Fair Use and New Purposes

Copyright Law – Professor Grimmelmann
Class 25 – November 24, 2008

last time

- first cluster: creating a specific new work substantially similar to the copyrighted one
- transformative use is key to the first factor, and weighs heavily on the other three
- what's "transformation?" it's controversial. changing the authorship definitely is, but recontextualizations are trickier

16-BIT
POWER
ON
ON
OFF
POWER
VOLUME
RESET
MEGA DRIVE
SEGA

SCORE 800
TIME 2:20
RINGS 24
SONIC
x 3

HI SCORE
0
POINTS
96
4WAYS-1
NEW
POUCH

Sega v. Accolade: what's at stake

- does *Ishido* infringe on Sega's game copyrights (e.g. in *Sonic the Hedgehog*?) On any of Sega's copyrights in the Genesis? What rights does Sega claim Accolade infringed on, and how?
- does the fact that *Ishido* will compete with *Sonic* affect the fair use analysis? What if *Ishido* will enhance sales of the Genesis?

Sega v. Accolade: fair use analysis

- purpose of use:
  - favored use?
  - commercial?
  - transformative?
- nature of work:
  - expressive?
  - published?
- amount taken
  - quantitatively?
  - qualitatively?
- effect on market?

Sega v. Accolade: the big picture

- Accolade is copying both "more" and "less" than in a standard cultural transformation
- Accolade is making money off of Sega's work, but in a very different way
- are "intermediate uses" fair?
- is there some other way to understand transformation of purpose?

A Google image search . . .

perfect 10 - Google Image Search

http://images.google.com/images?hl=en&q=perfect%2010

perfect 10

G-Reader Subscribe | Get YouTube video | Post with MarsEdit | Mendik Catalog | Get YouTube video

Web **Images** Maps News Shopping Gmail more ▼ **james.grimmelmann@gmail.com** | Web History | My Account | Sign out

Google

perfect 10

Search Images | Search the Web | Advanced Image Search | Preferences

Moderate SafeSearch is on

Images Showing: All image sizes | Any content

Results **1** - **20** of about **78,500,000** for **perfect 10**. (**0.05** seconds)

Related searches: perfect 10 **girls**

Perfect 10 Magazine sues Amazon for ...
394 x 500 - 46k - jpg
www.schwimmerlegal.com

THE **Perfect 10** Tel Aviv-Israel
300 x 446 - 55k - gif
profile.myspace.com

The New **Perfect** Ten on Infringing ...
195 x 255 - 24k - jpg
www.ipadrblog.com

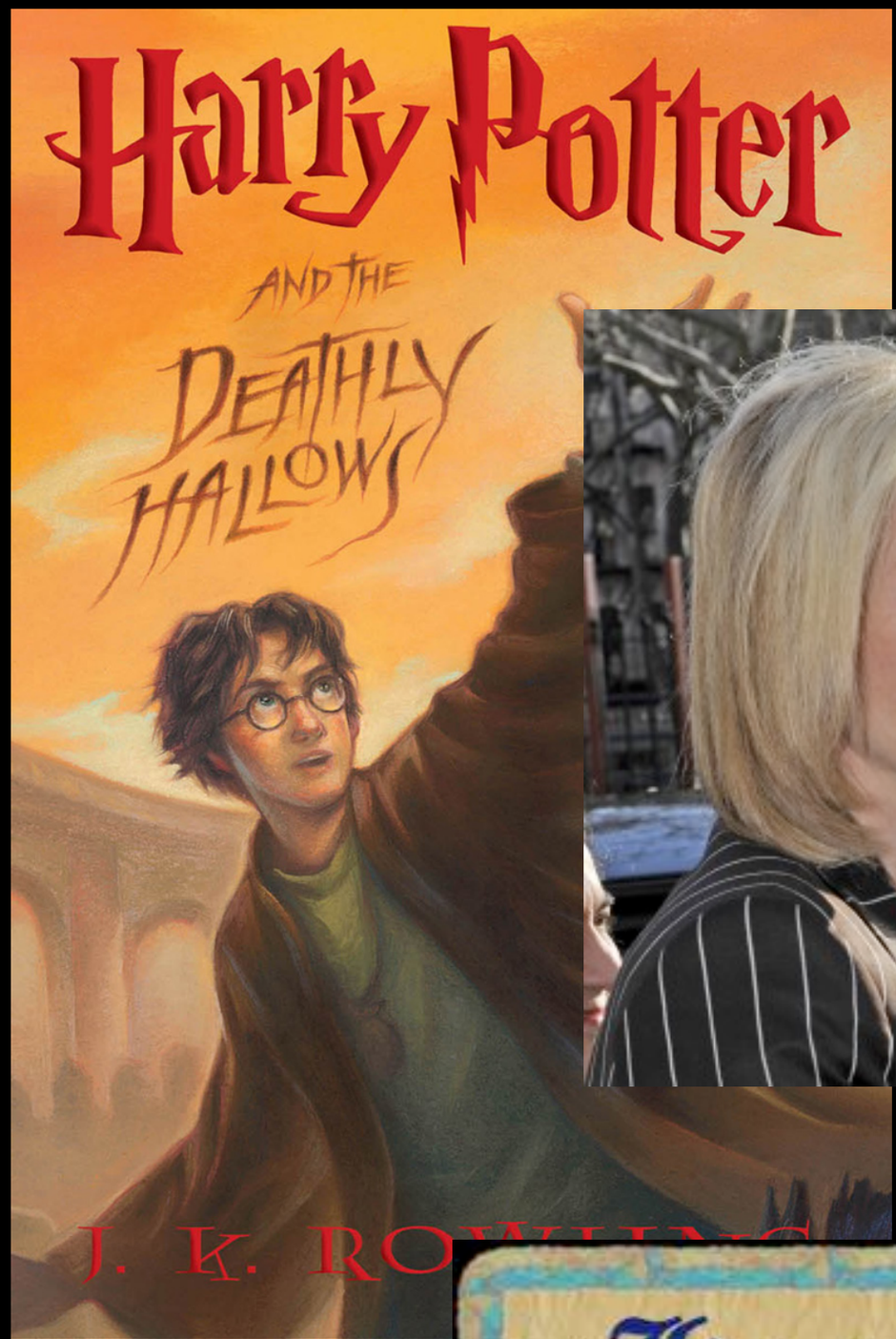
... entry **Perfect 10** magazine ceased ...
243 x 320 - 21k - jpg
copyrightlitigation.blogspot.com

Perfect 10: fair use analysis

- purpose of use:
  - favored use?
  - commercial?
  - transformative?
- nature of work:
  - expressive?
  - published?
- amount taken
  - quantitatively?
  - qualitatively?
- effect on market?

Perfect 10: the big picture

- how is this case different from *Sega*? are thumbnails an "intermediate" use? (perhaps something else here is . . .)
- how can a thumbnail be "transformative?" is the court getting at some other principle?
- is this just about market definition, or is there some other reason Google wins?



The Harry Potter Lexicon

The most compleat and amazing reference to the wonderful world of Harry Potter!

of magical items and devices

Rowling v. RDR: setup

- did you notice that indemnification clause? what's unusual about it?
- how did the parties get into this mess? could it have been averted?
- please ignore the derivative works discussion. the court has confused itself.
- anything interesting about the remedies?

Rowling v. RDR: fair use

- purpose of use:
  - favored use?
  - commercial?
  - transformative?
- nature of work:
  - expressive?
  - published?
- amount taken
  - quantitatively?
  - qualitatively?
- effect on market?

Rowling v. RDR: the big picture

- this is a very careful, nuanced opinion
- should projects like this be categorically fair use? be categorically unfair?
- could Vander Ark have written a non-infringing lexicon similar to the one he did?
- what would you advise a client working on a guide to a TV show? a quiz book?

next time

market failure and market definition