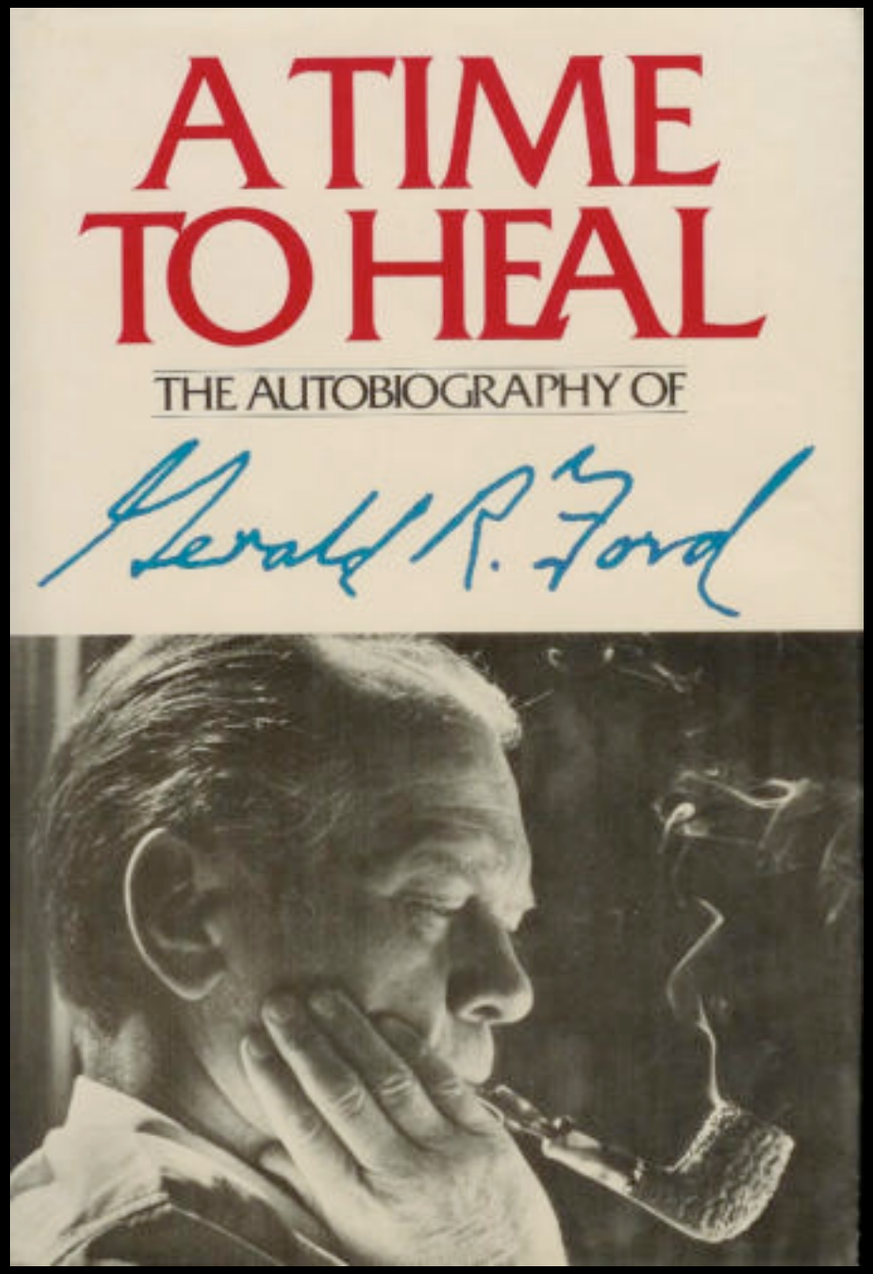
Fair Use and Culture

Copyright Law – Professor Grimmelmann
Class 24 – November 20, 2008

fair use

- by the time we're done, you should be able to recite the four factors from memory
- best approach is always just to work through the factors, one by one
  - each factor conceals multiple questions
  - and there are some interactions
- learn through practice, lots of practice


A TIME TO HEAL
THE AUTOBIOGRAPHY OF
Gerald R. Ford

TIME
Special Issue
THE HEALING BEGINS

MARCH 14, 2005
The Nation.
$2.95
$3.95 Canada
GORBACHEV'S LOST LEGACY
Stephen F. Cohen
WHY GALBRAITH MATTERS
Richard Parker
William Greider
THE IMPERMANENT REVOLUTION
Ronald Aronson
CAN'T WORKERS OF THE WORLD UNITE?
LABOR DEBATES ITS FUTURE
by DAVID MOBERG
Votes Republican every time
Likes small unions
Led strike as shop steward
Granted wage concessions
Worked 106 hours last week
Likes big unions
Applied for non-UAW job at Nissan
Missed Leadership meeting ...again
Makes $8/hr working at Wal-Mart
Scab
Shops at Wal-Mart
Moving to right-to-work Sunbelt state
Doesn't like Chicano carpenters

Harper and Row: factor 1

- what's the purpose?
  - why did Congress favor this kind of use?
  - other uses with democratic justifications?
- is this a commercial use?
  - are commercial uses favored?

Harper and Row: factor 2

- is the memoir published or unpublished?
  - who does this help? how much? why?
- is the work informational or expressive?
  - who does this help? how much? why?

Harper and Row: factor 3

- how much did the *Nation* use?
  - what fraction of the memoir is that?
  - qualitatively, how important was it?
  - what fraction of the Nation article was copied? does that matter? should it?

Harper and Row: factor 4 etc.

- why is this factor easy here?
- anything else we should include?

Campbell v. Acuff-Rose

Campbell v. Acuff-Rose: factor 1

- is this reporting, commentary, or criticism?
- is this use commercial?
- what is this "transformative use?"
  - why are parodies good fair use cases?
  - what's the parody/satire distinction?
- which of these matters most here?

Campbell v. Acuff-Rose: factor 2

- is this work published or unpublished?
- is it expressive or informational?
- how strong are these facts here?

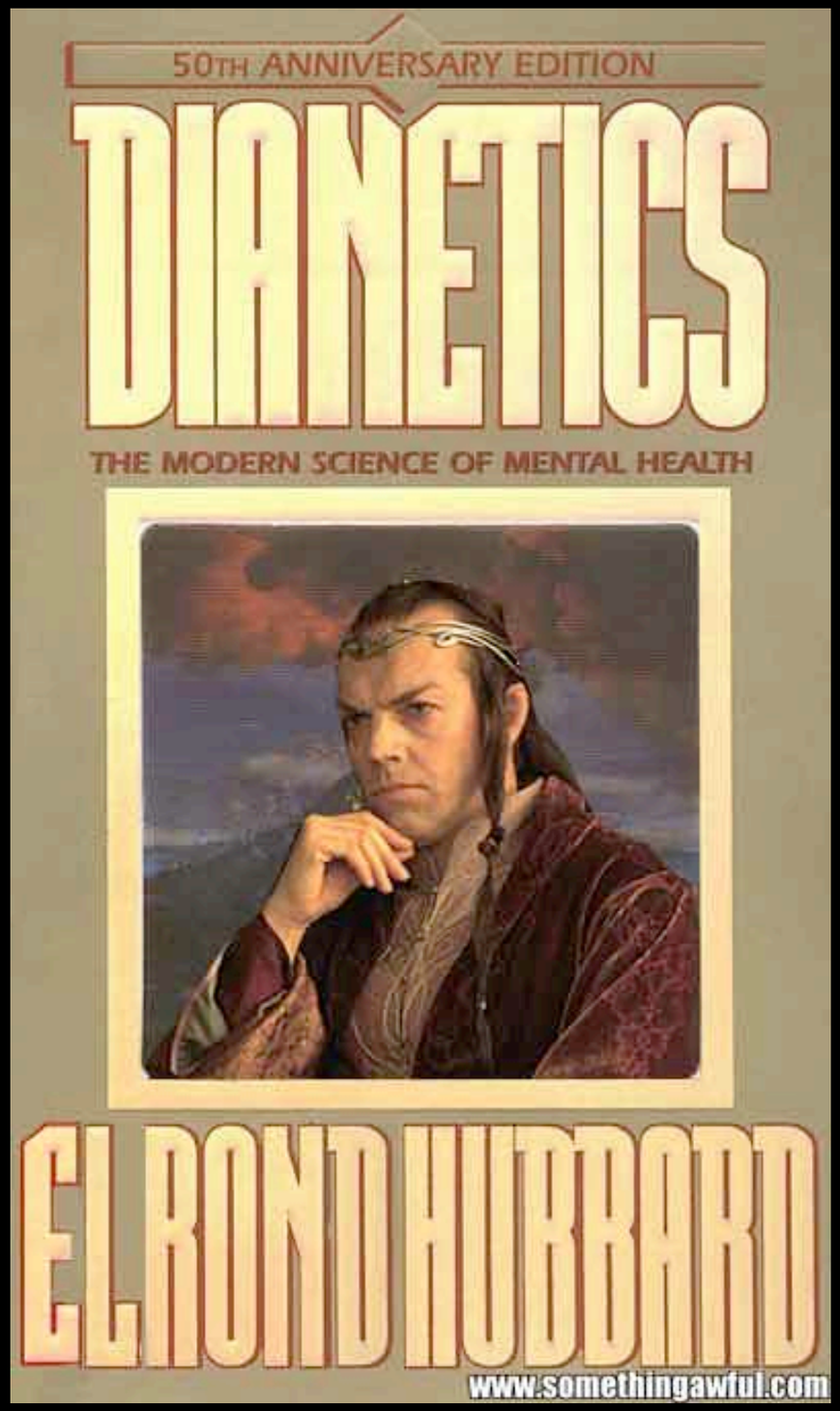
Campbell v. Acuff-Rose: factor 3

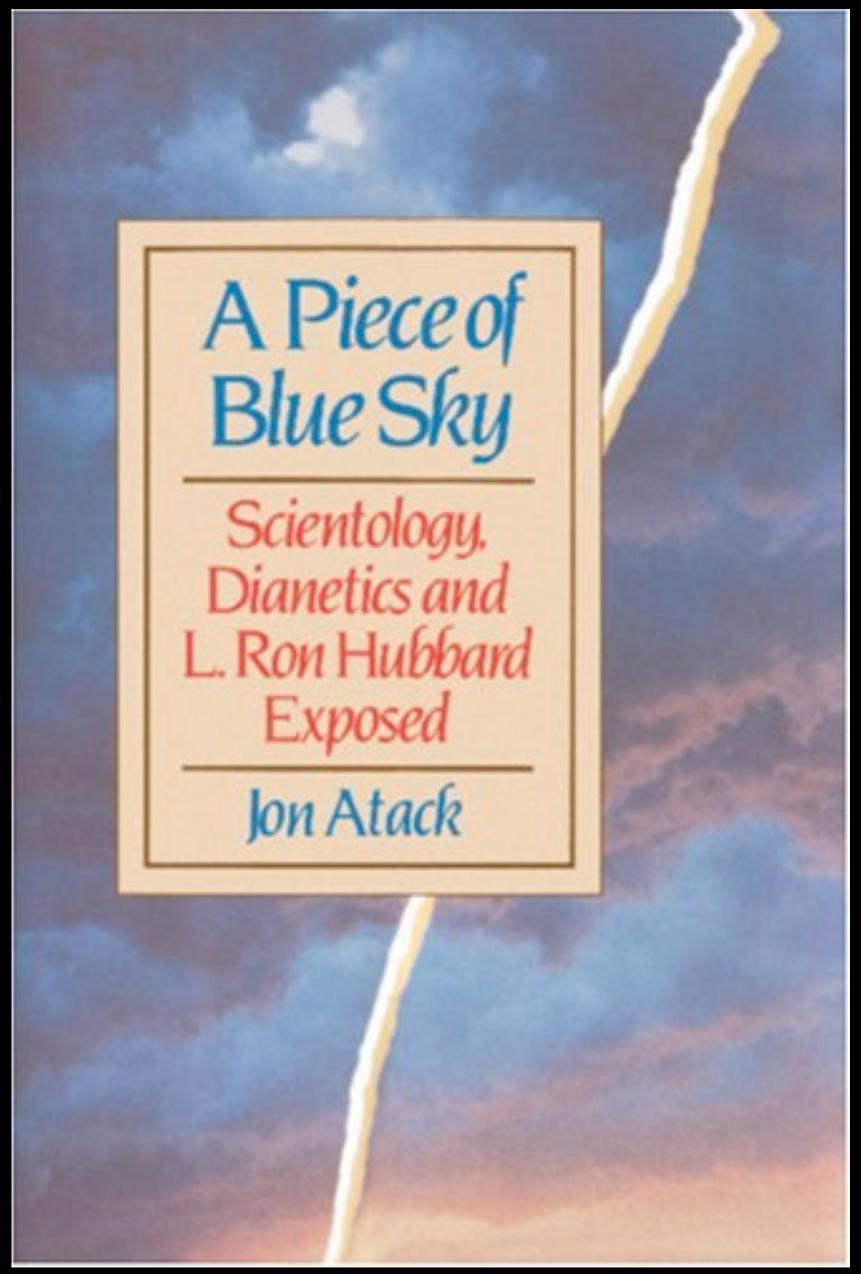
- how much did 2 Live Crew copy?
  - quantitiatively?
  - qualitatively?
  - how much did they *need* to copy to make a parody of the sort they did?

Campbell v. Acuff-Rose: factor 4

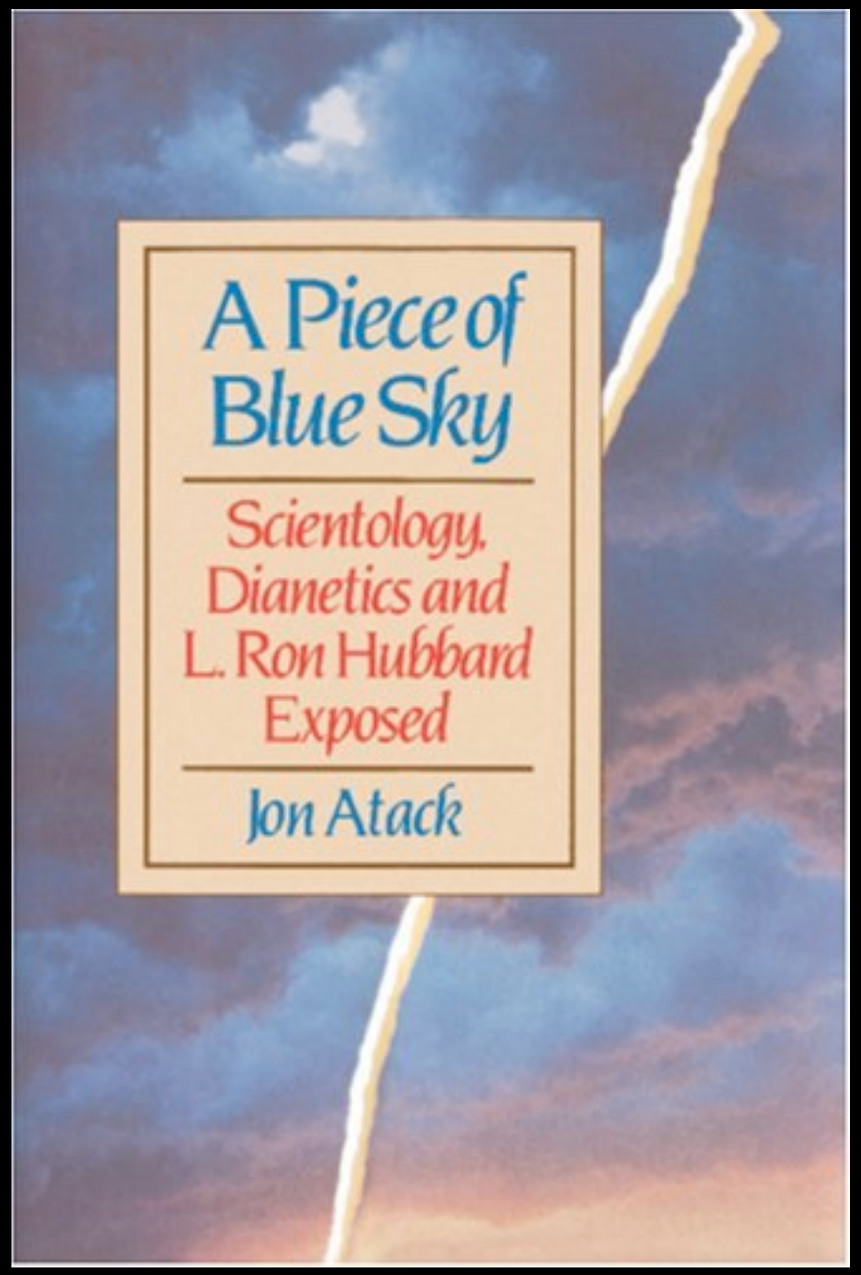
- please ignore the "presumptions" language
- the parody makes the original seem icky; is that harm to the market?
- if my Polka Pretty Woman parody expands the market for the original, can I count that in my favor?
- what if buyers like the riff, not the lyrics?

New Era v. Carol





New Era v. Carol



New Era v. Carol

- purpose of use:
  - favored use?
  - commercial?
  - transformative?
- nature of work:
  - expressive?
  - published?
- amount taken
  - quantitatively?
  - qualitatively?
- effect on market?
  - how many biography markets are there?

Bill Graham Archives

Merl Saunders

Organist Merl Saunders was a number of years Garcia's senior and had already had a successful career as a jazz and R&B keyboardist by the time he hooked up with the guitarist in 1971. Saunders replaced Howard Wales at The Matrix jam sessions in San Francisco and then moved on, with bassist John Kahn and drummer Bill Vitt, to a residency at the Keystone Korner jazz club and the New Monk (later the Keystone Berkeley). A master of the Hammond B-3 organ, Saunders had performed with the likes of Lionel Hampton, Miles Davis, B.B. King, Paul Butterfield, and others. Garcia credited Saunders with opening him up to the world of jazz and pop standards. They played together from 1972–1975 (which yielded the 1974 *Live At Keystone* album and a pair of Saunders "solo" discs), then again in the jazzy group Reconstruction in 1979. Their last collaboration was on Saunders' *Blues From the Rainforest* "new age" CD in 1988.

Right: Monday, June 21, Château d'Hérouville, France. The band's tie-dyed amp covers were made by their friend Courtney Pulock.

Saturday May 29
Sunday May 30
Winterland Arena, San Francisco, California

With NRPS, R.J. Fox, and James and the Good Brothers. The first night of this Memorial Day weekend run is remembered as the "Acid Punch Night," thanks to a heavily dosed beverage that sent a number of people on some very bad trips; 30 of them wound up in the emergency room. The attendant publicity (and an unjustified rebuke of Bill Graham by the SFPD) led Graham to announce that the Fillmore West, too, would soon close its doors. Saturday's show also sees the first "Promised Land."

Left: To save money, BGP stamped the back of older tickets with current show dates. The reused ticket was valid for a non-Dead show at the Fillmore on the 14th May and for the Dead show at the Winterland on the 29th.

The band take most of May '71 off, but the ever-active Jerry Garcia continues with his several solo and side projects, including regular gigs at Berkeley's Keystone club, where he works up his jazz/funk/R&B chops with Merl Saunders, who will become, after John Kahn (see page 156), perhaps his most frequent collaborator. Jerry also brought Saunders into the studio to do some organ overdubs on the "live" *Skullfuck* album.

Parlez-Vous Dead?

June brought a weird, wonderful, one-off gig on the manicured grounds of a 16th-century chateau at Auvers, outside Paris. The impetus for the band's second overseas jaunt was a free festival—"Free Freedom Three Days"—sponsored by a French fashion designer, Jean Bouquin, who owned a boutique that catered to the Parisian *jeunesse dorée*. Bouquin's motivations in setting up the fête were either to impress his *haut monde* friends, to use it as a springboard into politics by scoring points with the youth of France (this was just a couple of years after student radicals had nearly fomented another French Revolution), or to drum up business for the recording studio his friend, composer Michel Magne, had installed in his chateau. Whatever the reason, Bouquin decided it would be good to have this American hippie band in the lineup. The band accepted readily, because Bouquin agreed to fly over not only the musicians and crew but also many of the band's ever-growing family of girlfriends, friends, and staffers. Who could say *non* to such a junket?

The party set down in *La Belle France* only to discover the festival was a literal washout thanks to the worst rains in years. So they camped out in the Château d'Hérouville, not doing any recording but taking full advantage (when the lousy weather permitted) of the swimming pool, the tennis courts, and the magnificent wine cellar (Pigpen preferred duty-free bourbon, until he was laid low by some kind of illness—a harbinger of sad events to come). Phil Lesh was delighted to learn that Frederic Chopin had once been a guest at the chateau. And there was a day trip to the City of Lights, where some visiting American hippies were amazed and delighted to run into the Grateful Dead at the Eiffel Tower.

But the band had come to play, and play they did, throwing a free Summer Solstice show (complete with Bill Ham's light show projected against the chateau) for 200 or so bemused villagers of Auvers. A TV crew came out from Paris to record the event, which was later broadcast on French TV and radio. After the band closed with "Johnny B. Goode," there was a rollicking party that ended with most of the revelers, including the local *Chief des Gendarmes*, in the pool. After the tortuous process of checking the equipment through the notorious French customs bureaucracy, the band & co. flew back to San Francisco, arriving exactly a week after the trip had first been proposed.

Above: Monday June 21. The wine was flowing at Château d'Hérouville, in Auvers, France.

Monday June 21
Château d'Hérouville, Hérouville, France
Last performance of "Long Black Limousine."

Sunday June 27
The Fillmore East closes. It is a sad turn of events: the band's shows at this venue had played an important part in developing an East Coast following, and they played some of their finest performances here. All together, the Dead played the Fillmore East 42 times, plus two times when it was the old Village Theater (see page 61).

"PROMISED LAND"

BERRY

It may not have been the region of milk and honey referenced in Moses' time, but Chuck Berry's "Promised Land" was a place the Dead visited often after debuting their version at Winterland Arena in San Francisco on May 29, 1971. Released on Berry's album *St. Louis to Liverpool* (1964) and written while he was serving time in Missouri for interstate transportation of an underage female for "immoral purposes," the song's geographical details posed a peculiar problem for the rocker. "Remember having extreme difficulty... in trying to secure a road atlas of the United States to verify the routing of the Po' Boy from Norfolk, Virginia to Los Angeles," Berry wrote in his autobiography. "The penal institutions then were not so generous as to give a map of any kind, for fear of providing the route for an escape." Covers of Berry's "Around and Around" or "Johnny B. Goode" had turned up at over twenty Dead gigs before the arrival of "Promised Land," and by the last show of 1995 the band had played the three songs a total of just over 1,000 times.

Bill Graham

Bill Graham Archives

- do the checklist
- is this really a biographical use?
- do posters on a timeline transform? how?
- how does shrinking affect the “amount?”
- should failed licensing negotiations matter?

next time

intermediate uses
the boy who lived