

Legal Perils and Legal Rights of Internet Speakers
an outline with citations

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Resources

There is a decent outline available online covering a number of issues relating to the Internet on the web site of the Libel Defense Resource Center:

Fifer & Doellinger, *Annotated Bibliography of Materials Concerning First Amendment & Intellectual Property Internet Law Issues*

This site features more generalized discussions, with more lay-oriented prose and fewer citations:

Bitlaw, <http://www.bitlaw.com/>

Some good collections of links on this issue can be found at

<http://www.bitlaw.com/links/index.html>
Intellectual Property in Cyberspace 2000 (course offered by Harvard University's Berkman Center),
<http://eon.law.harvard.edu/property/>
All About Trademarks, http://www.ggmark.com/#IP_And_The_Internet

Several groups with good resources on Internet free speech include:

Public Citizen Litigation Group, www.citizen.org/litigation/briefs/IntFreeSpch/
American Civil Liberties Union,
www.aclu.org/FreeSpeech/FreeSpeechlist.cfm?c=267
Electronic Frontier Foundation, http://www.eff.org/Legal/active_legal.html
Center for Democracy and Technology, <http://www.cdt.org/>
Electronic Privacy and Information Center, http://www.epic.org/free_speech/
John Does Anonymous Foundation: <http://www.johndoes.org/>

General Points

First Amendment rights apply with full force to the Internet.

Reno v. American Civil Liberties Union, 521 U.S. 844, 853, 870 (1997).

much good, ringing language about its potential for letting ordinary citizens speak effectively

Given the First Amendment, think of First Amendment doctrines when you are sued

For example, a preliminary injunction would be a prior restraint, which is almost always forbidden. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996); *New York Times v. United States*, 403 U.S. 713(1971); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993)

Note, however, these protections are much less if the speech is "commercial" speech.
Dun & Bradstreet v. Greenmoss Bldrs., 472 U.S. 749, 762-763 (1985)

The First Amendment regulates only actions by the government. But courts are government actors; so even in a lawsuit involving only a private parties, an injunction or an award of damages is government action, and so subject to the First Amendment. *New York Times v. Sullivan*, 376 U.S. 254 (1964) (damages); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (injunction); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) (injunction).

If a private party uses its economic power to interfere with internet speech, without getting a court order, the question is whether a state or federal law protects speech in that instance. Employer action may be governed by section 7 of the National Labor Relations Act, 29 U.S.C. § 157, or by a specific federal anti-retaliation act, or by a

state conscientious employee or similar law. *E.g.*, AB 1698, adopted 10/10/99 (California); C.G.S.A. § 31-51q (Connecticut); N.J.S.A. 34:19-3. Union action may be regulated by section 101 of the Labor-Management Reporting and Disclosure Act. 29 U.S.C. § 411.

Personal Jurisdiction Concerns (where you can be sued)

Merely having a web site does not necessarily mean you can be sued anywhere in the country.

A newspaper or magazine can be sued for libel anyplace where it sends more than a handful of copies. *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984).

But not necessarily true of a web site it depends what kind of web site you have.

The courts speak of a continuum between merely passive sites and highly interactive ones. To sue the operator of a passive site, the plaintiff has to go to the operator's own state, while the operator of a highly interactive site can be sued wherever the site has been seen and used.

Some leading cases discussing this distinction are *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997); *Cybersell v. Cybersell*, 130 F.3d 414 (1997).

These cases stress that the interactivity that makes one amenable to suit is **commercial** interactivity; that is, the fact that the site visitor can use the site to place commercial orders.

Some cases that have refused to allow suit far from the defendant's home are *Cybersell; Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 29 (2d Cir. 1997); *Blackburn v. Walker Oriental Rug Galleries*, 999 F. Supp. 636, 639 (E.D. Pa. 1998); *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 113-115 (D. Conn. 1998); *Santana Prods. v. Bobrick Washroom Equip.*, 14 F. Supp. 2d 710, 714 (M.D. Pa. 1998) *American Information Corp v. American Infometrics* (D.Md. 04/12/2001), <http://www.mdd.uscourts.gov/Opinions/PDF/2001/April/ainet.pdf> ; *Oasis Corp. v. Judd*, 132 F. Supp.2d 612, 623 (S.D. Ohio. 2001) (gripe site allowed visitors to generate automatic letters to media and target of criticism). An extreme case denying jurisdiction is *Berthold Types Ltd v. European Mikrograf Corp.*, 102 F. Supp.2d 928 (ND Ill. 2000)

Merely placing an email address or mailto link on the page is probably not enough to make the page sufficiently "interactive" to justify jurisdiction. *Desktop Technologies v. Colorworks Reprod. & Design*, 1999 U.S. Dist. LEXIS 1934; *Osteotech, v. Gensci Regeneration Sciences*, 6 F. Supp. 2d 349, 356 (D.N.J. 1998); *Blackburn v. Walker Oriental Rug Galleries*, 999 F. Supp. 636, 639 (E.D. Pa. 1998) *Conseco, Inc. v. Hickerson*, 698 N.E.2d 816 (Ind. Ct. App. 1998).

Note some cases seem to go against the pattern: *Inset Systems v. Instruction Set*, 937 F. Supp. 161 (D. Conn. 161).

Note also: defendant's non-internet contacts can also establish jurisdiction. *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996) ; so, for example, a national group can't avoid being sued throughout the US over a passive web site.

Liabile only for your own content

Communications Decency Act, section 509 protects the "provider or user of an interactive computer service" from being held liable for "information provided by another information content provider" 47 U.S.C. §§ 230(c)(1), 230(d)(3)

Several courts have held that this protects the operator of a computer bulletin board against liability for defamation by a poster on the board, or even by a news provider that the operator pays for content. *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

exception for trademark or copyright violations: 47 U.S.C. § 230(e)(2)

Protecting the right to speak anonymously

Supreme Court precedent recognizes the right to speak anonymously.

Buckley v. American Constitutional Law Found., 119 S. Ct. 636, 645-646 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960)

A few cases address how to strike the balance between the right to speak anonymously and the interest of a plaintiff in getting redress:

Columbia Insurance Company v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *Melvin v. Doe*, <http://www.aclu.org/court/melvin.pdf> (Pennsylvania Common Pleas, November 2000); *Dendrite v. Doe*, <http://www.citizen.org/litigation/briefs/dendrite.pdf> (N.J. Super. November 2000); *In re 2TheMart.com, Inc. Securities Litigation* (W.D. Wash. 2001), http://www.eff.org/Temp/20010427_2themart_order.tif (temporary

until http://www.eff.org/Legal/Cases/2TheMart_case/

The best articulation of the balance remains the briefs filed by the ACLU, the EFF, and Public Citizen on this issue. There is a collection of such briefs on Public Citizen's web site, at <http://www.citizen.org/litigation/briefs/internet.htm#Right to Speak Anonymously>

America Online's legal department maintains an archive of decisions on this issue: <http://legal.web.aol.com/aol/aolpol/civilsubpoena.html>

In arguing under this standard, a variety of common libel defenses are incorporated:

Requirement that plaintiff in a case involving a labor dispute prove actual damages: *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966)

This is required for all defamation claims by the law of some states: *Global Telemedia v. Does*, 132 F.Supp. 2d 1261 (C.D. Cal. 2001)

In California, the actor may be subject to a special motion to strike under the anti-SLAPP law. Discussions of publicly-traded corporations concern an issue of public interest. *Global Telemedia v. Does*, 132 F.Supp. 2d 1261 (C.D. Cal. 2001)

Fact / opinion distinction:

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)

Some states have more protective standards on this issue. E.g., *Vail v. Plain Dealer Pub. Co.*, 72 Ohio St. 3d 279, 281-282, 649 N.E.2d 182 (1995)

"Truth is a defense." Actually, the plaintiff has to prove falsity.

Most libel cases involving public figures founder on the requirement that the defendant must have spoken with actual malice knowledge of falsity, or reckless disregard of probably falsity. But it is hard to avoid identifying the defendant if the Court needs to reach this issue.

A claim based on "injurious falsehood" has to meet the constitutional requirements for defamation no matter what the label on the claim.. *Hustler v. Falwell*, 485 U.S. 46 (1988); *Blatty v. NY Times Co.*, 42 Cal.3d 1033, 1044-1045 (1986).

Good general discussion:

Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855 (2000)
<http://www.johndoes.org/html/lidsky.html>

If the complaint is based on some theory other than injurious falsehood, the *Dendrite* standard for protecting anonymity is equally applicable, but the test is applied through the prism of whatever the substantive elements of that claim may be (for example, breach of contract by employees).

Note the discovery concerns here for the operator of a web message board. The hostile target of a message board can keep the host very busy serving subpoenas for the identity of the posters of hostile messages.

One host has configured his message board so that each message shows both the Internet Protocol number and the time of posting. Although original reason was simply to encourage posters to be more responsible, one result was that he had no "private" information about posters, and so could not be subpoenaed every time the company was unhappy about a message. NWA Flight Attendants Forum, <http://216.156.32.93/>

Taking the other tack, some web hosts go out of their way to limit access to the message board to "insiders." A recent case held that an employer that snooped on a private web site message board could be sued for damages under the wiretap laws and the Railway Labor Act.

Konop v. Hawaiian Airlines, 236 F.3d 1035 (9th Cir. 2001), *pet. rehearing pending*. A web site taking this approach is <http://www.aercon.org/>.

Take care about promising more anonymity than you can deliver. A poster might well claim that violation breach of such a promise is a breach of contract. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)

Trademark Issues

Exclusion of non-commercial sites

Exception for claims of dilution or cybersquatting:

Lanham Act Section 43(c)(4)(B), 15 U.S.C. § 1125(c)(4)(B)

Cybersquatting Act Savings Clause: Public Law 106-113, Section 3008, 113 STAT. 1501A-551.

Requirement of commercial use also applies to infringement claims, although the argument is more complex. *Colligan v. Activities Club of New York*, 442 F.2d 686, 692 (2d Cir. 1971). *Endoscopy-America v. Fiber Tech Medical* (4th Cir 02/05/2001) (unpublished opinion at <http://pacer.ca4.uscourts.gov/>)

opinion.pdf/001032.U.pdf).

S. Rep. 100-515, 100th Cong.2d Sess. 44 (1988), reprinted in 1988 U.S. Code Cong. Ad. News 5577, 5607: ("Amendment of the definition of 'use in commerce' [in section 45 of the Lanham Act] is one of the most far-reaching changes the legislation contains. . . . The committee intends that the revised definition of 'use in commerce' be interpreted to mean **commercial use** which is typical in a particular industry.").

Trademark laws do apply to non-profits, at least where they are engaged in fundraising or sales: *United We Stand America v. United We Stand America, NY Chapter*, 128 F.3d 86 (2d Cir. 1997)

If trying to use this exception, don't "play games" by trying to raise money through the web site on the side

Courts are reluctant to find wholly non-commercial use where there is a patent use of a trademark in a manner that seems confusing. For example, sites have been deemed "commercial" where web site helps sell the site owner's books. *Jews for Jesus v. Brodsky*, 993 F. Supp. 282 (D.N.J. 1998); *Planned Parenthood v. Bucci*, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997); *Christian Science Board v. Robinson*, 123 F. Supp.2d 965 (WDNC 2000), aff'd No. 00-2029 (4th Cir. 01/09/01). In the *PETA* case, below, the site was commercial because it contained links to commercial meat sellers apparently unconnected with the web site owner.

Some cases go even further, and say that the impact of the web site on the business of a target of criticism is enough to make it "in commerce". *Bihari v. Gross*, 119 F. Supp.2d 309 (S.D.N.Y. 2000) (this decision went on to find no violation). But this is plainly inconsistent with the statute. There is dictum to this effect in a number of decisions, where there actually **was** commercial content to site.

A fair argument can be made that allowing banners on a site to get free web space, or merely linking to commercial sites, does not make the site "commercial". The safest thing, however, is to eschew all of this.

Relevance of First Amendment even when site is deemed "commercial"

Cases require narrow construction of trademark laws to avoid undue impingement on free speech. *Cliffs Notes v. Bantam Doubleday*, 886 F.2d 490, 494 (2d Cir. 1989).

If the plaintiff wins, an injunction has to be as narrow as possible to limit impact on speech. *Anheuser-Busch v. Balducci Publications*, 28 F.3d 769, 778 (8th Cir. 1994); *Better Business Bureau v. Medical Directors*, 681 F.2d 397, 404-405 (5th Cir. 1982)

Two basic kinds of trademark suits

Infringement:

plaintiff claims that defendant's use of its mark is likely to confuse viewers about whether the plaintiff is the source of the goods of services

Dilution:

plaintiff claims that the use of its mark will either tarnish the mark by associating it with shoddy or offensive goods or services (for example, using trademark to identify a pornography web site), or weaken the mark by making it less distinctive as an indicator of the plaintiff as the source of the goods (think of how "ketchup" lost its trademark status)

Checklist of things to check about a critical web site to minimize threat of infringement suit

basic objective go out of your way to be sure that no one can be confused about whether the site is pro- or anti- the TM owner

1. Be sure not to use type similar to trademark owner's logo

if you use their logo, consider putting a red slash through it, or some other show of criticism

2. Don't use their colors / color scheme

they might argue "trade dress" infringement; and besides, if you mimic their trade dress, it could look as if you **were** trying to confuse viewers

3. Visit your target's web site, and make sure yours doesn't have same look and feel

4. Put something near the top of page to emphasize it is critical.

Using disclaimers of sponsorship is a common way of avoiding confusion

5. If you get a demand letter, make reference to it on the web page:

"GM has sued to make me take down this page...."

Some recipients of trademark demand letters manage to forestall litigation by making fun of the trademark holder, and attracting media attention that makes would-be plaintiff think twice about whether it is worth suing. For one example of this sort of response, see <http://www.wired.com/news/business/0,1367,36210,00.html>

6. If you mimic target's web site or trade dress, and decide to defend on grounds of parody, you may well prevail, but you will be in thick of likelihood of confusion or fair use analysis, which can be expensive cases

Domain name cases

Anticybersquatting Act is Section 43(d) of the Lanham Act, 15 U.S.C. § 1125(d)

Directed at problem of those who registered domain names using trademarks as a way of shaking down trademark holder to get own name back. House Report 106-412, 106th Cong. 1st Sess (1999), at 5-6. Shakedown took two forms: (1) register name, offer to sell it to owner or potential rivals, even threatening to auction name to highest bidder, *Virtual Works Inc v. Volkswagen of America*, 238 F.3d 264 (4th Cir. 2001); (2) register name, erect site with objectionable content, such as pornography, to give trademark owner an especial incentive to buy quickly and at high price, see *Ford Motor Co. v. Lapertosa*, 126 F. Supp.2d 463 (ED Mich 2000).

Plaintiff must establish **both** trademark element, that the domain name is "identical or confusingly similar to or dilutive of" a mark, section 1125(d)(1)(A)(ii), **and** a bad purpose, the "bad faith intent to profit" from the good will that the trademark holder has established in the mark. 1125(d)(1)(A)(i)

Statute recognizes that mere inclusion of the trademark of another in a domain name does not constitute objectionable conduct.

Cases upholding "sucks" names:

Lucent Technologies v. LucentSucks.com, 95 F. Supp.2d 528 (E.D. Va 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998)

Cases finding legitimate registration of domain name with nothing more than name of a different company, because no bad faith: *Northland Ins. Cos. v. Blaylock*, 115 F. Supp.2d 1108 (D. Minn. 2000); *Cello Holdings v. Lawrence-Dahl Companies*, 89 F. Supp.2d 464 (S.D.N.Y. 2000)

Some cases finding improper use of company name for hostile sites:

People for the Ethical Treatment of Animals v. Doughney, 113 F. Supp.2d 915 (E.D. Va. 2000) (group calling itself People Eating Tasty Animals used "peta.org"); *Jews for Jesus v. Brodsky*, 993 F. Supp. 282 (D.N.J. 1998); *Planned Parenthood v. Bucci*, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997) (anti-abortion group registered plannedparenthood.com; site was misleading about sponsorship)

Not only is non-commercial criticism, or a fair use, a factor supporting a finding of no bad faith, section 1125(d)(1)(B)(i)(IV), but the statute's savings clause explicitly preserves the rule that non-commercial criticism is protected. Public Law 106-113, Section 3008, 113 STAT. 1501A-551. If, however, after being called for cybersquatting, the domain name registrant tries to place non-commercial criticism on the web site in order to seek shelter of this exception, a court may well find this to be a mere ruse and reject the defense. *E & J Gallo Winery v. Spider Webs Ltd*, 129 F. Supp.2d 1033 (S.D.Tex 2001). This all goes to the defendant's underlying purpose.

Note that claims can also be brought under Lanham Act as well as the Cybersquatting Act.

Be sure **not** to offer the domain name for sale; court may conclude that real purpose was to shake down the trademark owner.

The line between such a shakedown, and bargaining for the resolution of a legitimate, pre-existing dispute with the trademark holder, can be a narrow one. At the least, such bargaining over a domain name may prevent a defendant from getting a quick dismissal of the case because there is a factual question about his motive. *Northland Ins. Cos. v. Blaylock*, 115 F. Supp.2d 1108 (D. Minn. 2000). At worst, the court may just find a violation.

Meta Tag Cases

Meta tags are a form of HTML code that are not seen on the web page, but which summarize the page's subject matter; many search engines use meta tags to classify web pages for possible response to search requests (both identifying pages

and ranking them within results)

A number of early cases found trademark violations where name of competitor hidden on page to attract customers to rival's site. *Brookfield Communications v. West Coast Entertainment*, 174 F.3d 1036 (9th Cir. 1999); *Nettis Env't v. IWI*, 46 F.Supp.2d 722 (N.D. Ohio 1999).

Other cases found use of meta tags for critical site was legitimate:

Bihari v. Gross, 119 F. Supp.2d 309 (S.D.N.Y. 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998)

Cases allowing use of meta tags by commercial ventures with legitimate interest in trademark:

Bernina v. Fashion Fabrics, 2001 U.S. Dist LEXIS 1211 (N.D. Ill.); *Nissan Motor v. Nissan Computer*, 89 F.Supp.2d 1154, 1162 (C.D. Cal. 2000); *Playboy Enterprises v. Welles*, 7 F. Supp. 2d 1098 (S.D. Cal. 1998), *aff'd*, 162 F.3d 1169 (9th Cir. 1999).

Interesting recent law review article on subject of meta tags, proposing a novel solution: McQuaig, *Halve the Baby: an Obvious Solution to the Troubling Use of Trademarks as Metatags*, 18 John Marshall J. Computer & Info. L. 643 (2000)

Public Citizen briefs discussing the meta tags issue in the context of a gripe site:

<http://www.citizen.org/litigation/briefs/virga.htm>

<http://www.citizen.org/litigation/briefs/virgarpy2.htm>

Public Citizen amicus brief discussing domain names and meta tags in a commercial context:

<http://www.citizen.org/litigation/briefs/TeleAmWeb.htm>, discussing appeal from *Paccar v. TeleScan*, 115 F. Supp.2d 772 (E.D. Mich. 2000)

Copyright Issues

Some of the most interesting and gripping legal issues relating to the Internet involve copyright, but these are remote from most gripe sites

sites whose focus is opposing the Digital Millennium Copyright Act, or sites that offer downloads of copyrighted music or videos, or sites that employ protected software, obviously face some heavily litigated questions; these are not addressed here

Copyright issues most commonly arise for a gripe site when the site republishes a copyrighted graphic or text for the purpose of illustrating the site, for pointing up a problem, commenting or criticizing or ridiculing the target of the site, or for providing evidence to support something stated on the site

One way to limit exposure is if the copyright holder (or somebody else) has the material on a different web site; the gripe site can simply link to the other site, directing the viewer to that site to view the original.

linking can raise copyright problems, but they are likely to be less severe, and less likely to produce a finding of liability

There is a good discussion of these issues at the Bitlaw web site:

<http://www.bitlaw.com/internet/linking.html>

Two major defenses from the trademark context do not apply here

(1) No exception for non-commercial use

the non-commercial character of the use is **one** factor in analyzing a fair use defense, 29 U.S.C. § 107(1), but it is not the only one or even the most important

note that use by a non-profit group in order to raise money may be treated as a "commercial" use for these purposes *Hustler Magazine v. Moral Majority*, 796 F.2d 1148, 1152-1153 (9th Cir. 1986)

the question "is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 562 (1985)

(2) The First Amendment does not provide much independent help

The Supreme Court has held that First Amendment concerns are met through the dichotomy between expression (copyrightable) and ideas (not copyrightable), and by the fair use doctrine, and thus need not be considered independently. *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 555-560 (1985)

Republication of copyrighted materials

This is the main concern for the author of a gripe site

Creators of web sites frequently grab elements from other web sites
graphics, text, etc

The fact that material is not registered, or not accompanied by the copyright symbol, does not mean it cannot
protected by copyright

the author can register it later, and get relief for infringement after registration

lack of inclusion of copyright notice makes it easier to invoke the defense of innocent infringement

copyright forbids more than exact copying substantial similarity is also actionable
Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992)

the safest course is to get permission for anything being copied
and be sure that the person who gave permission has the power to give it

web site operators will frequently give permission for reproduction in return for credit plus a link

a web site operator has several incentives to get linked:

(1) increased exposure on the linking site

(2) increasing the number of links to a site is a good way to improve the site's search
engine ranking

Obtaining permission to reproduce material from an adversary is more difficult
this is the common most problem for the gripe site operator

the main defense is fair use under section 107 of the Copyright Act

the statute lists four factors

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for
nonprofit educational purposes;"

truly non-commercial work, not done with any expectation of financial gain, is likely protected
Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided Court*, 420
U.S. 376 (1975).

but courts find various ways of avoiding the conclusion that a use is truly non-commercial
Weissman v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989)

if use is deemed non-commercial, plaintiff must prove likelihood of substantial impact on the
potential market for the original
Sony Corp v Universal City Studios, 464 U.S. 417, 450-454 (1984)

where copying is needed for reporting or commentary, fair use is liberally applied
New Era Pub. v. Carol Pub. Group, 904 F.2d 152, 156-157 (2d Cir. 1990); *Maxtone-Graham v.*
Burtchaell, 803 F.2d 1253, 1260-1262 (2d Cir. 1986); *Consumers Union v. General Signal Corp.*, 724
F.2d 1044, 1050 (2d Cir. 1983)

similarly, copying for purposes of parody tends to warrant a finding of fair use, but not always
Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

the scope of fair use is wider when related to an issue of public concern
National Rifle Ass'n v. Handgun Control Fed'n, 15 F.3d 559, 562 (6th Cir. 1994)

"(2) the nature of the copyrighted work;"

unpublished work is much more likely to be protected, unless a very small portion is copied
Harper & Row v. Nation Enterprises, 471 U.S. 539, 564 (1985); *Wright v. Warner Books*, 953 F.2d 731,
738-739 (2d Cir. 1991)

if original work is factual, rather than fictional, scope of fair use is broader
Diamond v. Am-Law Pub. Corp., 745 F.2d 142, 148 (2d Cir. 1984)

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;"

the less of the whole is copied, the more likely is fair use to be found
but if the most important parts are taken, with major effect on market for the original, fair use is unlikely
Harper & Row v. Nation Enterprises, 471 U.S. 539, 564-565 (1985)

even copying the whole work can be fair use in appropriate circumstances
Sony Corp v Universal City Studios, 464 U.S. 417, 450-454 (1984)

"(4) the effect of the use upon the potential market for or value of the copyrighted work."

this is easily the most important of the four factors
Harper & Row v. Nation Enterprises, 471 U.S. 539, 566-567 (1985)

even though the copyright owner may prefer to sue out of antagonism, criticism by an adversary can
increase the market for the original
National Rifle Ass'n v. Handgun Control Fed'n, 15 F.3d 559, 562 (6th Cir. 1994)