



not “the kindest”: case between feuding friends over facebook post thrown out on fair use grounds

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On September 14, 2023, the U.S. District Court for the District of Massachusetts issued a decision in *Larson v. Perry*, Case No. 1:19-CV-10203-IT, 2023 WL 5985251 (D. Mass. Sept. 14, 2023), dismissing on summary judgment a highly publicized case concerning the short story “The Kindest,” which was inspired by a Facebook post about becoming a living kidney donor. The Court concluded that the short story was a transformative fair use, and also dismissed claims for defamation and interference with business relationships brought by the author of the short story against the creator of the Facebook post.

Background

In 2015, defendant/cross-complainant Dawn Dorland Perry created a private Facebook group to share information about her altruistic decision to donate one of her kidneys as part of a donation chain, which would provide a kidney to a recipient who might otherwise not have a living donor. This Facebook group included plaintiff/cross-defendant Sonya Larson. After Dorland’s surgery, she shared with the Facebook group a heartfelt letter she had penned to the final recipient of the surgical chain.

Later in 2015, inspired by Dorland’s letter, Larson wrote a short story entitled “The Kindest,” about a Chinese American woman who receives a kidney transplant from an anonymous donor. After the surgery, the woman receives a letter from the donor, which leads the recipient to feel resentment and contempt. Several lines of Dorland’s original letter appeared verbatim in the version of the donor’s letter in Larson’s story when it was first published as an audiobook. In a second iteration of the story, which was included in a collection of short stories by American Short Fiction (“ASF”), Larson included a new version of a donor letter that quoted much less from Dorland’s letter. However, the structure and organization of the fictional letter remained similar to the real

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document. This version won a competition hosted by the Boston Book Festival ("BBF"). In a third iteration of her short story, Larson altered the structure of the donor letter altogether and removed all of the language that had appeared in Dorland's original letter.

In the meantime, Dorland caught wind of Larson's use of her letter "as inspiration," and started contacting various news outlets, publishers, platforms, organizations (including ASF and BBF), and even Larson's employer, to apprise them of the alleged copying. On June 10, 2018, Dorland registered the copyright for her Facebook letter.

On January 30, 2019, Larson filed a lawsuit against Dorland for intentional interference with Larson's advantageous business relationship with ASF and BBF and for defamation. She also sought a declaratory judgment of non-copyright infringement. In response, Dorland asserted a counterclaim for copyright infringement. The parties filed dueling summary judgment motions requesting entry of judgment as to each of their claims.

In 2021, the *New York Times* ran a long-form article titled, "Who is the Bad Art Friend" covering the dispute. The *Times* article resulted in significant media attention. Ultimately, Larson's employer fired her.

Substantial Similarity

On the question of whether Larson's use of the letter constituted copyright infringement, Judge Indira Talwani considered the three iterations of the letter contained in Larson's story separately, ultimately concluding that only the first version of the letter in "The Kindest," which copied verbatim approximately 100 words and closely paraphrased 50 more, was substantially similar to Dorland's letter. The Court further held that the second iteration of Larson's version of the letter, which contained less verbatim language, but still closely paraphrased the original letter, compelled neither a finding of substantial similarity nor a finding of no infringement. Finally, the Court found that the "points of dissimilarity" between Larson's third iteration of the letter and the original letter exceeded any remaining points of similarity, which were either of minimal importance or did not contain copyrightable expression.

Fair Use Defense

Judge Talwani held that Larson's substantially similar fictional letter—iteration one—constituted fair use under 17 U.S.C § 107. On that ground, the Court denied Dorland's motion for summary judgment as to the copyright claims. In explaining why Larson's use was fair, the Court turned to the four factors set forth in § 107.

1. *First Fair Use Factor: the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes*

Citing to *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), the Court explained that the first statutory factor, the "purpose and character" of the use, requires courts to consider "whether the new work merely supersedes the objects of the original creation ... (supplanting the original), or instead adds something new, with a further purpose or a different character. Put another way, the first factor contemplates whether and to what



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extent the new work is transformative." (Internal quotations and citations omitted).

As an initial matter, the parties disagreed upon the proper frame of reference for the transformative-use inquiry. Larson argued that the Court should focus on whether "The Kindest," taken in its entirety as a short story, serves a distinct purpose from Dorland's original Facebook post. Dorland argued that the letter in "The Kindest" has the exact same purpose as her original letter – "a personal letter from the organ donor to an organ recipient, for the purpose of sharing the donor's motivations and desire to connect in the shared experience with the recipient of the organ."

The Court sided with Larson, opining that under the U.S. Supreme Court's recent decision in *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023), an analysis of whether a work is transformative must "start[] with the medium of the work . . . but end[] with the broader framework in which the work ultimately appeared." Applying the *Warhol* framework to the facts of the case, Judge Talwani held that the short story, not the letter in the short story, was the "final contextual reference point" for purposes of the first factor. Within that framework, the Court found that the two works had divergent purposes and that the first factor weighed in Larson's favor. The purpose of Dorland's letter was to inform the kidney recipient at the end of the chain, as well as Dorland's friends and family members, about her motivations for becoming a living kidney donor, and to express her emotions surrounding her own donation and her good wishes for the recipient. By contrast, Larson's use of the letter in her story was to introduce a character, to starkly contrast an altruistic kidney donor's view of her own actions with the view a recipient may have of the same actions, and to criticize an actual donor's public discussion of her kidney donation. The fact that Larson's use was commercial in nature did not tip the scales given the highly transformative use.

1. *Second Fair Use Factor: the nature of the copyrighted work*

On to the second statutory factor, the "nature of the copyrighted work," the Court considered: (1) whether Dorland's letter is factual or creative, and (2) whether Dorland's letter was previously published. The Court held that Dorland's letter was somewhere in the middle ground with respect to its level of creativity, since it used creative language to express ideas, emotions, and feelings, but it was primarily a means to convey factual information. The Court further held that the letter was previously published via the Facebook posting for purposes of the copyright inquiry. Thus, this fair use factor was neutral.

1. *Third Fair Use Factor: the amount and substantiality of the portion used in relation to the copyrighted work as a whole*

Because Larson used different amounts of Dorland's letter in the different iterations of her story, the Court analyzed each version of her work separately, finding that the first two iterations borrowed more than necessary from the Dorland letter, which weighed against a finding of fair use with respect to those versions. As to the third iteration, it contained no verbatim or closely paraphrased language, such that the third factor weighed in favor of a finding of fair use with respect to that letter.



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1. *Fourth Fair Use Factor: the effect of the use upon the potential market for or value of the copyrighted work*

Referring to the fourth "market-effects factor" as the "most important one," the Court explained that the inquiry is "whether the alleged infringer transformed the source material in such a way that demand for the new work can exist alongside demand for the original." The Court held that the answer to that question was "yes," and that this factor weighed in favor of a finding of fair use, as "The Kindest" is highly critical of the subject matter of the original letter, and actually increased demand for the original letter. The Court rejected Dorland's theory that Larson's "bad faith" in making negative comments about Dorland to others could foreclose her invocation of the fair use defense, as copyright law is only concerned with whether the person obtains copyrighted material using egregious or inappropriate means.

Because three of the four factors, including the "most important" fourth factor weighed in favor of Larson, the Court found that the at-issue versions of "The Kindest" were protected by fair use.

Larson's Claims for Defamation and Intentional Interference with Advantageous Business Relationships

After dismissing the copyright claims, the Court addressed Larson's remaining claims. In support of her defamation claim, Larson argued that Dorland "spread[] false and malicious claims of plagiarism against Larson" to various individuals and entities. In response, Dorland argued that her statements were true, or in the alternative, that they were non-defamatory statements of opinion. The Court sided with Dorland, finding that her communications were not defamatory because, at best, they amounted to fact-based opinions. In addition, because Larson did "plagiarize" the letter to some extent, truth was an absolute defense to the defamation claim. Interestingly, the Court properly distinguished between copyright infringement and plagiarism.

With respect to Larson's claim for intentional interference with advantageous business relationships, Larson claimed that Dorland and her agents "intentionally utilized aggressive and coercive language . . . in order to cause damage to Larson." Because, according to the Court, Larson was unable to show any economic harm, this claim was dismissed as well.

The opinion marks an early fair use decision following the Supreme Court's *Warhol* opinion. Generally, the district court's analysis is consistent with established law that preceded *Warhol*.