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# Lessons from a Reformed Copyright Infringer

*Presented by:*  
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*Date:*  
2023 Principals'  
Academy

DIFFERENT  
BY DESIGN

# AGENDA

- Quick Refresher on Copyright Basics
- Lessons Learned
- Best Practices

# COPYRIGHT BASICS

- **1787:** The Constitutional Convention accepts the language of *U.S. Constitution*, Article I, Section 8, Clause 8

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”



Photo: Wikimedia Commons

# COPYRIGHT BASICS

Copyright protection automatically begins upon an **original** work being **fixed** in a **tangible medium of expression**.

17 U.S.C. § 102

# COPYRIGHT BASICS

- Why is it so important to provide protection?
- Copyright owners are granted 6 exclusive rights:
  1. Right to reproduce or copy the work
  2. Right to make derivative work
  3. Right to distribute copies of the work
  4. Right to publicly perform the work
  5. Right to public display the work
  6. For sound recordings, the right to perform publicly through digital transmission
- Also effectively provides the right to **exclude** others from exercising any of the exclusive rights!

# FAIR USE EXEMPTION

- “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 U.S.C. § 107  
(emphasis added)

# FAIR USE EXEMPTION

- **FACTORS:**

1. The **purpose and character of the use**, including commercial v. nonprofit educational purpose
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
4. The effect of the use upon the potential **market** for or **value** of the copyrighted work

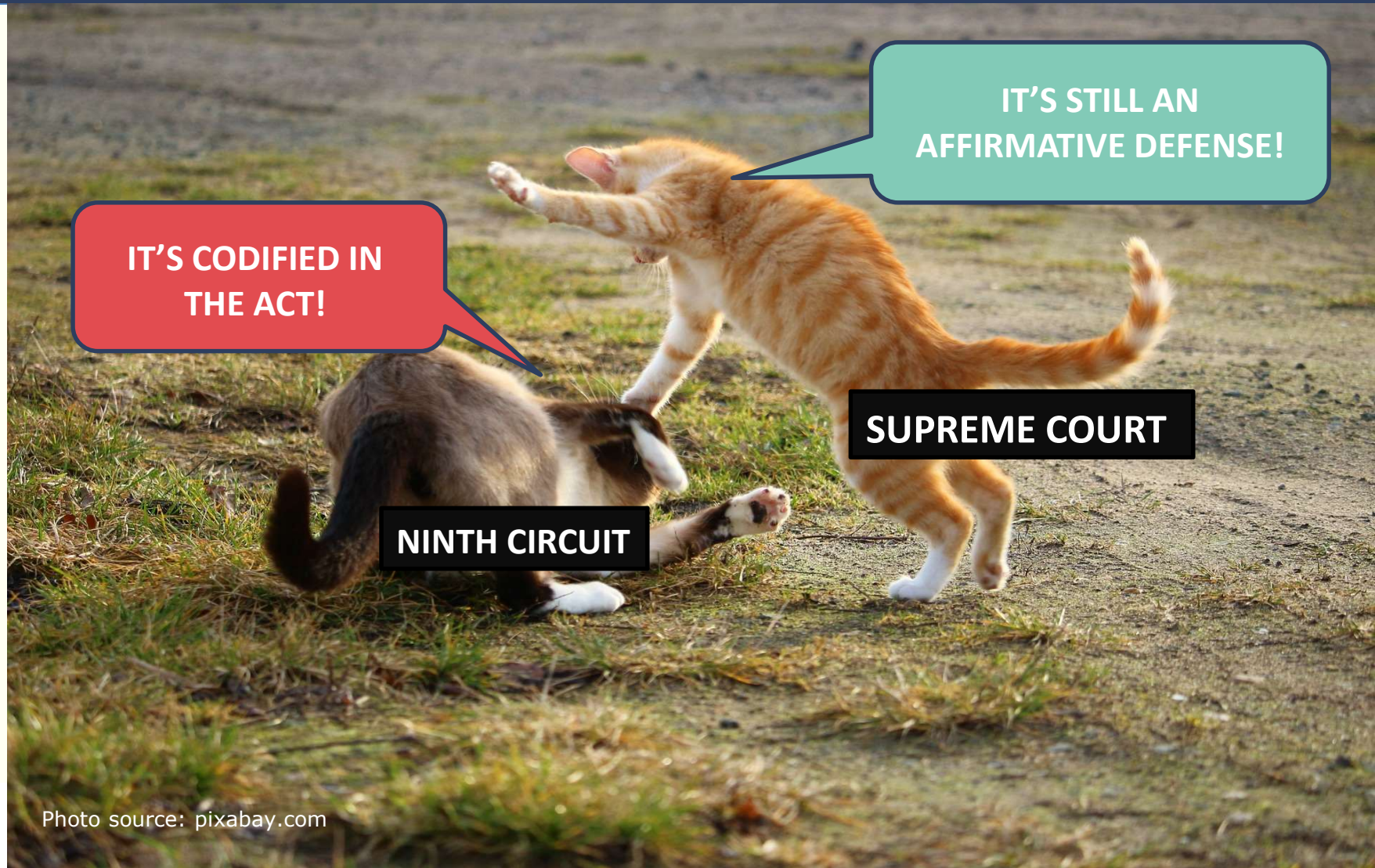
17 U.S.C. § 107  
(emphasis added)

# FAIR USE EXEMPTION

- “Guidelines for Classroom Copying in Not-For-Profit Educational Institutions...” (1976)
  - Multiple copies for classroom use or discussion is permissible provided that the copyright:
    - Meets the tests of brevity and spontaneity;
    - Meets the cumulative effects test; and
    - Each copy includes a notice of copyright.



# FAIR USE = AFFIRMATIVE DEFENSE



# CLASSROOM USE EXEMPTION

- “Notwithstanding the provisions of section 106, the following are not infringement of copyright:
  - 1) Performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, [it’s a pirated copy and you know it]....

17 U.S.C. § 110(1)

# CLASSROOM USE EXEMPTION

- TEACH Act added 17 U.S.C. § 110(2), which allows some digital transmission of certain amounts of copyrighted works in an online classroom platform.
- **RESTRICTIONS:**
  - Amount of work should be reasonable (not entire work);
  - Performance must be made “by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session...” and the performance must be “directly related and of material assistance to the teaching content of the transmission...”

# CLASSROOM USE EXEMPTION

- TEACH Act added 17 U.S.C. § 110(2), which allows some digital transmission of certain amounts of copyrighted works in an online classroom platform.
- **RESTRICTIONS:**
  - Transmission is limited to students official enrolled in the class and restricts ability to retain or further disseminate the work; AND
  - The school district has a copyright policy that promotes compliance with the Copyright Act and notifies students that content may be subject to copyright protection.

# CLASSROOM USE EXEMPTION

- TEACH Act added 17 U.S.C. § 110(2), which allows some digital transmission of certain amounts of copyrighted works in an online classroom platform.
- **RESTRICTIONS:**
  - Materials uploaded should not be primarily produced or marketed for online learning.
  - To use those materials, school districts should obtain an appropriate license.

# DynaStudy, Inc. v. HISD

## **DynaStudy, Inc. v. Houston Ind. Sch. Dist., 325 F.Supp.3d 767 (S.D. Tex. 2017)**

- DynaStudy creates student study aids for various subjects and grade levels
  - End of Course Review Guides, DynaNotes
- Sells study aids in print and electronic formats
- Prohibits reproduction and distribution of materials

# DynaStudy, Inc. v. HISD

- DynaStudy alleged that HISD “participated in an ongoing pattern and practice of infringing [DynaStudy’s] intellectual property rights,...despite the fact that [DynaStudy] has repeatedly placed Defendant on notice of such ongoing and repeated infringement.”



# DynaStudy, Inc. v. HISD

- Middle school teacher posted a “nearly identical copy of [DynaStudy’s] Grade 8 Science for STAAR guide online for anyone to download....”
- High school teacher posted DynaNotes Biology EOC online “for anyone to download.”
- Another high school teacher “plagiarized a significant portion of DynaStudy’s Physics EOC and Chemistry EOC student course notes and then posted these unauthorized derivative works online at Defendant’s website for anyone to download.”



# DynaStudy, Inc. v. HISD

- Another high school teacher posted a full version of DynaStudy's Biology EOC student online at HISD's website.
- Another high school teacher posted a copy of DynaStudy's Biology EOC student course notes online after removing DynaStudy's copyrights and trademarks. Other school districts and organizations allegedly posted and reposted this document.

# DynaStudy, Inc. v. HISD

- A high school principal asked a DynaStudy sales representative to leave some examples of the notes for teachers to review and assured the sales rep copies would not be made.
  - When the sales rep returned to gather the samples, there was tape covering up the language at the bottom that read “COPYING THIS MATERIAL IS STRICTLY PROHIBITED.”
  - The principal did not deny that copies had been made but stated she did not know who made copies.

# DynaStudy, Inc. v. HISD

- HISD was able to dismiss the claim of contributory copyright infringement and dismiss one claim for damages as time barred.
- Following a 7-day trial, a federal jury awarded DynaStudy a **\$9.2-million** verdict
- HISD filed post-trial motions, and the parties eventually settled the matter.

# LESSONS LEARNED

- School districts can be held liable for the infringing behavior of their employees (and students!).
- School employees must carefully read materials to determine if there is a prohibition against the action they would like to take (e.g., copying, public display)
- If copyrighted materials are uploaded to teacher's classroom webpages, they should not be public or available to download.

# YOUTUBE

- Terms of Service include: “the Content [a user submits] must not include third-party intellectual property (such as copyrighted material) unless [the user has] permission from that party or [is] otherwise legally entitled to do so.”
- But YouTube is riddled with infringement, so what gives?
  - ✗ Copyright Strikes
  - ✓ Content ID Claims

# SEEKING PERMISSION

1. Find out who the copyright holder is. May be different than the author/artist!
2. Contact copyright holder with explanation of intended use and request for permission.
3. Be prepared to pay nominal fee.
4. Be prepared to enter into a licensing agreement.

# SEEKING PERMISSION

- Licensing Agreements are or may be necessary when:
  - Showing movies outside of classroom environment
  - Marching band is performing at competitions
  - Glee Club sponsor has created derivative work
  - Theater program is performing a play and charging admission to public
  - Student newspaper is posting pictures with articles

# SEEKING PERMISSION

**Ensure the license  
covers all intended uses  
for the work!**



# POTENTIAL CLAIMS

- Direct Copyright Infringement
  - Statutory Damages
  - Actual Damages
- Contributory Copyright Infringement
- Vicarious Liability

# BEST PRACTICES

- Enforce robust policy on intellectual property use with an emphasis on usage of copyrighted materials both in and out of the classroom.
- Provide training for staff on copyright about appropriate usage of copyrighted materials
- Prepare staff to pass along knowledge to students about copyright in an age-appropriate manner
- Encourage teachers and students to create their own content

# BEST PRACTICES

- Include a segment on security measures for posting materials online
  - Bring in IT Support as needed to establish procedures
- Encourage attribution of source materials
- Empower teachers and students with an understanding of how to ask for permission from copyright holders
- Consider purchasing an umbrella license for streaming content
- Read the fine print of licensing agreements

# BEST PRACTICES

- **If a cease and desist letter is received:**
  - Don't ignore it!
  - Call your attorney!
  - Investigate!
  - Make copyright holder show his math!
  - Negotiate!

# QUESTIONS??

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