<sup>23</sup> *Supra* no 21, at 750.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, at 715.

<sup>26</sup> 561 F Supp 2d 1136 (2008).

<sup>27</sup> *Id.*, at [6].

biographical purpose within a glossy photographic spread otherwise designed for entertainment.”<sup>28</sup>

Likewise in *Seltzer*, the court could have narrowly characterised Green Day’s use of *Scream Icon* in its video backdrop as artistic or decorative, while broadly characterising Seltzer’s use of his icon in street art as similarly artistic or decorative. Accordingly, no transformative purpose would be found. Judicial precedent for such a view can even be found in *Ringgold*, where the Second Circuit considered that the “defendants ha[d] used Ringgold’s work for precisely a central purpose for which it was created – to be decorative”<sup>29</sup>, the same of which could be said of Green Day’s unauthorised use of Seltzer’s artwork.

The inherent flexibility of the test was meant to allow copyright law to adapt to developing community norms<sup>30</sup>, but flexibility inevitably creates uncertainty, which could have a chilling effect on creative expression because secondary users are deterred from making and distributing valuable works that rely on fair use. The court in *Ringgold* rejected fair use partly because it was against “expanding fair use to permit wholesale appropriation of copyrighted art for movies and television”.<sup>31</sup> The reverse can be identified in *Seltzer* where the focus on the ‘transformativeness’ inquiry favours creative expression. If judges’s decisions are truly community norm-based, such reliance should be articulated for transparency.

### *C. Perspective of ‘Transformativeness’ – Audience or Author*

In determining ‘transformativeness’, the court in *Seltzer* curiously decided to rely on Seltzer’s deposition to establish that there was a change in expressive purpose. This is despite the admission of Staub that he had no expressive purpose in creating the modified *Scream Icon*.<sup>32</sup> Apart from this peculiarity, there is the further question of whether the ‘transformativeness’ inquiry should be author-centric or audience-centric.

---

<sup>28</sup> *Supra* no 21, at 750-751.

<sup>29</sup> *Ringgold*, 126 F 3d 70 at 79.

<sup>30</sup> Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L Rev 2537, 2546 (2008-2009).

<sup>31</sup> *Ringgold*, 126 F 3d 70 at 80.

<sup>32</sup> *Seltzer v Green Day*, CD Cal, Aug 18, 2011.

In *Prince*, the Second Circuit held that the crucial factor “is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work”<sup>33</sup>. After all, in such situations, it is unsurprising that “the alleged infringer would go to great lengths to explain and defend his use as transformative”.<sup>34</sup> This recognises that “[t]he value of transformative recoding ‘lies in the observer’s opportunity to confront a familiar work in a nuanced context’”.<sup>35</sup> For example, “[t]he value of a Jeff Koons sculpture results from the viewer’s desire to be part of the discursive community surrounding the sculpture, not from that viewer’s membership (if it exists) in the community around Art Rogers’ photograph”.<sup>36</sup> Essentially, approaching fair use from the audience’s perspective focuses the doctrine on the reader who is “claimed to be the beneficiary of the uses that the doctrine promotes”<sup>37</sup>, thus bringing greater legal coherency to fair use.

With respect, the Ninth Circuit erred in its application of the first fair use factor by adopting the author-centric approach over the audience-centric perspective in analysing ‘transformativeness’. Comparing the two works side-by-side as was done in *Prince*,<sup>38</sup> the reasonable observer is likely to find no transformative purpose in Green Day’s use since the “directionless anguished screaming face”<sup>39</sup> appears to have no specific meaning, and that minimal changes were made in Green Day’s use as its video backdrop. Alternatively, even if the author-centric approach was adopted, the court failed to explain why it chose to rely on Seltzer’s statement instead of Staub’s to determine transformativeness. Such displays of discretion and unpredictability without coherent explanations will only fuel criticisms of judicial manipulation.

### III. Beyond *Seltzer*

---

<sup>33</sup> *Prince*, 714 F 3d at 707, citing *Campbell*, 510 US at 582; *Leibovitz v Paramount Pictures Corp.*, 137 F 3d 109, 113–14 (2d Cir 1998) (evaluating parodic nature of advertisement in light of how it “may reasonably be perceived”).

<sup>34</sup> *Id.*

<sup>35</sup> David Tan, *The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the “Purpose and Character” of Appropriation Art*, 24 Singapore Academy of Law Journal 832 (2012).

<sup>36</sup> Laura A Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 Colum J L & Arts 445, 465 (2008).

<sup>37</sup> *Id.*, at 450.

<sup>38</sup> *Prince*, 714 F 3d 694 at 707-708.

<sup>39</sup> *Seltzer*, 725 F 3d 1170 at 1174.

*Seltzer* represents the first case in which the Ninth Circuit had to apply the ‘transformativeness’ test to cultural expression-related cases, along the lines of the Second Circuit’s rulings in *Bill Graham Archives v Dorling Kindersley*<sup>40</sup>, *Blanch v Koons*<sup>41</sup>, and *Prince*. By focusing on the ‘transformative use’ paradigm, the court reaffirms the primacy of the first fair use factor and indicates its ideological slant towards allowing individuals greater freedom in expressing themselves vis-à-vis copyrighted works.

*Prima facie*, it would appear that post-*Seltzer*, individuals or groups could use any artwork as part of its backdrop to their concert performances or videos, even in cases where the secondary work uses most or all of the appropriated work, as long as there is a perceived transformative purpose. Coming at the heels of *Prince*, where the Second Circuit decided in favour of appropriation artists unauthorised use of copyrighted works, the case also represents a meaningful convergence of law in the two Circuits with the most fair use cases adjudicated, as evident from the extensive referencing of Second Circuit decisions in *Seltzer*. Collectively, these decisions also reflect the court’s recognition of contemporary community usage norms, where the modern-day individual is accustomed to borrowing copyrighted materials to express themselves in new ways.

However, while it may seem that the balance between copyright protection and creative expression has tilted in the latter’s direction, the complex, fact-intensive, and case-by-case analysis undertaken in both the *Seltzer* and *Prince* decisions indicate that individuals who choose to rely on fair use to justify their unauthorised use of copyrighted works may still face the spectre of liability. Further reservations exist in the problems this author has highlighted in the application of the ‘transformative use’ paradigm.

Situating *Seltzer* among the fair use jurisprudence of other jurisdictions, the decision appears to parallel developments occurring elsewhere.

---

<sup>40</sup> 448 F 3d 605 (2d Cir 2006).

<sup>41</sup> 467 F 3d 244 (2d Cir 2006)

In UK, there is a similar movement towards promoting innovation and growth. After extensive consultation through the Hargreaves Review of Intellectual Property and Growth<sup>42</sup>, the Government has proposed many new changes to the existing copyright and fair dealing doctrines, which represents a marked shift towards the US fair use position and a gradual consideration of adopting the full list of copyright exceptions as laid out in the EU Copyright Directive<sup>43</sup>. For example, parody and caricature would be allowed on a limited fair dealing basis, thus allowing genuine parody, but prohibiting copying disguised as parody, which were previously illegal.

In conclusion, there appears to be global movement towards the recognition that extensive copyright protection is not suitable for contemporary living. Seltzer represents the Ninth Circuit's alignment with this international trend by updating the fair use doctrine to acknowledge the primacy of the 'transformative use' paradigm, which favours creative expression. Existing problems with the legal doctrine of fair use, however, remain to suggest that the door is still open for calibrated change.

---

<sup>42</sup> Hargreaves, Ian, *Digital Opportunity – A Review of Intellectual Property and Growth*, UK Intellectual Property Office (May 2011).

<sup>43</sup> Directive 2001/29/EC of the European Parliament and of the Council, 22 May 2001 (on the harmonisation of certain aspects of copyright and related rights in the information society).