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## **Assignment 2: Fair Use in the News**

### **Part I:**

In November of 2013, the toy company GoldieBlox released an online video advertisement for its product “Princess Machine.” The video begins with three young girls watching, with intense boredom, as three similarly aged girls on television flit about in pink dresses and tiaras. One of the girls watching then puts on a record, and as the familiar music of the Beastie Boys 1987 song “Girls” starts playing, the three subjects pick up construction tools and the camera turns to a Rube Goldberg-esque machine they’ve built. For most of the remaining video, the music continues, and the words of the Beastie Boys song are replaced with original feminist lyrics written by GoldieBlox.

GoldieBlox promoted the video via social media, and within one week it had received over 8 million views on Youtube.<sup>1</sup> During this time period, an attorney representing the Beastie Boys contacted counsel for GoldieBlox to inquire as to why they were using the song “Girls” in the “Princess Machine” advertisement without permission.<sup>2</sup> Concerned that a copyright infringement lawsuit was forthcoming, GoldieBlox filed a Complaint for Declaratory Judgement and Injunctive Relief in the US District Court for the Northern District of California, contending that their use of “Girls” was a clear parody and therefore protected under Fair Use.

GoldieBlox is a California-based company whose goal is to create toys that challenge gender stereotypes and open up the range of offerings that are traditionally presented as appropriate play items for girls. As their founding principle is expressly to counter conventionally held ideas about the interests and capabilities of girls, they made the choice to *explicitly* position the values of their product “Princess Machine” in direct contrast to those held in traditional American

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<sup>1</sup> Aaron Taube, “A Small Girls’ Toy Company Claims the Beastie Boys Want To Ban This Video,” *Business Insider*, November 25, 2013, accessed October 29, 2016, <http://www.businessinsider.com/goldie-blox-is-suing-the-beastie-boys-2013-11>.

<sup>2</sup> Answer, Counterclaims, and Demand for Jury Trial, *GoldieBlox, Inc. v. Island Def Jam Music Group*, Case No. 4:13-CV-05428-DMR, (N.D. Cal. filed Dec. 11, 2013), 9.

society, as represented by the Beastie Boys lyrics in “Girls.” The following is a direct comparison of the lyrics:

**Beastie Boys:**

Girls - to do the dishes

Girls - to clean up my room

Girls - to do the laundry

Girls - and in the bathroom

**GoldieBlox:**

Girls - to build the spaceship

Girls - to code the new app

Girls - to grow up knowing

That they can engineer that.

GoldieBlox had clearly conceptualized its video with Fair Use in mind, and I suspect was expecting the challenge from the Beastie Boys and its publishers. As outlined in its Complaint:

GoldieBlox created its parody video with specific goals to make fun of the Beastie Boys song, and to further the company’s goal to break down gender stereotypes and to encourage young girls to engage in activities that challenge their intellect.<sup>3</sup>

For their part, the Beastie Boys made clear in an open letter to GoldieBlox that they have a strong philosophical stance against any use of their music or image for purposes of advertising. Interestingly, the open letter acknowledges the creativity on the part of the GoldieBlox, (I would say unintentionally supporting their fair use claim) yet concludes, “As creative as it is, make no mistake, your video is an advertisement that is designed to sell a product, and long ago, we made a conscious decision not to permit our music and/or name to be used in product ads.”<sup>4</sup> Shortly thereafter, the Beastie Boys followed by filing an Answer, Counterclaims, and Demand for Jury Trial, claiming Copyright Infringement of their musical composition, as well as Trademark Infringement and Misappropriation of Right of Publicity, among other things.<sup>5</sup>

Ultimately the two parties settled, perhaps in part because the will of late founding Beastie Boys member, Adam Yauch, included a provision that no “music or any artistic property created by

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<sup>3</sup> Complaint for Declaratory Judgment and Injunctive Relief, GoldieBlox, Inc. v. Island Def Jam Music Group, No. 13-5428 (N.D. Cal. filed Nov. 21, 2013), 2.

<sup>4</sup> Michael Diamond and Adam Horovitz, “Open Letter to GoldieBlox,” November 25, 2013.

<sup>5</sup> Answer, GoldieBlox, Inc. v. Island Def Jam, 9-17.

me be used for advertising purposes.”<sup>6</sup> Referencing the intent in Yauch’s will, GoldieBlox removed “Girls” from its ad, and wrote in an open letter to the remaining members of the group, “Although we believe our parody video falls under fair use, we would like to respect his wishes and yours.”<sup>7</sup>

Although this dispute never reached the level of judicial opinion, it’s my belief that if it had, it would have been found to be a Fair Use. To begin, the first factor to be considered, the purpose and character of the use, falls very much in line with the circumstances behind *Campbell v. Acuff-Rose* in which the Supreme Court found that 2 Live Crew’s parody of “Oh Pretty Woman” was a Fair Use.<sup>8</sup> Like *Campbell*, GoldieBlox’s use is unequivocally commercial, in fact even more so than *Campbell*, because the “Princess Machine” video is actually an advertisement for a product. That being said, the use is nothing if not transformative. Through parody, it takes a song whose message is that girls are “useful only to the extent they fulfill the wishes of the male subjects”<sup>9</sup> and turns it into an anthem in which the girls are the agents, countering every stereotype imposed upon them. It may be commercial, but it is also educational, a direct criticism, and extremely productive for its contribution to the national conversation about gender discrimination. Seen more broadly, since stereotypes of all kinds are reinforced by popular entertainment, without the protection of Fair Use, critique of these often harmful representations, such as the Beastie Boys song “Girls” would be impossible.<sup>10</sup>

The second factor again mimics *Campbell* in that the Beastie Boys song is a wholly creative and original work. Yet, as the Court concluded in *Campbell*, “This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”<sup>11</sup>

Regarding the amount and substantiality of the song “Girls” used in relation to its whole, the use is quite substantial. The Beastie Boys song runs for a total of 2:14 while the “Princess Machine”

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<sup>6</sup> RJ Cubarrubia, “Adam Yauch’s Will Prohibits Use of His Music in Ads,” *Rolling Stone*, August 12, 2012, accessed October 29, 2016, <http://www.rollingstone.com/music/news/adam-yauchs-will-prohibits-use-of-his-music-in-ads-20120809>.

<sup>7</sup> Debra Sterling and GoldieBlox, “Open letter to Michael Diamond and Adam Horovitz,” November 27, 2013.

<sup>8</sup> *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994)

<sup>9</sup> Complaint, *GoldieBlox, Inc. v. Island Def Jam Music Group*, 2.

<sup>10</sup> It could be argued that the Beastie Boys “Girls” was itself a satire, however I don’t believe this would have any bearing on the Fair Use analysis as GoldieBlox did not view the song as such.

<sup>11</sup> *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994)

video utilizes the music for 1:35, albeit at a slower tempo. The instrumentation is extremely similar, yet it is not the same recording; the lyrics are of course, for the most part, intentionally quite different, but the repeated refrain of the word “Girls” is exactly the same. Again however, like *Campbell*, without the recognizability of the original, the parody simply doesn’t work.

Further, unlike what is considered a *typical* advertisement, the “Princess Machine” ad is itself a “music video” much like the one the Beastie Boys released for “Girls” in 1987. Thus, it would simply not make sense for the music of “Girls” to drop out or to change to something else during the course of the music video. The idea behind this parody is that GoldieBlox is *rewriting* the Beastie Boys song, and as such, it must be allowed to complete its narrative.

Finally, the factor of market harm seems less clear than the previous three factors. The Beastie Boys themselves have already made clear that they have no intention of licensing any of their work for the purpose of advertising, so there is no potential loss there. However this does not cancel out the potential for derivative uses by the remaining members of the Beastie Boys or other parties they authorize to use the work. At the same time, it’s not unreasonable to posit that now that “Girls” has been rewritten and resurrected for the 21st Century, that there would be even greater opportunity for the Beastie Boys to license the work for other derivatives. With regard to the literal audiences for “Girls” and “Princess Machine,” there is not likely to be much overlap as one is directed to hip hop listeners, perhaps with a misogynist bent, and the other to young girls seeking empowerment.

## **Part II:**

Based on the district court decision rendered in *Fox News Network, LLC v TVEyes, Inc.*, that found TVEyes’ recording, indexing and presentation of news content to be protected by Fair Use, I believe there could be potential for much greater online indexing and presentation of audiovisual content on the websites of moving image archives. TVEyes’ victory was largely predicated on the absolute *comprehensiveness* of its recording and indexing of the news, which in turn resulted in its transformative use, allowing subscribers to “gain access, not only to the news that is presented, but to the presentations themselves, as colored, processed, and criticized by commentators, and as abridged, modified, and enlarged by news broadcasts.”<sup>12</sup>

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<sup>12</sup> *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014)

Thinking about this idea of offering users comprehensive indexing and searchability, I wonder if it would be permissible for an archive to index by transcript, for example, all network television programs in a given year addressing the African American experience. Users would then be able to view *segments* of the programs based on their transcript searches, much like Google Books displays excerpts of text. I would argue that such a presentation would be transformative in nature as users would be searching and viewing the content based on its relationship to the overall depiction of African Americans on television in a given time period, as opposed to watching the shows for their original intended entertainment purpose.

I believe the first factor clearly supports a Fair Use claim as the use is highly transformative and has strong educational implications. In considering factor 2, the highly creative nature of the copyrighted works is exactly why they must be presented - the purpose is to gain an understanding of how the fictional television industry shapes the country's understanding of its black community. For the third factor, like in *Fox News v. TVEyes*, the amount of material used must be comprehensive in order to achieve transformiveness. And finally, since users would not be able to watch whole programs start to finish, the market for the copyrighted works would not be diminished. If anything, I suspect that users would subsequently seek out whole episodes from platforms such as Hulu and Netflix that license the content from the networks.