COPYRIGHT INJUNCTIONS AND FAIR USE: ENTER *eBAY* — FOUR-FACTOR FATIGUE OR FOUR-FACTOR FREEDOM?*

The 37th Annual Donald C. Brace Memorial Lecture

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I thank the Copyright Society for the high honor of selecting me as a Brace lecturer and to join the company of the very distinguished people who have been Brace lecturers in past years. It is especially gratifying to me that this lecture series honors the memory of Donald Brace, a prominent figure in the book publishing industry, the area of copyright I've been most associated with professionally.

I. FOUR-FACTOR FATIGUE

Let me begin by describing an affliction that is widespread in copyright — no one is immune, certainly not litigants or commentators. I call it four-factor fatigue.

The problem, or the opportunity, was described by the Supreme Court in 1994 in *Campbell v. Acuff-Rose*[1] and is familiar. The fair use doctrine permits — and requires — courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.[2] The task is not to be simplified with bright-line rules, because the statute, like the doctrine it recognizes, calls for case-by-case analysis.[3] This scheme is inherent in the statute itself. Section 107 (fair use) provides several preamble purposes and four factors that are illustrative, non-exclusive, that begin but do not exhaust the analysis.[4]

The four statutory factors — purpose and character of the use, nature of the copyrighted work, amount and substantiality of the portion used, market harm — may not be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.[5]

Even parody, the favored child of fair use, is not immune from fair-use factoring and failure (e.g., the Ninth Circuit Dr. Seuss or OJ case).[6]

Judge Pierre Leval, in his 1989 Brace Lecture (*Fair Use or Foul?*),[7] observed that no one can explain what we mean by fair use. We just don't know. The statute and cases mention factors but give us no standard. Judges share little consensus about what the doctrine means. Litigants can only guess and pray as to how litigation will turn out. In short, we are rudderless.[8]