MBUS 4300

Lecture 28 Fair Use Part II

- Interesting quotes from a law article
- *"If the painting is not sold commercially, or is sold as a single original work, factor one strongly points toward fair use; even with sale, the educational and commemorative nature of the use supports factor one.*
- *"If the painting is sold as an original work, that is still usually treated as a relatively limited commercial exploitation, as opposed to mass reproduction…"*



Fair Use Analysis

Warhol & Campbell’s Soup

Logo and can design reused in fine-art paintings.

Fairey & Obama Hope

Poster art based on a copyrighted photograph.

Koons & String of Puppies

Sculpture borrowing core expressive features from a photo.

Statutory Starting Point

17 U.S.C. § 107

The statute says the factors "shall include" four considerations: (1) purpose and character of the use, including commercial or nonprofit educational character; (2) nature of the copyrighted work; (3) amount and substantiality used in relation to the whole; and (4) effect on the potential market for or value of the copyrighted work.

Case-by-case method

The Supreme Court has repeatedly said § 107 restates, rather than freezes, the common-law fair use doctrine. That means no single factor controls automatically, and courts weigh the equities in the context of a particular dispute.

COPYRIGHT IN THE VISUAL ARTS



HOME ABOUT COPYRIGHT LAW FAIR USE FREQUENTLY ASKED QUESTIONS

Art Rogers vs. Jeff Koons

Search

String of Puppies

Work: Jeff Koons used a photo of a couple holding puppies as the basis for a sculpture that kept the arrangement and many expressive details.

Court ruled infringement: Weak fair use position because the copying tracked the source work closely across several factors.

1. Purpose — court's view	2. Nature — court's view	3. Amount — court's view	4. Market — court's view
The court said the use was done in bad faith, was primarily for profit-making motives, and was not a parody of Rogers's photograph itself, so factor one weighed against fair use.	The court treated Rogers's photograph as a creative, published work entitled to substantial protection, which favored the copyright owner under factor two.	The court concluded Koons copied the essence of the photograph nearly in toto, taking far more than permissible and appropriating its protected expression.	Because the sculpture was commercial in nature, the court saw a likelihood of future harm to Rogers's photograph and its derivative markets, so factor four also weighed against fair use.

Overall: The court held no fair use, and its reasoning that artistic intent alone does not overcome commerciality, close copying, and likely market injury.

AP photo used in poster

Artist Shepard Fairey has acknowledged the image of President Barack Obama on his famous poster is based on an Associated Press photo.

AP PHOTO **PHOTO AND POSTER**



AP photographer Mannie Garcia's photo of President Barack Obama, while he was still a senator April 27, 2006. Shown with and without an overlay of the Fairey poster.

Obama Hope

Work: Shepard Fairey’s poster was based on a copyrighted AP photograph of Barack Obama.

Settled no final court ruling: The fair use position is contested because the source is a creative photograph and the borrowed pose and composition remain central.

1. Purpose

No final judicial weighing. Fairey argued political commentary and limited commercial purpose; AP argued commercial exploitation through posters and merchandise.

2. Nature

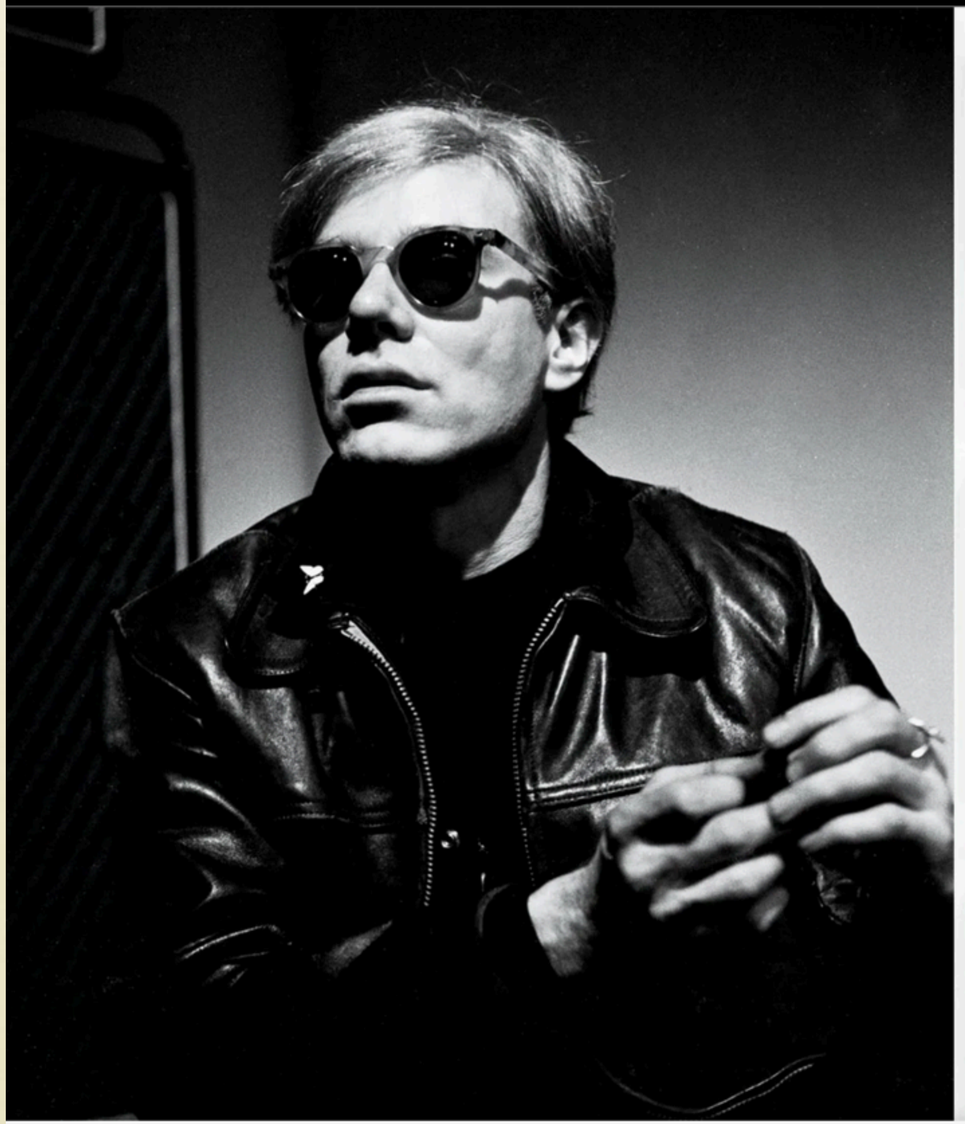
No final judicial weighing. The underlying image was a published news photograph, but still contained creative choices in pose, framing, and lighting.

3. Amount

No final judicial weighing. The dispute centered on whether the poster took the photo’s essential expressive core rather than merely factual information about Obama’s likeness.

4. Market

No final judicial weighing. The settlement itself underscores that licensing and merchandise markets were important enough to resolve by agreement rather than judgment.




Campbell's CONDENSED ONION SOUP MADE WITH BEEF STOCK
Campbell's CONDENSED GREEN PEA SOUP
Campbell's CONDENSED SCOTCH BROTH (A HEARTY SOUP) SOUP
Campbell's CONDENSED Old-fashioned TOMATO RICE SOUP
Campbell's CONDENSED BEEF (WITH VEGETABLES AND BARLEY) SOUP
Campbell's CONDENSED CREAM OF ASPARAGUS SOUP
Campbell's CONDENSED TURKEY VEGETABLE
Campbell's CONDENSED CHILI BEEF
Campbell's CONDENSED VEGETABLE

Campbell’s Soup

Work: Warhol’s paintings repeat the Campbell’s label, trade dress, and can imagery in a fine-art setting.

Likely outcome: Fair use argument is plausible but mixed because the copied material is commercially recognizable and taken in substantial visual form.

1. Purpose	2. Nature	3. Amount	4. Market
Fine-art display and commentary on mass consumer culture help the user under factor one, especially for gallery display rather than retail packaging.	The label design is commercial and published, which makes factor two less protective than a highly imaginative unpublished work.	The can image and label elements are taken in a recognizable, near-complete way, so factor three cuts against fair use.	An original painting is not a substitute for soup packaging, but prints and merch could create closer market concerns.



in this case I think the author means “commercial” in the sense the original work was not done for pure creative expression, but done as commercial graphic art for a product. So “less expressive”

Overall: Slight to moderate fair use case for one-off fine-art display; weaker if reproduced on posters, shirts, or other commercial goods that compete in licensing space.

Why “Transformative Use” Is Controversial

Why critics object

Critics argue that “transformative use” is controversial because the phrase does not appear in the text of § 107, yet in many cases it has come to dominate factor one and sometimes the entire fair use inquiry. Judge Easterbrook made that objection directly in *Kienitz*, warning that overuse of the concept can displace the statutory list and erode the derivative-work right.

Why supporters defend it

Supporters trace the idea to Judge Leval’s article and to *Campbell*, arguing that the concept helps courts decide whether a secondary use serves a genuinely different justification under factor one rather than merely repackaging the original.

Statutory concern

The criticism is textual: § 107 lists four factors, but “transformative use” is not one of them.

Doctrinal concern

The criticism is structural: if new meaning alone controls, factors two through four may do too little work.

Warhol’s signal

The Supreme Court in *Warhol v. Goldsmith* pushed back against an overbroad reading by insisting that factor one still depends on the specific use, including commercial licensing and overlap of purpose.

Gallery display helps

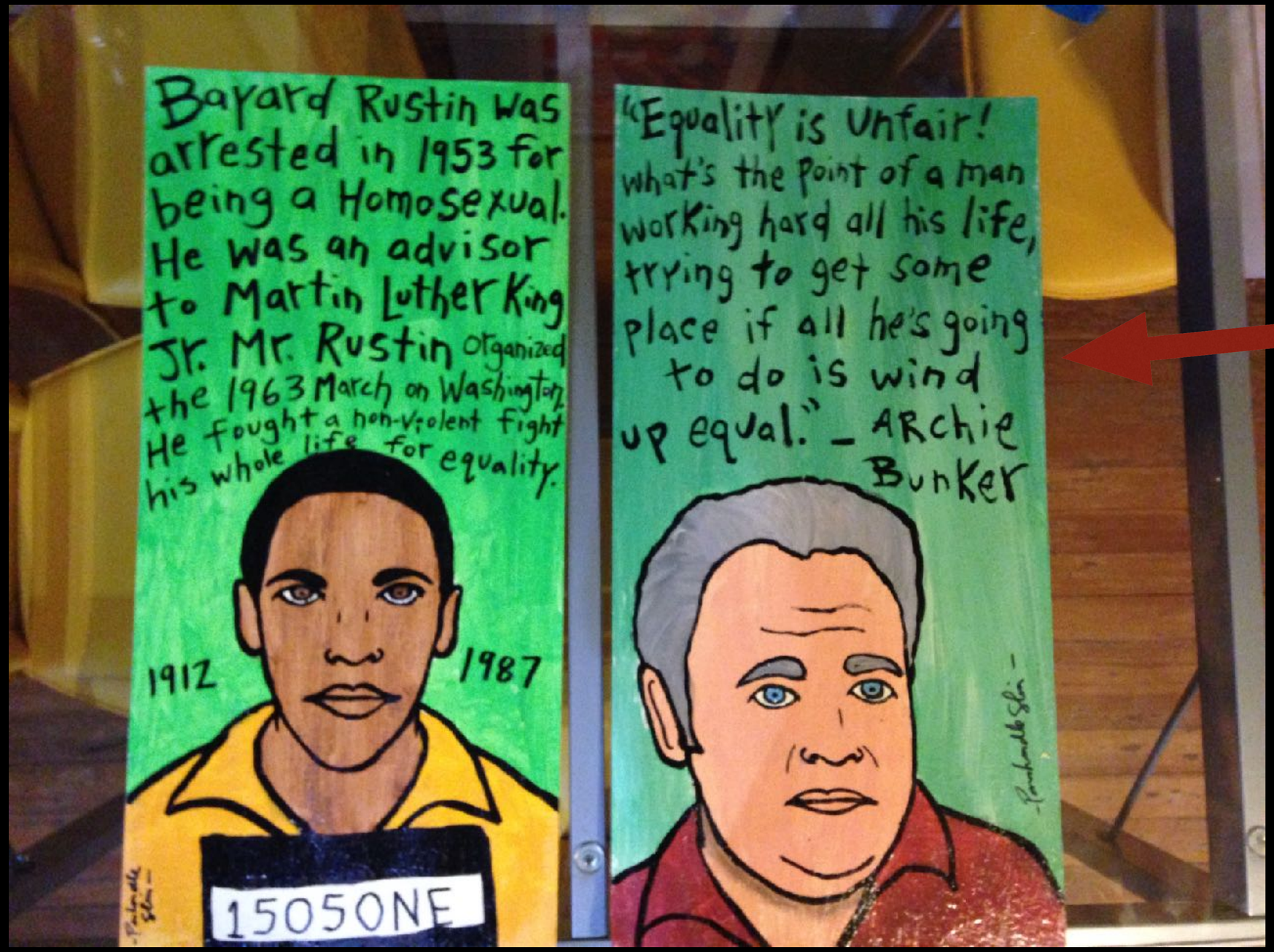
Factor one usually improves when the work is shown as an original in a gallery, classroom, or museum setting rather than sold as ordinary merchandise.

Creative sources matter

Factor two and factor three become harder when the borrowed source is a highly expressive photograph, script line, or staged visual composition.

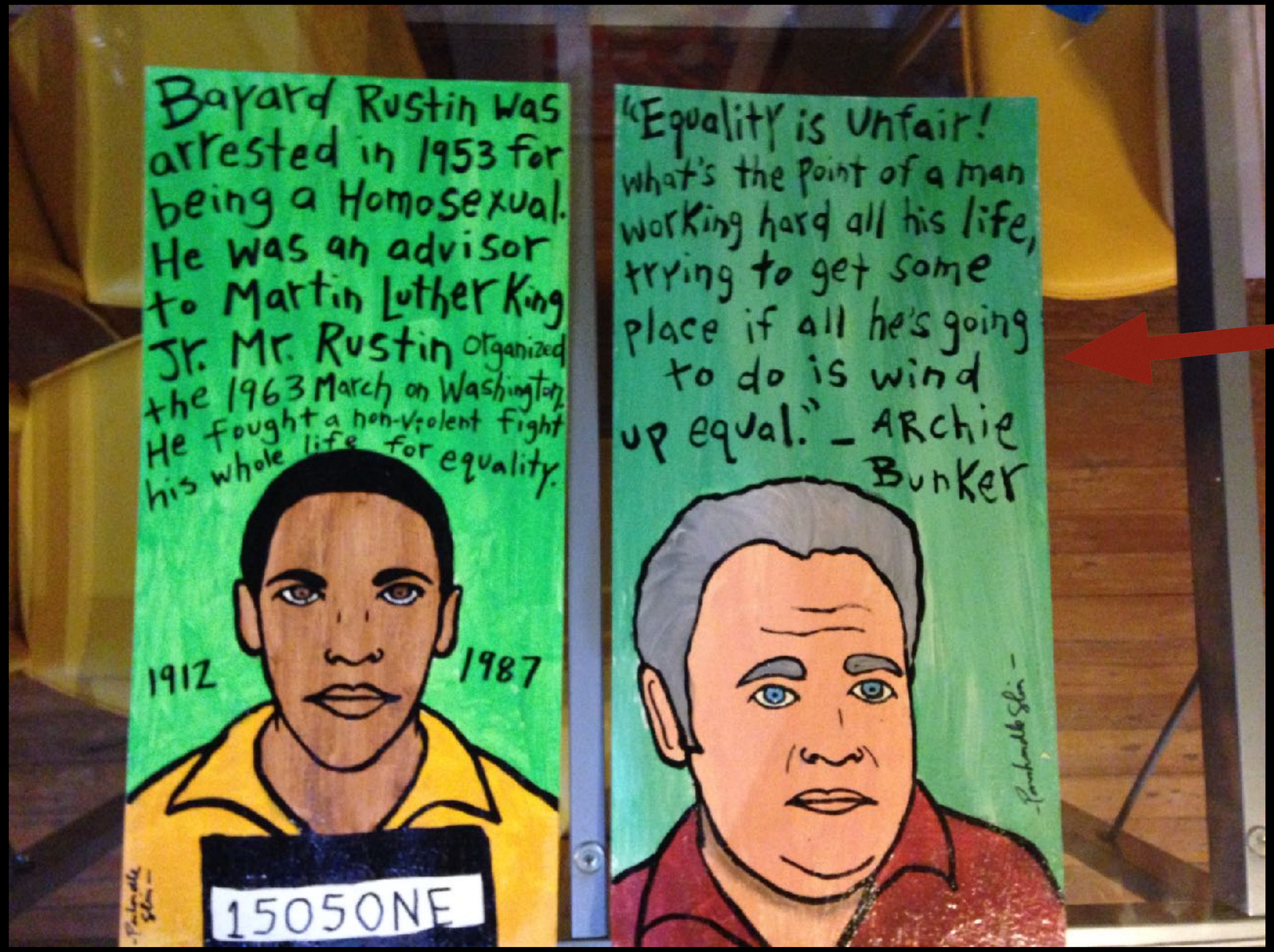
Prints raise risk

Limited-edition prints are still more defensible than broad consumer merch, but they create more market-effect pressure than a single original painting.



from TV Show

Final question Is this fair use?



from TV Show

Shown separately? shown together?

Fair Use Question Final

- For the fair use questions you need to look at these two painting. Bayard Rustin is a real person. Archie Bunker is a fictional character from the All In The Family tv show.
- First treat each one separately and do a fair use analysis on each painting. Next suppose they were shown together as if they were a single piece. Does it change the fair use analysis? Why? Make sure you go through the 4 elements of the fair use test in each of your answers.
- Is Bayard Rustin Painting Fair use
- Is Archie Bunker Painting Fair use
- If they are show together does this change the analysis (factor by factor)