

## Transformative Use in the Seventh Circuit

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### ***Kienitz v. Sconnie Nation LLC***

The **U.S. Court of Appeals for the Seventh Circuit** affirmed the district court's grant of **summary judgment** based on fair use, but cited different grounds than the district court and ultimately **rejected the concept of transformative use**. ***Kienitz v. Sconnie Nation LLC***, Case No. 13-3004 (7th Cir., Sept. 14, 2014) (Easterbrook, J.).

In 2011 plaintiff Michael Kienitz photographed the **mayor of Madison, Wisconsin, Paul Soglin**, who subsequently posted the photograph online with Plaintiff's permission. The same year, Soglin sought to shut down the annual political activism event **Mifflin Street Block Party**, which he had himself participated in many years earlier. The defendant, Sconnie Nation (Sconnie), downloaded the photograph of the mayor from the website, altered it and printed it on t-shirts bearing the words "sorry for partying." When the plaintiff learned of the t-shirts with his photograph on them, he filed a copyright application for the photograph and filed this suit against Sconnie for copyright infringement.

The district court granted Sconnie's motion for summary judgment, finding that the t-shirt made fair use of the plaintiff's photograph. In its decision, the district court relied on the U.S. Court of Appeals for the Second Circuit's opinion in *Cariou* to support its findings that by making "a monochromatic outline of Soglin's image in a Paschke-esque neon green," Sconnie made the photograph completely different from the original.

The concept of transformative use in copyright law refers to whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is "transformative," altering the original with new expression, meaning or message. In addition, 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. The fair use factors as listed in **§ 107 of the Copyright Act** are: the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for, or value of, the copyrighted work.

The 7th Circuit affirmed the grant of summary judgment based on fair use, but cited different grounds than the district court and ultimately rejected the concept of transformative use, holding that transformative use is "not one of the statutory factors" under § 107. "Asking exclusively whether

something is ‘transformative’ not only replaces the list in §107 but also could override **17 U.S.C. §106(2)**, which protects derivative works.” If you say that a new use transforms the work, it is precisely the same as saying it is derivative and therefore protected under **17 U.S.C. §106(2)**.

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