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Cases of Note -- Copyright: When Copyright Infringement Means Go to Jail

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lost. So, lack of a notice for works published between 1978 and 1988 may mean that they are the public domain, but not necessarily. After 1989, copyright notice became optional, but this is irrelevant if the work is in the public domain.

QUESTION: *A university professor is teaching an online course and wants to provide a link to a song that she personally purchased from iTunes. Access would be restricted to students enrolled in the course, and the intent would be for them to listen to the song, not download it. Will this require permission from the copyright owner to provide the link?*

ANSWER: The professor purchased a copy for her own use. She will need permission to make it available more widely. The link was just for one person — now she wants not only to make it available for a class but likely

it will be required listening. Thus, permission is necessary.

QUESTION: *“If it is part of the course content, may a video be streamed online for a specific group of students in a specific class, for a specific duration through the course learning management system”? The Information Technology department of the community college has been telling faculty members that they can stream no more than 10% of a video.*

ANSWER: The simple answer to the first question is yes, but all of those “specifics” make a significant difference. Section 110(2) of the Copyright Act, the TEACH Act, details all of the specifics about performing and displaying copyrighted works in a transmitted portion of a course. Streaming is the preferred technology for showing video in a transmitted course or portion of a course since it does not permit students to download the copyrighted work. However, there is a limit as to how much of a copyrighted work may be performed without permission of the copyright owner. If

the work is a nondramatic literary or musical work, the entire work may be performed. But if the work is an audiovisual work, then only a limited and reasonable portion of the work may be streamed (performed).

It appears that the community college has interpreted a reasonable and limited portion to be 10% or less of a video. While this might be a reasonable and limited portion, it may also be far too restrictive. A reasonable and limited portion could be 20% or 25%, but it is less than the entire work. The Register of Copyright’s 1999 Distance Education Report said that one judges what constitutes a reasonable and limited portion not only by looking at the copyrighted work itself, but also at the level of the course, the teacher’s purpose in using the clip, etc. So there is no absolute percentage in the statute.

As a matter of policy, however, an institution can define a reasonable and limited portion as any specific percentage, but that percentage may be more or less than the statute allows in a given situation. 🌿

Cases of Note — Copyright

When Copyright Infringement Means Go To Jail

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

United States of America v. Muza Kim, Steve Kim, a.k.a. Gyu Young Kim, United States Court of Appeals For The Eleventh Circuit, 2009 U.S. App. LEXIS 385

Star Graphics of Doraville, Georgia was in the business of silk screening on garments. Along with that, the owners **Muza Kim** (68) and son **Steve** (39) enjoyed counterfeiting clothing bearing the image of “**Cosby Kids**” copyrighted cartoon character “**Fat Albert**,” leader of the Junkyard Gang in “**Fat Albert and the Cosby Kids**.”

“Hey hey hey!”

Steve Kim had been previously convicted of criminal trademark counterfeiting, but somehow failed to learn his lesson. Now as VP and Art Director of **Star Graphics**, he chose to dress up the iconic “**Fat Albert**” in bling-bling and a dew rag and call him “**Big Face**.”

Yes, they wrote “dew” in the opinion. There’s no hope for those law review nerds who clerk for judges and do all their work. Utterly out of touch. No street cred. Wouldn’t last the night in the *Courvoisier Lounge* rollin’ with the new jack crew.

Our larcenous duo were charged with reproducing and distributing depictions of the said “**Fat Albert**” without permission of the copyright holder in violation of 17 U.S.C. § 506(a) and were found guilty by the jury. **Steve** got two years in the slam and **Daddy Muza** one year.

Indignant at what they saw as a travesty of justice, they appealed to the Eleventh Circuit (Ala., Ga., Fla.)

which of course is in A-town, home of OutKast, Lil Jon, Pastor Troy, Goodie Mob and the Ying Yang Twins. I mean we talkin’ hop hop capital of the South. Just where **Phat Albert** had best be seen stylin’ in a do-rag. No diggity. Ay yo trip. Check it out.

The Appeal

Evidence is viewed in accepting all reasonable inferences and credibility choices in favor of the jury’s verdict. **United States v. Tinoco**, 304 F.3d 1088, 1122 (11th Cir. 2002). Which is to say, the verdict stands unless their decision was so out of touch with reality that no reasonable jury could have made such a finding of fact. **United States v. Ndiaye**, 434 F.3d 1270, 1294 (11th Cir. 1986).

For criminal infringement, there must be (1) an infringement; (2) done willfully; (3) for commercial advantage or financial gain. 17 U.S.C. § 506(a); **United States v. Goss**, 803 F.2d 638, 642 (11th Cir. 1986).

The **Kims** argued that clean-cut **Fat Albert** would not be caught dead in a do-rag.

Although they wrote it “dew rag” once more and the words are separate but not with a hyphen. Uh-oh. Are we dealing with that spelling corrector on a PC and law clerks too lazy to fight with the thing to make it write right?

And they seemed to think it important that the copyright owner of **Fat Albert** would never have approved of him in a dukey rope and other bling like that so ipso facto they had not stolen the valuable essence of **Albert**. Foshizzle.

However, you can infringe a work

without doing an actual reproduction. See **United States v. O’Reilly**, 794 F.2d 613, 615 (11th Cir. 1986). Substantial similarity will do. It is not a defense that you did not steal the whole thing. *Id.*

The jury looked at images of **Fat Albert** and **Big Face**. It was their role to determine differences and similarities and find infringement based on the similarities.

The **Kims** said there was no evidence of willfulness. But **Steve** was Art Director, and the fact he had been convicted of this before would seem to show a certain familiarity with the law of the case. And there was evidence that **Muza** had told buyers of the goods, and he was aware they were unlawful.

Motion For Severance

Mid-trial, **Daddy Muza** began to sense son **Steve’s** prior conviction was posing a problem and chose to throw him under the bus. He made a motion to sever his trial and do it separately, claiming his son’s criminality would prejudice the jury and make it impossible for them to see what an innocent chap **Muza** was.

But, jointly indicted defendants are typically tried together. The trial judge should “balance the right of the defendant to a fair trial against the public’s interest in efficient and economic administration of justice.” **United States v. Baker**, 432 F.3d 1189, 1236 (11th Cir. 2005).

I mean, they were the two members of the company that pirated the image.

And so at the end of this fascinating appeal our trial court conviction was affirmed and our cheerful, well-scrubbed **Fat Albert’s** image is safe once again. Know what I mean? 🌿