

## **Teaching Note**

### **The GoldieBlox Video: Copyright Infringement or Fair Use?**

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#### **Critical Incident Overview**

The critical incident stems from a video that GoldieBlox made that went viral on the internet. The audio that accompanied the video was a performance of the Beastie Boys song “Girls” with the original misogynistic lyrics changed to lyrics that were empowering to girls and women. GoldieBlox used the song “Girls” without permission of the Beastie Boys, who charged that the use of the musicians’ song without their permission was an infringement of their intellectual property rights. GoldieBlox argued that its use was permissible as a fair use, specifically arguing that the song was a parody with the empowering lyrics of the derivative work a comment on the misogynistic lyrics of the original work. The critical incident asks students to analyze the situation from the perspective of both parties and decide how GoldieBlox should proceed.

The critical incident is appropriate for classes in business law, the legal environment of business, intellectual property law, copyright law, arts and entertainment management, public policy and ethics. It was tested in three business law courses at the undergraduate level.

#### **Research Methods**

The critical incident was written based on reliable publicly available sources, including documents related to the lawsuit between the parties. Accordingly, the names of the individuals, the firm and its location are the real ones.

#### **Learning Outcomes**

In completing this assignment, students should be able to:

1. Examine the underlying principles and public policy of copyright law in the context of a real-life situation.
2. Evaluate a party’s use of a creative work of another in light of the law of copyright and copyright infringement, specifically with respect to the creation of derivative works.
3. Analyze a legal defense from two perspectives to advocate for a position and to determine the strength of an opponent’s arguments.

## Discussion Questions

1. How does the controversy over the GoldieBlox video demonstrate the tension between the copyright scheme's countervailing rights of creators and the general public? (LO 1)
2. Does GoldieBlox's use of the song "Girls" in its video come within the ambit of the Beastie Boys exclusive rights in copyright? (LO 2)
3. Consider the fair use defense to a claim of copyright infringement from GoldieBlox's perspective. Analyze the facts and apply the facts to the law of fair use. What are GoldieBlox's strongest arguments in favor of a defense of fair use? (LO 3)
4. Consider the fair use defense to a claim of copyright infringement from the Beastie Boys' perspective. Analyze the facts and apply the facts to the law of fair use. What are the Beastie Boys' strongest arguments in favor of a finding of copyright infringement and a rejection of the fair use defense? (LO 3)

## Answers to Discussion Questions

- 1. How does the controversy over the GoldieBlox video demonstrate the tension between the copyright scheme's countervailing rights of creators and the general public? (LO 1)**

The history of American copyright law traces itself to the introduction of the printing press in the mid-15<sup>th</sup> century. The proliferation of printed and distributed material that resulted from the creation of the printing press led legislatures to create laws that began to explore the balance between the rights of authors to profit from their works and the rights of the general public to have access to an abundance of works.

The Constitution of the United States recognizes the importance of intellectual property as an agent of innovation and created countervailing rights between intellectual property creators and the general public. Article I, Section 8 of the Constitution provides that:

the Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

The Constitution envisaged a copyright scheme that rewarded creators in an effort to stimulate innovation and the creation of new works so that, ultimately, society as a whole would benefit. In essence, to encourage the creation of new works, authors were provided with a monopoly for a limited time on the commercial use of their work.

In this regard, Section 102 of the Copyright Act offers copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (Copyright Act, Section 102).

On the other side of the equation, Section 102 makes explicit certain limitations on copyright protection. Specifically, Section 102 provides that “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work” (Copyright Act, Section 102).

The Beastie Boys song “Girls” is an original work of authorship fixed in a tangible medium within the meaning of Section 102 of the Copyright Act. As such, the Beastie Boys (or the record label or other party who may own specific rights in the song) have the right to the protections of the Copyright Act. That right, however, is balanced against the rights of the general public to have, for example, the right to use the song when the copyright expires or the right to use the ideas incorporated into the song and to independently create a song based on those ideas.

The general public also has the right to make certain fair uses of the copyrighted work of another, which includes the right of a third party to parody the original work, as is discussed more fully below. These rights can be exercised without the need for permission from the copyright owner.

## **2. Does GoldieBlox’s use of the song “Girls” in its video come within the ambit of the Beastie Boys exclusive rights in copyright? (LO 2)**

Section 106 of the Copyright Act enumerates the exclusive rights of copyright owners with respect to their artistic works, providing copyright holders with the exclusive rights to “do and to authorize” six categories of activities. With regard to musical works, these are the right to (1) reproduce copies or phonorecords, (2) prepare derivative works, (3) distribute copies or phonorecords of the works, (4) to perform the works publically, (5) to display the work publically, and (6) “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission” (Copyright Act, Section 106).

Any third party that violates one of the Section 106 exclusive rights of copyright owners would be liable for copyright infringement and subject to damages, including lost profits. These rights apply whether the third party knew of the copyright owner’s assertion of copyright or not. And, if a party did knowingly use the work of another, such party would be responsible for willful infringement and subject to treble damages.

The use of the song by GoldieBlox without the authorization from the Beastie Boys was a violation of the second activity enumerated in Section 106. A derivative work is one that is based upon or includes elements from an underlying work. The GoldieBlox video’s incorporation of part of the song “Girls” creates a new artistic work – a derivative work – the video, which includes elements of the underlying work, the rights to which are owned by the Beastie Boys.

This is most significant, of course, where the creator of the derivative work is different from the creator of the underlying work. In such case, the derivative work creator must obtain permission from the owner of the underlying work. The Beastie Boys’ exclusive right to prepare derivative

works includes the right to license others to do so and to prevent others from doing so. Indeed, MCA's will is an indication that the Beastie Boys had a blanket policy not to allow anyone to use their works commercially.

**3. Consider the fair use defense to a claim of copyright infringement from GoldieBlox's perspective. Analyze the facts and apply the facts to the law of fair use. What are GoldieBlox's strongest arguments in favor of a defense of fair use? (LO 3)**

The fair use doctrine is codified at 17 U.S.C. Section 107. It provides for the fair use of copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright" (Copyright Act, Section 107). Fair use must be evaluated on a case-by-case basis and Section 107 explicitly requires the consideration of the following four factors in making any determination:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

No one of these factors is dispositive. A determination of fair use can only be made when evaluating all of the facts together. The Supreme Court noted that the four factors articulated in Section 107 must be applied by courts "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster. . . . [Rather], the doctrine it recognizes, calls for case by case analysis" (Campbell, p. 578). Furthermore, "[t]he four statutory factors [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" (Campbell, p. 578).

These considerations were part of the Court's evaluation of the first Section 107 factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." The Supreme Court has addressed two fundamental issues that arise under fair use that are relevant to GoldieBlox's situation, whether parody can fall within the scope of fair use doctrine and whether all infringement for commercial uses are presumptively not fair use (Campbell). The Court noted the interrelated nature of these two considerations stating, the "more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use" (Campbell, p. 579).

To satisfy this prong of the analysis, GoldieBlox must demonstrate, therefore, that the main purpose of the incorporation of "Girls" song into the video is not commercial but rather commentary on and parody of the underlying work. It is true that the parody and message is produced by GoldieBlox, a for-profit company, and that the video contains images of girls using products that are offered for sale by the company so, to be successful, GoldieBlox must argue

that the prominent feature of the video is that it parodies the limited view of girls espoused by the song. This demonstrates the highly transformative nature of the GoldieBlox work.

The mission of GoldieBlox is to promote the equality of girls and woman in general and, more specifically, in their pursuit of engineering degrees and related occupations (GoldieBlox, n.d.). In pursuing the promotion of equality, GoldieBlox is dispelling the notion that construction toys are boy toys. The Beastie Boys song “Girls” casts girls as boy toys. The rewritten GoldieBlox lyrics can be seen as a parody of the Beastie Boys message formed by recasting the lyrics to state that girls are more than boy toys (Complaint, p. 6). The accompanying video also focuses on girls’ capabilities, as demonstrated by their use of GoldieBlox construction toys. This demonstrates that a purpose of the video is to comment on the ridiculous nature of the original song’s limited view of girls’ value.

Moreover, the commercial benefit of the GoldieBlox work does not preclude it from the scope of fair use. A commercial firm is not precluded from engaging in parody and social commentary simply because it will have the mixed result of social commentary and promoting the business good will of the firm (*i.e.*, it will have the commercial benefit of advertising).

The second and third factors of the fair use analysis are often considered together. The nature of the copyrighted work informs the amount and substantiality of the portion used in relation to the work as a whole.

It is uncontroversial that a popular song is musical creation and is “creative expression for public dissemination [that] falls within the core of the copyright’s protective purposes” (Campbell, p. 586). Turning to the third prong of the analysis, taking a small portion of a work or a portion that does not include the essential character of the work often argues in favor of fair use. In the case of parody, however, it is often necessary to the parodic purpose to use a larger portion of the underlying work. The Supreme Court has noted that “since parodies almost invariably copy publicly known, expressive works,” the use of a large amount of a work should not preclude a finding of fair use. Thus, “parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable” (Campbell, p. 586). In other words, a parodist needs to use enough of the underlying work to make the parody recognizable.

Here, GoldieBlox must argue that the GoldieBlox parody uses sufficient components of the Beastie Boys song to make its parody recognizable. The fact that it is possible that the parody might have been recognizable if less had been used does not preclude the GoldieBlox work from fair use. Thus, GoldieBlox may argue that the second and third Section 107 factors favor fair use.

Finally, in evaluating the effect of the use upon the potential market for or the value of the copyrighted work, GoldieBlox must argue that the GoldieBlox video is not a substitute for the song Girls either as popular music or for the purposes of advertising or endorsement. It is unlikely that someone looking to buy a copy of the song “Girls” would be satisfied that the video (or the music in the video) was an appropriate substitute for the original work.

In fact, to the contrary, GoldieBlox may argue that the success of the parody tends to increase the value of the Beastie Boys' material for this purpose. The fact that the success and value of Beastie Boys songs for non-popular music purposes was untested in the market place left their value open to speculation. The success of the GoldieBlox parody has increased the market value of Beastie Boys songs for advertising or endorsement purposes by demonstrating that even not traditional Beastie Boys supporters (or perhaps even detractors of the group) may respond to their music in markets beyond popular music. The fact that the Beastie Boys presently state that the group will not use license its work for traditional advertising and endorsements does not change the fact that the GoldieBlox parody has caused no market harm. Thus, the fourth Section 107 factor supports a finding of fair use.

**4. Consider the fair use defense to a claim of copyright infringement from the Beastie Boys' perspective. Analyze the facts and apply the facts to the law of fair use. What are the Beastie Boys' strongest arguments in favor of a finding of copyright infringement and a rejection of the fair use defense? (LO 3)**

Turning to an evaluation of the Beastie Boys' perspective, we again look at the Section 107 factors for consideration in determining whether claim to fair use has been sustained:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

In considering the first of the Section 107 factors, the Supreme Court has rejected the suggestion that any parodic use is presumptively fair and made clear that the Copyright Act has no preference for parodists over their victims (Campbell, p. 581). In fact, the Supreme Court has indicated that different commercial uses will be accorded different prospects of fair use protection, noting that, the use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry, than the sale of a parody for its own sake (Campbell, p. 585).

The Beastie Boys must cast the use of their song, therefore, as a misappropriation of their work that creates an involuntary endorsement of GoldieBlox's products. While there may be parodic elements to the changed lyrics in the song, taken as a whole, the video is merely advertising meant to promote the GoldieBlox product.

Turning to the second and third factors, the Beastie Boys must focus the discussion on the Supreme Court's requirement that parody must be based on commentary on the original work, not simply an appropriation of the original work" (Campbell, p. 585). The analysis here is "to the persuasiveness of a parodist's justification for the particular copying done" (Campbell, p. 586). Parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable, (Campbell, p. 588) but "where the parody is so insubstantial, as

compared to the copying, that the third factor must be resolved as a matter of law against the parodists” (Campbell, p. 588).

This harkens back to the first factor of the analysis, the nature of the use. If the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger (Campbell, p. 580).

Taken as a whole, the GoldieBlox advertisement was not parody of the Beastie Boys’ song “Girls.” The video had a simple message regarding the empowerment of girls in STEM learning, which was unrelated to the Beastie Boys and the specific content of their song. At best, the video was some generalized commentary applicable to other songs and other artists or the depiction of women and girls in popular culture. At worst, the video’s message is an encouragement to buy products, to which the Beastie Boys song has even less relevance.

Furthermore, in making this generalized commentary, GoldieBlox used a substantial amount of the Beastie Boys work (virtually all of its melody, arrangement, and character). Were parody the true intent here, GoldieBlox could have made any parody by appropriating a more limited part of the song “Girls.” This overuse of Bestie Boys’ material also sets the GoldieBlox advertising also militates against a finding of fair use.

The fourth factor involves an evaluation of the effect of the infringement on the market value of the copyright protected material. The consideration is not only the extent of market harm caused by the particular actions of the alleged infringer, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market” for the original. The enquiry “must take account not only of harm to the original but also of harm to the market for derivative works. This is relevant to the Beastie Boys “because the licensing of derivatives is an important economic incentive to the creation of originals” (Campbell, p. 592).

Evaluating the proper market is essential. Here, the proper market for evaluation is the market for the use of Beastie Boys songs for advertising unrelated products and endorsement deals (Campbell, p. 590). GoldieBlox essentially proposes that GoldieBlox and any other entity can legally appropriate for free the music, image or likeness of another person or entity for the purposes of advertising, endorsement or both simply by casting it in the character of parody. If this were true, it would undermine the entire market for the licensing of music and images for advertising.

Furthermore, the Beastie Boys have not allowed any of their works to serve as a component of advertising. This is a preeminent guiding principle for the Beastie Boys. Its importance is emphasized by the fact that MCA memorialized this principle in his will. Since it is the right of all copyright owners to decide not to participate in any potential market for their products, GoldieBlox should not be able to take that away from MCA and the Beastie Boys.

## **General Discussion**

The critical incident deals with the copyright issues that come up every day in the workplace as an employee grabs images off the web to incorporate into a presentation, puts music behind a montage of pictures in a slideshow or includes data from another source in a report. In the current culture, many people tend not to give much consideration to the ownership rights of those who created the other work and this is a topic that resonates very strongly with students who are comfortable with using and adapting material that they find online. These issues are brought even more sharply into focus when the material is incorporated into a work that is disseminated widely on the internet and through social media, as was GoldieBlox's viral video.

The critical incident points out the difficulty of the determination of the fair use in commercial situations. At the same time, this incident emphasizes that businesses should be aware of the potential risks of using the creative works of third parties.

Basic to a thorough analysis of this case is an understanding of social media marketing. In recent years, there has been an expanding growth in social networking and social media Web sites such as Facebook, Twitter, YouTube and LinkedIn. One of the most significant reasons for this growth is their viral nature. Social media, therefore, are considered an important aspect of promotion for businesses because the viral nature of social media can spread brand names and images of companies out across the globe.

In addition to the benefit to the students in considering the substantive issues raised by the critical incident, students are sharpening their critical thinking and reasoning skills and abilities by using identifying the law and applying the facts to the law from two different perspectives.

The instructor may pose the discussion questions to students considering the critical incident. In connection with the students' task in analyzing the critical incident and deciding how GoldieBlox should proceed, students are asked to consider the situation from the perspective of both parties, an exercise that will assist in the development of critical thinking skills along with problem solving and decision making skills.

As a way to increase the student interest in and engagement with the critical incident, the instructor may wish to ask them to take sides in the controversy. Students can vote on whether GoldieBlox should have asked permission of the Beastie Boys before using the song "Girls" in its video or whether GoldieBlox had a right to do so without getting permission and without regard to the wishes of the musicians.

## **Epilogue**

Some months after GoldieBlox took the unusual step of filing legal action, seeking a declaratory judgment against the Beastie Boys to "vindicate the rights of toy company GoldieBlox in connection with a parody video set to the tune of the Beastie Boys' highly sexist song "Girls" (Declaratory Judgment), the Beastie Boys countersued GoldieBlox for copyright infringement (Answer).



In March 2014, the contentious legal battle between two parties came to an end and they reached a settlement. GoldieBlox rereleased the video with another song, although they still claimed that they had fair use rights to “Girls” based on parody. And GoldieBlox agreed to pay \$1 million to charities chosen by the Beastie Boys. (Dredge, 2014)

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