

Fair Use Safe Harbors?

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Michael C. Donaldson, *Refuge From The Storm: A Fair Use Safe Harbor For Non-Fiction Works*, 59 **J. Copyright Soc’y U.S.A.** 477 (2012), available at [SSRN](#).

So much has been written on the fair use case law in the U.S. that it would seem nigh impossible to find something new to say about it. But new things are indeed possible. Michael Donaldson, who practices entertainment law in Los Angeles and has represented many clients in copyright disputes in the film industry, has made four significant contributions to the fair use literature in his article “Refuge From the Storm: A Fair Use Safe Harbor for Non-Fiction Works,” which was published in the Journal of the Copyright Society in 2012.

One contribution is the concept of fair use safe harbors. Copyright professionals are used to speaking of safe harbors when it comes to the statutory limits on liability of Internet service providers for the infringing acts of others. Some of us also use that term when discussing the judge-made limit on secondary liability for developers of technologies having substantial non-infringing uses. But we have shied away from the safe harbor concept in fair use cases, perhaps because the Supreme Court was unwilling to endorse presumptions of fairness for parodies in its *Campbell v. Acuff-Rose* decision. Donaldson’s article makes a persuasive argument that a fair use safe harbor does exist for certain uses of pre-existing materials in non-fiction works, and it opened my mind to the possibility that other fair use safe harbors might also exist.

A second contribution is the set of three questions that Donaldson asserts will, if answered in the affirmative, will qualify a particular use as within a fair use safe harbor: 1) does the material the non-fiction author wants to use illustrate or support a point that author is trying to make?, 2) does the non-fiction author use only as much as is reasonably appropriate to illustrate or support that point?, and 3) will the connection between the point being made and the material being used to illustrate or support that point be reasonably clear to the ordinary person who is the intended audience for the non-fiction work? Notice that these questions build off of the statutory fair use factors, but recast them in a way that makes analysis of the issues much more precise and that yields answers that are more likely to predict the outcome if the use is challenged.

A third contribution is Donaldson’s discussion of 82 non-fiction fair use cases he studied to illustrate the kinds of litigated cases that, he believes, easily qualify for this safe harbor, and those that may or may not be fair uses because the answers to one or more of the three questions above are more equivocal. This leads Donaldson to make another useful point: fair use, he argues, is best perceived as a spectrum, in which some cases are easily fair use, some easily not fair use, and some in a gray zone. Donaldson gives an example of working with a filmmaker who wanted to use a short clip from a John Lennon song in a documentary film. Because it was quite likely that Yoko Ono would sue for infringement, Donaldson worked with the filmmaker to craft the use of the song in a manner that would likely satisfy courts that the use was fair.

Finally, Donaldson discusses a dozen or so arguments that copyright owners frequently make to defeat fair use defenses that Donaldson thinks are “distractions”; i.e., that, in Donaldson’s view, are not convincing counters to fair use defenses, at least in the non-fiction fair use work context. They include the failure of the defendant to ask permission, the use of the material after permission was refused, the existence of negotiations that failed to yield a license, the availability of alternatives that could have been used as substitutes, and a claim that the material used was the “heart” of the work. Donaldson argues that as long as the three questions he’s sketched out can convincingly be answered in the affirmative, these “distractions” should not derail the fair use defense.

Donaldson's article builds on the works of a number of scholars who have argued that fair use is more predictable than some commentators claim. But Donaldson's experience in the practice of law has yielded insights into the predictability of fair use in the important sector of non-fiction works which makes his article even more persuasive than the works that he builds on.

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