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Sight, Sound and Meaning: Teaching Intellectual Property with Audiovisual Materials

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SIGHT, SOUND, AND MEANING: TEACHING INTELLECTUAL PROPERTY WITH AUDIOVISUAL MATERIALS

REBECCA TUSHNET*

INTRODUCTION

When I began teaching copyright and trademark, computer projectors had been newly installed in many of the classrooms at NYU's law school. It seemed obvious that students would often benefit from seeing, hearing, or watching the subjects of the cases we studied, so I began putting together a few images and sound clips. Many of my colleagues had collections of their own, developed over years, often projected on overhead or slide projectors or played from tape or CD players. These examples benefited the students in those classes, but in the digital age, we can do better.

With generous backing from the dean at Georgetown, where I now teach, along with programming assistance from Georgetown's staff, I created the Georgetown IP Teaching Resources Database.[1] The basic idea is that professors should have instant access to materials to supplement any intellectual property course.[2] These materials allow students to see the subject matter of the cases rather than just reading verbal descriptions and enable them to apply the principles they read about to new, concrete examples. Many students in IP courses have special interests in music, film, or the visual arts, and the database allows me—and other teachers—to present materials that engage them. I have found that students are more willing to speak up in class when they can see or hear for themselves and can point to specific aspects of the underlying materials.

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* Professor, Georgetown University Law Center. Thanks to Michael Madison for sharing his expertise, Mark Tushnet for his comments, and especially to Zachary Schrag for teaching me about the importance of nontextual evidence.

1. I am grateful for the professional and dedicated job Juan González de Escalada has done in programming the database, helping me configure it for best use, and solving technical problems as they arise.

2. Access to the database is available to any person teaching an intellectual property course at an accredited law school, or otherwise making educational uses of the materials. Anyone interested in receiving the username and password should contact me at rlt26@law.georgetown.edu.

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This piece addresses my experience using audiovisual materials in class, focusing on specific examples in which students reacted to what they saw and heard.[3] I also briefly address the copyright question: should teachers worry about using digital materials in class? Fortunately, the available statutory exceptions are supportive of in-class teaching. Using images and sounds to illustrate litigated cases and hypotheticals is pedagogically valuable and legally justified.

I. HOW DO AUDIOVISUAL EXAMPLES AFFECT TEACHING?

Students generally enjoy the audiovisual materials, at least as a welcome change of pace from the texts that necessarily dominate other subjects. But I think their value is deeper than that. As the Supreme Court has recently recognized,[4] the ability to evaluate the evidence itself, rather than just reading a description of it, can be vital in forming a considered judgment in a case.[5] Much of the current writing on the pedagogical benefits of audiovisual materials in legal teaching concerns ways to present visually (or audibly) material that could be written out, such as a diagram of the legal relationships of parties in a case. Presenting material in multiple ways is a good idea, but I am more concerned with audiovisual materials as the subject of analysis—audiovisual materials that were involved in litigation, or that students can use to practice applying the legal principles we are studying. I offer here a few examples from copyright, trademark, and the right of publicity, with a brief comment on patents.

3. Other articles have addressed the use of audiovisual materials in legal education generally. *See, e.g.*, Fred Galves, *Will Video Kill the Radio Star? Visual Learning and the Use of Display Technology in the Law School Classroom*, 2004 U. ILL. J.L. TECH. & POL'Y 195 (2004); Vincent Robert Johnson, *Audiovisual Enhancement of Classroom Teaching: A Primer for Law Professors*, 37 J. LEGAL EDUC. 97 (1987).

4. *See* Scott v. Harris, 127 S. Ct. 1769, 1775–76 & n.5 (2007) (referring to video of a car chase posted at the Supreme Court's website in order to bolster the majority's conclusions about the reasonability of the police actions at issue).

5. *See, e.g.*, James Eagar, Comment, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389, 410–11 (1997); Galves, *supra* note 3, at 202–03; Johnson, *supra* note 3, at 102; *see also* M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139, 151–52 (2001) (suggesting that visual learners may have difficulty with other standard law school teaching methods, so visual aids may be particularly helpful for them).

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A. Copyright

Audiovisual materials are useful for teaching about the basic subject matter of copyright and the scope of protection. For example, the classic *Alfred Bell*[6] case, concerning the copyrightability of mezzotints based on public domain works, is easier to understand when students can see that different mezzotint artists working from the same painting produce noticeably different results.

Compilations and the fact/expression distinction are often challenging for students. I have had some success with using the periodic table as an example of a compilation of facts and asking students whether the arrangement is protectable, or whether the arrangement itself should be considered factual and uncreative. Students are often unaware that there are multiple ways to represent the periodic table, and showing them several different versions can spur interesting comments, especially from students with a scientific background.[7]

Last semester, I explored merger and the idea/expression distinction by discussing *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, a case holding that defendants did not infringe by copying the idea of a jeweled bee pin because the idea of a jeweled bee pin and its expression were inseparable.[8] After I described the case, I showed the class dozens of different jeweled bee pins, some of which look almost nothing like the other pins. I argued that the problem in *Kalpakian* was not simply merger of idea and expression, but that the plaintiff defined its rights too broadly, contending that any jeweled bee pin would be substantially similar to its pin.[9] As a result, the court rejected its claim in equally broad terms.[10] This helped students see the different ways that merger works in practice.

Relatedly, I showed five different editorial cartoons that ran the day after Christopher Reeve's death. Each depicts Superman (Reeve's best-known role) rising heavenwards from an abandoned wheelchair.[11] The timing of publication makes independent creation extremely likely, yet the expression

6. Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

7. Michael Madison, similarly, uses different versions of the periodic table, including Tom Lehrer's excellent song *The Elements*, to teach merger.

8. 446 F.2d 738, 742 (9th Cir. 1971).

9. *See id*. at 740.

10. *See id*.

11. *See* Daryl Cagle's Professional Cartoonists Index, http://cagle.msnbc.com/ChristopherReeve/2.asp (cartoons by Bob Englehart and Jeff Koterba) (last visited Nov. 9, 1007); Daryl Cagle's Professional Cartoonists Index, http://cagle.msnbc.com/ChristopherReeve/7.asp (cartoon by Cal Grondahl) (last visisted Nov. 9, 2007); Daryl Cagle's Professional Cartoonists Index, http://cagle.msnbc.com/ChristopherReeve/main.asp (cartoon by Vic Harville) (last visited Nov. 9, 2007); Daryl Cagle's Professional Cartoonists Index, http://cagle.msnbc.com/ChristopherReeve/6.asp (cartoon by Steve Nease) (last visited Nov. 9, 2007).

might be considered substantially similar. I used this to show how similarity in idea can produce similarity in expression without copying.

Images and sounds are especially valuable for teaching the substantial similarity inquiry in infringement. Words on a page are essentially useless for describing the similarities and differences between nontextual works. If the similarities are visual, they need to be seen; if they are aural, they need to be heard. Copyright casebooks usually try to include some relevant pictures, but they never have everything, and the expense of color printing means that any pictures are black and white, which eliminates crucial details.

The text I use, *Copyright in a Global Information Economy*,[12] for example, uses five recent cases to expand on the classic formulations of the substantial similarity inquiry.[13] The works in three of those cases are visual (a poster, alphabet quilts, and a children's book).[14] Unfortunately, however, the casebook had pictures only for the first case.[15] I collected color images of the poster and similar pictures, found a picture of one of the quilts, ordered the allegedly infringing children's book, and contacted the plaintiff's lawyer for images of the allegedly infringed book. I was then able to show the pictures in class, and students made their own judgments about substantial similarity and compared their reasoning to the courts'.[16] The pictures on the following pages are from the children's book case.[17] They were not shown in the court's opinion or in the casebook, but seeing them gives some sense of the facts the parties' lawyers and the courts actually had to evaluate. (In my class, I show them in color).

12. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY (2d ed. 2006).

13. The cases are *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987); *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001); *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004); and *Cavalier v. Random House, Inc.*, 297 F.3d 815 (9th Cir. 2002).

14. *Cavalier*, 297 F.3d at 819 (children's book); *Boisson*, 273 F.3d at 265–66 (alphabet quilts); *Steinberg*, 663 F. Supp. at 708–09 (poster).

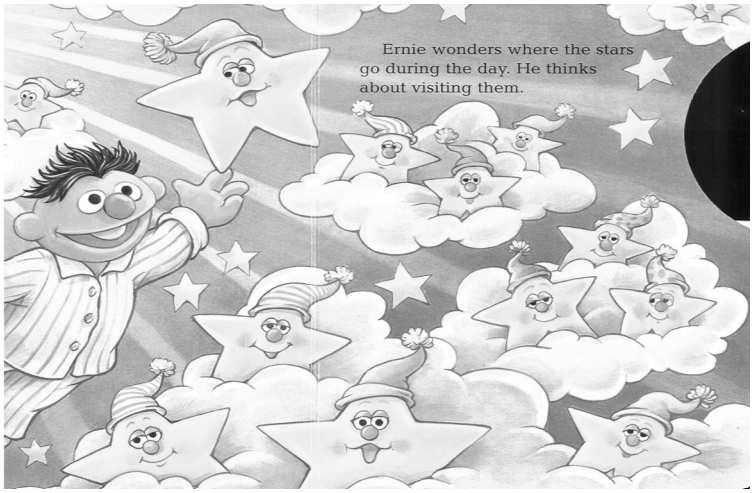
15. *See* COHEN, *supra* note 12, at 338–39 (showing pictures of the works at issue in *Steinberg*, 663 F. Supp. at 708–09).

16. *Cf.* Galves, *supra* note 3, at 214 ("[T]he class can better follow the particular issue being discussed, since they can refer to the pending issue on the screen as they wrestle with the substantive legal issue at hand. Class discussion is more organized and focused than it is without visual displays because verbal misunderstandings of facts, hypotheticals, and key language are minimized.").

17. *See Cavalier*, 297 F.3d 815.



A page of plaintiff's book in *Cavalier v. Random House*.



An allegedly infringing page of defendant's book.

Likewise, using Columbia Law Library's Music Plagiarism archive,[18] students can listen to samples of music involved in infringement cases,

18. *See* Columbia Law School Music Plagiarism Project, http://ccnmtl.columbia.edu/projects/law/library/entrance.html (last visited Nov. 9, 2007).

including the works involved in the casebook's fifth recent case.[19] In fact, for some cases, the Music Plagiarism archive makes available samples of accused and accusing songs, samples of their melodic lines alone, and sheet music.[20] Comparing these, students can get a sense of which ways of presenting the evidence best support the plaintiff's argument and which best support the defendant's.[21]

Another of the cases, *Steinberg v. Columbia Pictures Industries, Inc.*,[22] deserves extended discussion. *Steinberg* involved the famous *New Yorker* cover showing a New Yorker's myopic vision of the world, in which New York looms largest and only a few other national and world landmarks are worthy of note.[23] The artist, Steinberg, sold many copies of a poster reproducing the cover.[24] A district court found that the poster for the film *Moscow on the Hudson* infringed Steinberg's copyright.[25] The last time I taught the case, I showed the class the original *New Yorker* cover and the *Moscow on the Hudson* poster. Then I showed a number of other "myopic vision of the world" pictures, clearly inspired by Steinberg's work. Most of them depict cities other than New York; some are closer to Steinberg's style than others.

The result of showing this extensive series of images surprised me. At the beginning of the discussion, most of the students agreed with the judge in *Steinberg* that the movie poster was substantially similar to the *New Yorker* cover. After we had looked at so many other "myopic vision" images, however, many changed their minds. They now saw the shared features of the pictures as an unprotectable style, not protectable expression. Reasonable people can disagree over the result in *Steinberg*, of course, but what is striking is that the images themselves affected how students thought about the problem.

Images can have persuasive power in other contexts. Roberta Rosenthal Kwall suggests that the court in *Carter v. Helmsley-Spear, Inc.*[26] may have determined that the installation at issue was a work for hire, and thus not

19. *See* Swirsky v. Carey, 376 F.3d 841, http://ccnmtl.columbia.edu/projects/law/library/cases/case_swirskycarey.html (last visited Nov. 9, 2007) (providing sound recordings).

20. *See* Bright Tunes Music v. Harrisongs Music, 420 F. Supp. 177 (S.D.N.Y. 1976), http://ccnmtl.columbia.edu/projects/law/library/cases/case_brightharrisongs.html (providing samples of the sound recordings, melodic lines, and partial scores for the works at issue in *Bright Tunes Music Corp. v. Harrisongs Music Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976)) (last visited Nov. 9, 2007).

21. I thank Laura Heymann for this example.

22. 663 F. Supp. 706 (S.D.N.Y. 1987).

23. *Id*. at 709–10.

24. *Id*. at 709.

25. *Id*. at 714.

26. 71 F.3d 77 (2d Cir. 1995).

protected against destruction by the Visual Artists Rights Act,[27] "because it was troubled by the prospect of allowing the work to remain in a lobby for a long period of time when the original agreement was entered into by a net lessee of the building, rather than by the building's owner."[28] That's very plausible, but let me suggest an additional consideration: the installation was hideously ugly. It may have had artistic merit, like a Francis Bacon painting, but that doesn't mean any reasonable hotel or office building management would want it dominating ("eating" might be a better word) the lobby. The persuasive force of my argument is, I think, much enhanced by the pictures I copied from my former NYU colleague, Diane Lenheer Zimmerman. Showing them in class is the best way to make my point.

B. Trademark

Audiovisual materials are extremely helpful in trademark classes as well. Students have strong feelings about whether an unauthorized poster of the Rock and Roll Hall of Fame should be deemed infringing,[29] or whether the Baltimore CFL Colts infringed on the trademark of the Indianapolis (formerly Baltimore) Colts,[30] and pictures of the merchandise at issue in those cases give them ammunition for their arguments. I also pass around a can of the novelty energy drink Cocaine, allowing students to examine it and evaluate whether the mark COCAINE for a beverage is scandalous or, as some suggest, treading too close to Coca-Cola's rights.

I have found audiovisual materials particularly useful in teaching aspects of trademark that are less intuitive, such as the meaning of using a symbol "as a mark." Sonicare's alleged whirlpool mark for its toothbrushes, which appears on Sonicare boxes only behind a picture of the toothbrush, demonstrates that an image may appear on a product without serving as a source identifier for that product.[31] I also enjoy showing students examples that straddle the border between descriptive fair use and use as a mark, such as a photo I took of a PBS ad for the reality series *Colonial House*. As part of an advertising theme that life in the Seventeenth Century was very different from modern life, this ad shows a large picture of a single blackberry fruit, with the caption "Blackberry, 1628." The reference to the Blackberry PDA is obvious in context, but is it descriptive or nominative, or something else?

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27. 17 U.S.C. § 106A (2000).

28. Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 9–10 (1997).

29. *See* Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Productions, 134 F.3d 749 (6th Cir. 1998).

30. *See* Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P'ship, 34 F.3d 410 (7th Cir. 1994).

31. *See In re* Optiva Corp., 2005 WL 906510, at *2–3 (T.T.A.B. Apr. 5, 2005).

I introduce the concept of trademark dilution with a classic definition, the "whittling away" of the value of a mark through non-confusing use on multiple products.[32] Then I switch to a term used by a slightly confused student on an exam some years ago: the "widdling away" of a trademark. Combined with a picture of a rather crass auto decal—Calvin of *Calvin & Hobbes* urinating on the Dodge logo—students get an indelible image of dilution, or at least of tarnishment.

I am no fan of dilution law, particularly blurring, which I think is a theory without a justification.[33] Nonetheless, it is part of the law, and many people have an intuition that there is something to the idea of dilution. Thus, I show students an example of dilution in action. I start with the iTunes advertising trade dress, which is a white silhouette against a colorful background. I then show dozens of examples of unauthorized use of the trade dress, from a *New Yorker* magazine cover about doctors to a *Mad Magazine* parody, with stops along the way at political posters about the war in Iraq, modified Lego men holding tiny iPods, ipodmyphoto.com, and numerous other unrelated uses. I hope to demonstrate to students why trademark owners care about dilution, even if the harm is very hard to articulate and even if one individual unauthorized use seems unlikely to do any harm to the trademark owner.

Finally, for keeping students engaged, nothing beats the two Battletanx ads starring a brutalized Snuggle bear; I explain to students that the first one was enjoined,[34] but that the defendant still produced the second one because the concept was just that good.

C. The Right of Publicity

My best experience with teaching publicity rights came from showing a website that sells outfits and accessories just like those worn by celebrities and advertises using pictures of those celebrities wearing the items.[35] The class recognized pictures of Paris Hilton and other currently famous people and had a vigorous discussion about the acceptability of using such pictures for commercial purposes without authorization. Many younger students are unfamiliar with figures such as Woody Allen and Bette Midler, whose legal battles set the basic ground rules for the right of publicity.[36] Scenarios

32. *See, e.g.*, 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:67, at 24-166; § 24:70, at 24-173 (2007).

33. *See* Rebecca Tushnet, *Gone in 60 Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. (forthcoming 2007), *available at* http://www.law.berkeley.edu/institutes/bclt/ipsc/papers2/Tushnet.doc (last visited Nov. 9, 2007).

34. Conopco Inc. v. 3DO Co., 53 U.S.P.Q.2d 1146, 1147 (S.D.N.Y. 1999).

35. *See* ShopRobertson.com, Celebrity Sightings, http://www.shoprobertson.com/index.php?main_page=page&id=1 (last visited Nov. 9, 2007).

36. *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985).

involving current stars kept students' attention and allowed them to use their background knowledge of the role of celebrity in modern culture.

In my coverage of the right of publicity, the limits on the right as applied to artistic works loom large. I frame the issue in terms of the Second Circuit's artistic relevance test for works that are not subject to Lanham Act or right of publicity liability[37] versus the California Supreme Court's transformative use test. The latter was set forth in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,[38] which found that artist Gary Saderup's lithographs of the Three Stooges violated the Stooges' right of publicity.[39] I discuss *Saderup*'s "Andy Warhol exception," the court's implicit concession that Andy Warhol's lithographs are valuable commentary on fame because Warhol was himself famous, rather than because Warhol transformed the celebrity images he depicted.[40] I show Saderup's Stooges picture, then Warhol's Marilyn Monroe, and ask what the difference is between them. Invariably, a student points out that Saderup's charcoal drawing is naturalistic, whereas Warhol's version has color and is more abstract. I then show them Saderup's Stooges drawing "Warholized" using Photoshop,[41] and ask them if Saderup would win the case if he had done the same thing. Students don't agree on the right answer, but it's an entertaining example that allows them to sharpen their thinking about the proper limits on publicity rights.

Encouraging students to think in concrete terms about the specific materials in front of them, and the different media in which they're delivered, often produces new insights: one student pointed out that our intuitions about artistic relevance, and thus the appropriate outcome in right of publicity cases, are highly medium-dependent. She offered the example of a painting of a sunflower. If the artist called the painting *Rosa Parks*, most of us would be willing to construct a story linking the title to the subject matter in order to allow the artist to use that title without permission. With the song *Rosa Parks*, by contrast, a court of appeals was willing to parse the lyrics for explicit artistic relevance, rather than deferring to the artists' choice of allusion.[42]

D. Patent

I do not currently teach patent law, but I have it on good authority that images are important so that students can see the often significant divergences between the invention as disclosed in the drawings and the scope of the claims.

37. *See* Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989).

38. 21 P.3d 797, 808–10 (Cal. 2001).

39. *Id*. at 811.

40. *Id*.

41. *See* Melissa Clifton, *Andy-Warhol-Up Your Photographs*, http://www.melissa clifton.com/tutorial-warholphoto.html (last visited Nov. 9, 2007).

42. Parks v. LaFace Records, 329 F.3d 437, 452–54 (6th Cir. 2003).

In the future, I hope to add more patent-related material to the database, including animations prepared for litigation in patent cases which can educate them both in the subject matter and in practice considerations.

Using materials prepared for litigation is helpful because practicing intellectual property lawyers are far ahead of professors in using audiovisual materials for demonstrative purposes. Actual exhibits are a preview of what students will encounter once they leave law school. Moreover, students who are intimidated by the technical reputation of patent law are often reassured by reminders that patent litigation is about explaining specialized subject matter to non-specialist judges and jurors.

E. Concerns

There are some dangers of relying heavily on audiovisual materials, even setting aside occasional technological glitches. Students come to expect that every case will be illustrated. When we were discussing an important case finding that putting the name of a sports event on a T-shirt creates a presumption of infringement,[43] one student commented that she would have had a much easier time reaching a conclusion about the result if she could have seen the T-shirts themselves. (Given the age of the case, I had relied on pictures of official T-shirts, but had been unable to find any trace of the defendant's T-shirts.) It is a truism in teaching that one bad moment erases dozens of good ones before, but I had never felt that so keenly before.

Another, more significant issue is differences among students. Foreign students, for example, often have very different cultural backgrounds. When the subject matter of my examples is popular in the United States, I have to make sure that other students who might be unfamiliar with the referent can still follow along.[44] Students whose native language is not English can also have difficulty hearing the lyrics of songs, so when they are relevant it is important to provide written lyrics.

Varying physical capacities also pose potential challenges.[45] As far as I know, I have not yet taught students who were entirely unable to see or hear, but I have dealt with a colorblind student. It was not a problem in class, but

43. *See* Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 29 (1st Cir. 1989).

44. *Cf.* Galves, *supra* note 3, at 228 ("[S]tudents [whose native tongue is not English] have observed how much more information they are able to understand and obtain from my lectures given the added use of display technology. They state that they are able to overcome the language barrier much better because the verbal information I present is reinforced by computer images. This should not be surprising because it is easier to understand a foreign language when reading it while listening to it, rather than when merely listening to a native speaker.") (footnote omitted).

45. Visually impaired students may have difficulty with standard uses of a whiteboard or blackboard as well, but using "pictures worth a thousand words" makes the problem more salient.

because my exams also rely extensively on pictures, I had to ensure that nothing on the exam turned on the ability to distinguish colors.

A final problem concerns class recording. Currently, at Georgetown, classes are recorded only in audio, rather than in video. As a result, a student who downloads the audio recording to catch up with a missed class, or even to reinforce material from a class she attended, is unable to see the images I displayed in the actual class.[46] I hope that the visual component of the class will ultimately be recorded. Ideally, I would like to record the screen and synchronize that with the audio. For now, I will give students access to the PowerPoint presentations associated with a class when they need it to understand the audio recording.

II. COPYRIGHT ISSUES

The Copyright Act allows professors to engage in:

> 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, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.[47]

(The Technology Education and Copyright Harmonization Act (TEACH Act) also allows similar uses for teaching over the internet though its requirements are complicated and somewhat unclear.)[48]

Section 110(1)'s wording, designed to give special protections to audiovisual works, suggests that teachers can use the protections of §110(1) in

46. Again, this is a problem for any professor who writes on the board as part of teaching a class that is being recorded. Slides improve the situation, by creating a record that can be shared.

47. 17 U.S.C. § 110(1) (2000).

48. 17 U.S.C. § 110(2) (Supp. IV 2006) (allowing the online performance of nondramatic literary or musical works, and performance or display of reasonable and limited portions of any other work); *see also* 17 U.S.C. § 112(f) (Supp. IV 2006) (allowing reproductions in conjunction with performances or displays authorized under § 110(2), as long as the educational institution does not digitize an analog work unless no digital version is available or the digital version cannot be used because of technological protection measures). The TEACH Act is complicated enough that many institutions, and even more individual educators, are not making use of it. *See* Kristine H. Hutchinson, Note, *The TEACH Act: Copyright Law and Online Education*, 78 N.Y.U. L. REV. 2204, 2231–34 (2003). Several institutions offer useful guides to the Act's provisions. *See, e.g.*, N.C. State Univ., *The TEACH Toolkit: An Online Resource for Understanding Copyright and Distance Education*, http://www.lib.ncsu.edu/scc/legislative/teachkit/ (last visited Nov. 9, 2007); Office of Legal Affairs, Univ. Sys. of Ga., *Guide To The TEACH Act*, http://www.usg.edu/legal/copyright/teach_act.phtml (last visited Nov. 9, 2007); Univ. of Tex. Sys., *The TEACH Act Finally Becomes Law*. http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm (last visited Nov. 9, 2007).

most cases, even to show excerpts of films that infringe pictorial or sculptural works.[49] Nonetheless, some cases I teach involve infringement of an audiovisual work.[50] In those cases, the infringing work was not "lawfully made," and showing it requires reliance on fair use. Fortunately, I am confident that fair use applies to such educational uses. Related questions include whether making an excerpt of a film is fair use, such that the excerpt is "lawfully made."[51] In fact, because the §110(1) exception does not cover reproduction and because courts have consistently found that RAM copies made automatically in a computer's memory implicate the reproduction right,[52] it may be necessary in many cases to engage in a fair use analysis when the classroom copy comes from a computer projection.

Unsurprisingly, I believe that classroom use of unauthorized copies of works in order to discuss intellectual property issues raised by those specific works is fair use.[53] Crucially, the use is nonprofit and educational, and thus resides firmly within the core set of socially beneficial activities that have traditionally been considered fair uses. Moreover, the use is transformative, recontextualizing the works and giving them new meaning. We study Steinberg's poster to understand the concept of substantial similarity, not to benefit from its aesthetic and entertaining qualities.[54]

49. *See, e.g.*, Woods v. Universal City Studios, Inc., 920 F. Supp. 62, 63–65 (S.D.N.Y. 1996) (issuing preliminary injunction against studio when artist claimed the film *12 Monkeys* infringed his pencil drawing).

50. *See, e.g.*, Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976) (discussing infringement claims brought by Monty Python authors).

51. *Cf.* Library of Congress, Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,473–74 (Nov. 27, 2006) (to be codified at 37 C.F.R. pt. 201) (concluding that film and media studies professors may lawfully circumvent access controls on DVDs in order to make excerpts of films for use in class).

52. *See, e.g.*, MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).

53. I phrase it this way to make clear that I don't contend that copying a random work in class, for example downloading an unauthorized copy of a movie, is fair use, even though the act of downloading could be the focus of a classroom discussion.

54. *See, e.g.*, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609–10 (2d Cir. 2006) (using images to document historical events was transformative when the original purpose was expressive and promotional); Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–20 (9th Cir. 2003) (finding fair use where inclusion of pictures in database was unrelated to the aesthetic value of the pictures and the database served a socially valuable purpose); Hofheinz v. A & E Television Networks, Inc., 146 F. Supp. 2d 442, 446–47 (S.D.N.Y. 2001) (use of film clips in biography was fair use because it "was not shown to recreate the creative expression reposing in plaintiff's film, [but] for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business").

The nature of the works varies, though they are often creative and almost always published.[55] Where it is possible to use only excerpts, as with most of the musical and video examples, I do so. With pictures, by contrast, it is often vital to show the entire picture in order to make the issue intelligible; a corner of Steinberg's poster would not suffice. Recent fair use cases have recognized that, in such instances, reproduction of the entire work does not cut against fair use.[56] Evaluating the effect on the market requires a murky, often circular, inquiry, but in general the market value of the materials I use is minimal. In fact, lawyers for parties to litigation often send me their pictures at my request, without asking for compensation. On balance, the transformative and nonprofit nature of the use outweighs any other considerations.

In some ways, this exercise in fair use analysis is silly. It is unlikely that any copyright owner is going to protest. Moreover, I may be giving too much legitimacy to what sensible people should recognize as extreme copyright claims. Jessica Litman has recently criticized copyright scholars' tendency to treat copyright owners' control as so pervasive that every unauthorized use requires careful justification.[57] Instead, she argues, we should look beyond restrictive, overly literal interpretations of the Copyright Act and recognize substantial scope for uncontrolled, unauthorized uses.[58] Nonetheless, it would be difficult to write an article about teaching intellectual property with audiovisual materials without at least mentioning the copyright implications. Regardless of whether we *should* argue about fair use so often, we routinely do.

CONCLUSION

Keeping an eye out for picture-taking opportunities has enriched my daily life. For example, as I was walking from my hotel to a conference at the Loyola Law School in Los Angeles, I saw a building that looked oddly familiar. As I approached, I realized that it was the 801 Tower, which sits at the southwest corner of Figueroa and Eighth Streets. The courtyard and the streetwall attached to the building's façade comprise Zanja Madre, a sculptural installation by Andrew Leicester.[59] The movie *Batman Forever* shows Zanja Madre for several seconds when the 801 Tower plays the role of the Second Bank of Gotham.[60] This brief display triggered a lawsuit that resulted in an

55. *See, e.g.*, *Kelly*, 336 F.3d at 820 (weighing the creative nature of works only slightly in favor of plaintiff and holding that the scope of fair use is broader for published works).

56. *See, e.g.*, *id.* at 820–21; Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 522 (7th Cir. 2002); Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000).

57. Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1920 (2007).

58. *Id*.

59. *See* Leicester v. Warner Bros., 232 F.3d 1212, 1213 (9th Cir. 2000).

60. *Id*.

important ruling on the line between copyright protection for architectural works and copyright protection for sculpture.[61] The pictures I took that day were bad, but the thrill of stumbling upon the subject of a case was delightful.

Less delightful was getting kicked out of a Walgreen's. I had been taking pictures of house brands with trade dress that imitated the trade dress of the competing national brands. Apparently the manager of the store was concerned that I was up to no good.

In general, however, people have been very helpful with my odd preoccupation. Many lawyers have provided me with useful materials. I have found that approaching the lawyers for the prevailing party in an interesting intellectual property case is often the most productive tactic, because the winning lawyers are most likely to want to share both their pictures and their war stories with me. Litigants themselves, by contrast, are often still smarting from the lawsuit—even when they are formally the victors—and can find it difficult to revisit the case.

Searching for useful audiovisual materials keeps me engaged with my teaching areas every day. There is always another picture to consider, another celebrity whose name is borrowed for a song title.[62] I doubt my students consider me entirely culturally up to date, but I am confident that my courses are better because I routinely revisit my examples, looking for materials that draw on students' existing competences in analyzing images and sounds.

The judicial opinions and the casebooks we use to teach only occasionally show the works they discuss, and legal scholarship in intellectual property almost never does. Our students, however, should be familiar with the increasing use of pictures, video, and audio in law practice. Although those of us who teach intellectual property are particularly well-positioned to take advantage of audiovisual materials in the classroom because of our subject matter, our students will be using such materials no matter what type of law they practice. Law professors should consider whether going beyond the blackboard offers them the advantages it provides in other types of teaching and in legal practice. My experience has been overwhelmingly positive, and I encourage others to experiment with the materials in the Georgetown IP Teaching Resources Database to see what works best for them.

61. *See id.*

62. Along with Outkast's *Rosa Parks*, *see* Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003), I have used excerpts from *Clark Gable* (The Postal Service) and *Clint Eastwood* (Gorillaz) as examples, asking students to analyze whether they violate the celebrities' rights of publicity under the Second Circuit's artistic relevance test and the California Supreme Court's transformative use test. The results are always enlightening.