

Your Inside Track Newsletter

Description

Eighth Edition

Interview with Michael Donaldson

By Don Franzen and Judith Finell

Don Franzen

What are your general thoughts since the Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al. came down? Has it changed fair use analysis? Has it refined it? Was it a sea change or just an adjustment? How do you see the Warhol case fitting into fair use analysis?

Michael Donaldson

I say it's none of the above. You had nine judges and not one of them was well-versed in copyright. You heard the hearing, and they were a little strange. They were a little lost in their questioning and the opinion did absolutely nothing to change the way we look at fair use. It apparently rattled a lot of people because it focused on the use. The Folsom v. Marsh decision from 1841, which was the first fair use case in America, was always about the use. That's why they call it "fair use." It's not a fair photo, not a fair statute that you can say "oh, it's fair to use this statute anywhere." It's the use. In fact, in our retainer letter, a lot of people come to us to clear their film, and we have a paragraph that says, keep in mind, just because it's fair use in your film doesn't mean it'll be fair use in promotional material. You must allow us to look at the ad or promotion to see if it's used in a fair way in your promotional material.

I was on a panel in New York where I finally just blurted out what I just said to you. It surprised them, but it's like, "you guys are good lawyers. Did you ever read the first fair use case?" It was about letters from George Washington. It was reported to be an autobiography, but all it was, was a reprint of a lot of his letters, but very little in between. It was the use. The use was not fair. Anyway, that's my high horse. That'll probably be as elevated as you can get in this area.

Don Franzen

I'd like to hone in on *Warhol* because I am certain you have a perspective on it that will help clear the case up in the minds of people reading this. When you hold up those two images, the photograph, the Goldsmith photograph, and the Warhol lithograph, looking at the two of them, it's hard to say the one isn't transformative of the other, and yet that wasn't enough, at least for Justice Sotomayor. So, how do we specifically line up the outcome in *Warhol* with the other big Supreme Court case that we've all been talking about, we've all been dealing with up until recently. How do you line those two up and do you see them as consistent.

Michael Donaldson

Exactly what I said: it's the use. The Warhol image was probably fair use when it was hanging in a museum because it was so transformed. But the presentation of it on a magazine cover is the exact same reason the photo was originally created. It was created for a magazine cover, and then Warhol made changes. The changes were quite substantial, but it was the same use exactly, and that was the problem. And it's always been a problem. There's never been a time when using something in the exact same way would not be highly suspect. Highly suspect. *Campbell v. Acuff-Rose Music, Inc.* involving 2 Live Crew and "Pretty Woman" was a totally different use. It was, yes, it was a song, obviously just as the statues or art usually take the same form.

But the second song's intention was to criticize and mock and comment on the themes of the first song. That's why (and in fact the Supreme Court decision in that case left open the question) it was sent back to the lower courts. It was the opening guitar riff that sort of introduced the song. So, they questioned whether the guitar riff was included in fair use. But the song itself was created for a totally different purpose than the original song.

It's almost too bad that you're asking me this question because there are a lot of lawyers that could spend half an hour wringing their hands about it. The angst is unnecessary. It has always been the use.

Don Franzen

What's the use? In other words, you could say, well, the use in the "Pretty Woman" case was to criticize, comment upon, or mock the original, or could you say the use was the same use, namely a phonographic record album? They're both phonographic record albums. So, what takes it out of the one into the other? What makes the use different?

Michael Donaldson

Well, you just touched on why we have so much business referred to us by other lawyers. Fair use is highly subjective and highly opinionated. We just see so much of this; we feel confident to call the shot. If this were a hearing at the Second Circuit I would say "yes, they're both record albums." But, if that is controlled, then you could never use a movie clip in a film because the film that the clip was taken from is the same use. But it's really the purpose — why was the first song made? Purely for entertainment. Why was the second song written? Purely to

criticize the motif, if you would, of the first song and society in general.

Don Franzen

It's purpose and use. It's the two together.

Judith Finell

Right.

Michael Donaldson

Yes.

Judith Finell

It's the parody use in the "Pretty Woman" case. But you're saying maybe the guitar line is copyright infringement because it used Orbison's intro guitar riff?

Michael Donaldson

Well, it was an interesting case in that they separated that out. The ruling was crystal clear that the song was very used, the recording that had that riff on it, that may not be. They sent that part of the case back after ruling on the body of the case. That's not done very often, but they separated it out, wrote an opinion on the song: maybe the guitar riff at the beginning is not fair use, and we're not including that in our opinion. We're sending that back to the lower courts.

Judith Finell

I understand when it's parody musically. So, you're building a parody in a musical case, at least on the lyrics and the melody of the preexisting composition, possibly one or the other, or both. But you're saying that the elements of the second work that are not directly commenting in words or melodic imitation are treated differently: how does that work? Because in "Pretty Woman," they're singing the song changing some of the words from "pretty woman" to "hairy woman," etcetera, to be funny and to comment on the earlier song, but they're doing it with the melody of the earlier song. How is that different from part of the guitar riff?

Michael Donaldson

That was easily separable because the song started with the guitar riff. Then it went into the, what would be called the music for the song. So, you had the song, and when they recorded it, they started with their own guitar riff. They just sort of packed it in at the beginning and it was easily separable, very unusual.

Judith Finell

So, you're saying that the two could be separated out in terms of the interpretation and analysis of that?

Michael Donaldson

Quite separate. And in fact, it was not only separate, but it was also created by a different person at a different time. So, it was quite separate.

Judith Finell

Oh, and that was brought up by the defense, in other words, or the plaintiffs in rebuttal, is that correct?

Michael Donaldson

Yes, the plaintiff in the original case.

Judith Finell

Right. So, with music, it can be at least filtered that way. Wouldn't that also apply to other art forms, visual art, etcetera?

Michael Donaldson

Oh, I'm sure. I can't think of another case where they made that kind of a separation, but clearly you could do that with a book. You know, for example, the first half is not fair use, and the second half is fair use or public domain or whatever. And they do that, routinely by separating out the public domain material. Our fair use opinion has no impact on the public domain because it's public domain and they can do whatever they want with those materials. They don't have to even think about fair use.

Judith Finell

Well, I was thinking of literature, like the *Wind Done Gone* case. In terms of *Gone with the Wind* and the creation of a new novel based on the other side, you know, the other viewpoint of the characters, etcetera.

Michael Donaldson

Yeah, on that one, I felt the *Wind Done Gone* could have gone much further than it did, and it would still be fair use.

Judith Finell

Well, I was just thinking, in literature, is it different than music? Where's the dividing line that we were just talking about with literature, if you start from the premise of the previous book and just look at it

from a different viewpoint, is that considered fair use?

Michael Donaldson

There is a very different viewpoint, and in fairness, a different story. There was more than that, but the *Wind Done Gone* case is a very good example, though it is an example of a case where it was easy for fair use. I know there were some things in it that I thought at the time, “well, they could have done this, they could have done that.” The connection to *Gone with the Wind* would have even been greater. I ultimately think they were nervous because that estate is very litigious.

Don Franzen

Michael, you, personally, and your office analyze many films for fair use issues. And in the process, you must be called upon both to look at visual images, ask whether a particular visual image is fair use, or sometimes musical quotations. Is your method of analysis any different for visual quotes versus musical quotes, or is it the same principles at play?

Michael Donaldson

I rest on the same principles, for sure. And what’s interesting is that I rest on the same process and almost always the fix, if you will. Because, in our first review of a film, we have a clearance log with everything that’s not licensed. We mark it with either green, saying “you nailed it” or yellow, meaning, “we’re willing to say it’s fair use, but it’s not very strong. Here’s what you can do to make it stronger.” If it’s not fair use, we label it red and say, “Okay, here’s what you can do if you want to get it over the line.” And the most common fix is more context: tell the audience why it is you’re using this bit of a song or this bit of a film or this bit of a painting. Let them know what the purpose is of that film or this photo or this song.

What purpose is it serving to advance the points you’re already making in your film? It is often easier in documentaries than scripted films. We worked on *Uncut Gems*, which was a wonderful basketball film about a basketball player who is betting on the game. His performance slipped and he was told that if he got his hands on this uncut gem, his luck would change. He got it, and his luck changed. In that film, at the end, all the clips of the basketball games were actual basketball games and were actual basketball games where the actor who played the lead in *Uncut Gems* played in the game. Needless to say, we got pushback on that. At the end of the conversation, which went on for about an hour, the NBA legal team said to us: “well, we don’t agree with you, but we’re not going to sue.”

Judith Finell

Well, Michael, I remember one case you told me about concerning musical lyrics being posted. I believe it was either “Give Peace a Chance” or another Lennon and McCartney Beatles song. You made some sort of exception for the posting of lyrics within the body of a film compared to the use of a song. And that you saw there was a distinction, I believe.

Michael Donaldson

We have authorized a lot of Beatles music. And it's interesting. A lot of the referrals we get are things like that where they're saying, "Oh, the Beatles are too litigious. We're afraid of this." In fact, we signed off on a film where I would say easily 40% of the time of the film was Beatles music. It's a very interesting film. But what it was, was a film of a lecture that a music professor gave at some place like Harvard or Yale. He went through the recording of a single song and would talk about "this is what it sounded like when it was first written." *Music plays* "They brought in the guitars and listen to the difference the guitars made." When the use of a piece of song or a photo is illustrating a point that you're already making in your film, it's fair use.

Don Franzen

In the last few months, time and time again the issue of fair use in political campaigns has been coming up and I wanted to give you an opportunity to talk about when, if ever, is it fair use to use music without permission in a political campaign?

Michael Donaldson

Well, I can imagine such a use but all these cases come up in the same way some enthusiastic staffer thinks, "Oh, this would be a great song for him to walk in on," or simply "a great song." And they are just not aware of licensing, or they believe, as some people do, "well, it's political, therefore we can do anything." No. The only way it would work is if it were somebody like Trump saying, "Who was the singer who just endorsed Harris?" with a very short identifying piece of music. Not likely, right?

If somebody in the Trump campaign says those people who are making all those endorsements, "they're the Antichrist, just like Harris. Listen to the lyrics in her last song." They could play several lines because that would illustrate why Beyoncé. is an Antichrist along with Harris. So, it's interesting that you ask the question. Something like that would be the only way I could think of, but that's not what any of them are doing. These are walk-on music pieces, and it's never a fair use in those cases.

Judith Finell

Wouldn't there be a right of publicity in terms of sort of fraudulently acting as if that artist is endorsing your candidate, if the artist doesn't want to be seen that way also?

Michael Donaldson

Well, the answer is yes, but it's not fair use. That's what's called the "right of publicity" to use because an endorsement in a campaign falls in the category of commercial use, though it would be judged under a different legal system under the Lanham Act or state right of publicity act. But you're right, that is the real problem that irritates the artist, is that it causes people listening to think, "oh, Beyoncé is in favor of somebody else."

Judith Finell

I think there were cases involving Taylor Swift, et cetera where Trump did refer to her lyrics or music.

Michael Donaldson

I'd have to look at them. There's such a volume. At the same time, they all settled out before they went to trial. Some people who want somebody to stop doing something and merely file a lawsuit if they don't stop. The response is often, "oh, it costs me \$50,000 retainer to fight this lawsuit. I'd better take that down."

Don Franzen

Now, I wanted to bring up another subject with you, Michael, that seems to be very much on everybody's mind and I think in all the creative arts, which is AI or artificial intelligence. The subject of fair use is brought up a lot, especially as a defense by the AI generator companies, the companies that are producing AI content, and I think they bring it up on both sides of the debate. They bring up the idea that it's fair use to train from copyrighted material and that the output of AI is fair use. I'm sure you're running into that these days a lot. What are some of your thoughts about how fair use fits in with the world of AI?

Michael Donaldson

Well, my advice to most clients is "pull it up." The law is so unsettled on this. Even the Copyright Office has tried to clarify, and step one in that clarification: "is the output even covered by copyright?" The issue there is the extent to which a human being directed the AI – if I went to AI and said, "I want you to sing the role of Maria using the voice of Dale Nelson" and it did, that would not be enough input to qualify as a human controlled— it is usually just an idea. If I give AI an idea and it comes up with something, that's not enough human involvement to trigger copyright protection. But on a painting, if I say I want a shaft of light across here, and I want a color palette to be an autumn color palette, instead of the original green color palette and put a river in here, there's sufficient human control to give the human a copyright. Most output is not covered by copyright, but then the question of fair use comes up and it would be the same: how much material are you using, and why are you using it? Why are you using this AI creation? What point are you illustrating?

Judith Finell

Do you have a prediction as to how some of the current litigation is going to turn out, or do you want to share that prediction with us?

Michael Donaldson

Well, I've looked at some of it, and it's interesting. I think as a creator, I would feel differently, but in my line of work, all I want to know is "what's the answer?" My criticism of Warhol is that it wasn't a very well-written decision. That's what I'm looking for is some clarity here and we just have to wait because there isn't clarity. Those who guess about where the law is going to end up, especially with this court at

the top, given their demonstrated lack of copyright experience and expertise, predicting the future is just a fool's game. I think very quickly the Second and Ninth Circuit are going to have enough cases so we can begin giving clients advice on it. But right now, I suggest we "stay away!"

Don Franzen

You mentioned earlier that there were various opinions on Warhol. Particularly, there is a really strong dissent by Kagan, I believe. She dissented, and then there were concurring opinions. Were there any concurring opinions that made more sense to you than the majority opinion?

Michael Donaldson

The dissents were quite heated, quite elevated. They were not the typical intellectual discussion of prior law and its application. They were clearly agitated with the majority.

Don Franzen

They also seem like somewhat of an art history lesson or an attempt at an art history lesson. This has been interesting for me. I think one of the themes you're giving us, Michael, is that there's more continuity perhaps in fair use analysis than the bar, many members of the bar have been indicating because as you say there's been a lot of hand-wringing over Warhol and so your message seems to be that Warhol fits in with the fabric of fair use analysis up to now, is that right?

Michael Donaldson

That's right. It matches the first case that ever came down and the case law has been followed ever since. And of course, as you know your listeners might not, that fair use was never in the Copyright Act until 2002. When they did the big revision, they included fair use. And how did they include it? Well, it's on a case-by-case basis, but there's four factors to consider. Where did they get the four factors? Oh, from the 1841 case. I mean, it's been very constant because it is, what's fair. And we have that in life all the time, sometimes you're approaching a door at the same time with some other person, but if it's your wife, you open the door for her and let her in, whereas if it's a stranger who goes in first, it's what's fair. There are certain things we do in life that are highly reliant on our inner core values and our gut. One of them is fair use, and that's the way it's always been, which is why we get so much work.

Judith Finell

Is that going to change, in your opinion, with some of the new ways that technology enables the creation or the use of previous material, or have you seen a change?

Michael Donaldson

The short answer to your question is, for now, yes. Insurance companies don't know how this is going to turn out and don't like insuring uses that are based on AI material. They also don't like insuring cases where very important people are criticized, like Trump. Try and get insurance for a film that criticizes Trump these days. I mean, it's like pulling teeth. We get it, we get it,

but boy, we worked on Apprentice, and we got insurance, but boy, was it hard.

Judith Finell

Well, that's really interesting. So, the actual topic does have some control over the advice.

Michael Donaldson

Yeah, but when it settles down and we know what the courts are going to do, I think that'll go back. It'll be like anything else, but for now your question is particularly salient because they just don't want to touch it.

Judith Finell

But, I mean so much film and television is created with some form of CGI (computer generated imagery) these days, and that's often being at least enabled by AI. I mean, where's that line? Those films, I don't think they would be released without having obtained insurance, would they?

Michael Donaldson

No, they need insurance. And you should ask where is the line? That's the issue. That's the issue that is not clear yet from the limited case law we have in this area, and not helped by the legitimate well-thought-out Copyright Office ruling on it, which basically said, "well, it depends on how much human control is involved." That doesn't get us very far, frankly. They know it. This is not like I'm going to get thrown out of the copyright circle of trusted lawyers by that viewpoint. I expressed it before they ever issued the rule. You can't nail it if it's too early. They tried.

Judith Finell

But there are some countries in the world that have acknowledged, have given copyright protection to AI-created, machine-created content, right?

Michael Donaldson

Yes.

Judith Finell

I mean, so is your advice different depending on either the territory where the film's released or the territory where it's located?

Michael Donaldson

No, because we've got films, music, they travel all over the world. And so the insurance we get is

based on American law. But it covers far and wide. If it's found to be a violation of fair dealing in England, insurance covers it, covers it anywhere in the world. But our opinion letter is based on American law.

Don Franzen

What is the life cycle of a complaint? Let's say your office or another office gives an insurance company the reassurance to issue a policy, and then along comes a litigious content owner and says this wasn't fair use. What's the life cycle of a claim like that? What happens next?

Michael Donaldson

Well, you probably have a better handle on the court backlog than I do. But it can literally take years to work all the way through where you actually get a decision. And Trump's case, for example, is that he's upset about facing sentencing now so close to the election because he kept appealing to the Supreme Court on things get put off. So, it can be a short term of a couple of years, especially in federal court. They can move cases along very fast. Or it can be 10 years with interim appeals.

Don Franzen

I assume in this litigation process that we're all too familiar with, you're talking about at various stages different experts testifying on whether something was fair use or not. Is that kind of how it goes?

Michael Donaldson

Actually no. Whether its fair use is a factual issue decided by some judges and considered a mixed fact and legal by other judges, but it is something that's decided by a jury. A fair use opinion by an expert usually would be frowned upon, however. I've testified several times as an expert in entertainment law, but the only question was about fair use. I helped the lawyer frame the questions and I framed the answers so that it was a general observation about copyright law and about how the song was used in the film, if that's the case. But the important thing that you have touched on is that very often the claim doesn't come in at the beginning of the exploitation. It may be on a streaming channel, and they just don't realize it, but then there's an article about it, and the underlying owner wakes up and files a lawsuit, but your insurance coverage has just run out. So often we recommend renewing the insurance policy more often. Look, it's been three years. It's been widely reviewed. It's been widely exhibited. No claims. And the fair use is rock solid. You may not want to waste your money. But of course, if you get a claim, there's no waste at all.





Michael is an entertainment attorney who has been fighting for independent filmmakers for over 40 years. In addition to working on films by such industry icons as Oliver Stone, Davis Guggenheim and Lawrence Bender, Michael serves as General Counsel to Film Independent (home of the Independent Spirit Awards).

He is the industry's go-to attorney for fair use (a doctrine in United States copyright law permitting limited use of copyrighted material without permission from the rights holders) and other clearance and rights-related issues.

Michael graduated from UC Berkeley School of Law, Boalt Hall in 1967. His book *Clearance and Copyright* is now in its fifth edition and has his law partners as co-authors. It is used in over 50 film schools and has become the standard industry reference book. Michael also wrote *Negotiating for Dummies* (now in its second edition and translated into eleven languages), *Fearless Negotiating* (published in hardback in 2007 by McGraw Hill) and *The E-Z Legal Guide to Trademarks & Copyrights*. He co-authored *The American Bar Association's Legal Guide to Independent Filmmaking* with his partner Lisa Callif.

Michael has worked on such projects as *This Film is Not Yet Rated* (where all 134 clips were utilized under fair use), *Wanderlust* (saving its filmmaker over \$400,000) and *Expelled* (which featured the song "Imagine," prompting a quick dismissal of a lawsuit by Yoko Ono and an order for her to pay for our client's lawyer).



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