

Fair Use in an all Access World

Rick Kurnit

FRANKFURT KURNIT KLEIN & SELZ PC

Fair Use Applied to New Media

- **Copyright**
- **Trademark**
- **Publicity Rights**
- **Association**
- **Defamation**

The Web

Aggregators
Content Owners

Mega site: *About.com*

- **Content at no cost**
- **Eyeballs**
- **Advertising Revenue**

Social Networks: MySpace-----FaceBook

- **User Generated Content**
- **Mash Ups**
- **Netzines**
- **Brand Integration**

YouTube

- Aggregate content ---“Fair Use”
- Gain Eyeballs
- Monetize (advertising)
- Sell
- Lawsuit==Fair Use?

Grokster:

Contributory Infringement

- **Intentionally Induce**
- **Supply Product With Constructive Knowledge**
- **Fail to act to prevent**

DMCA Take Down

- **Service Provider**
- **Inform**
- **Register/Implement**
- **Repeat Infringer Policy**
- **Red Flag: remove apparent infringement**
- **FAIR USE?**

Google Video ID

- **Submit for “Fingerprint”**
- **Block?**
- **License? : generate ad revenue**
- **FAIR USE?**

COPYRIGHT

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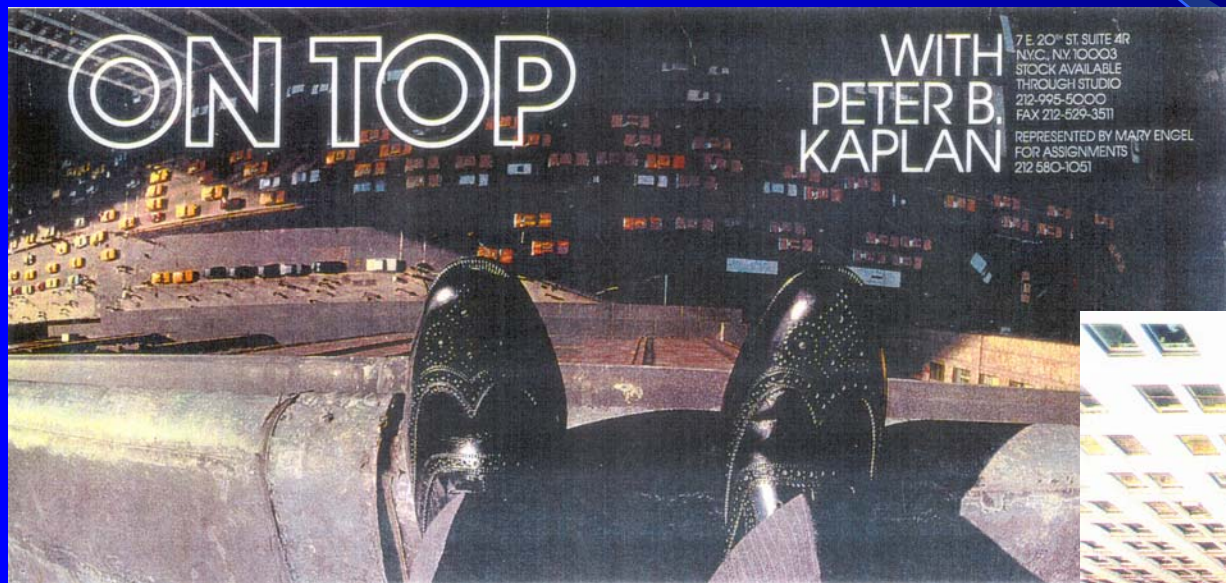
Free Use

- **Deminimis**
- **Idea**
- **Scènes à Faire**

De Minimis

- How much was copied?
- Observability
 - Length of time displayed
 - Prominence
 - Focus, lighting, camera angles
- Average lay observer

Idea or Expression?



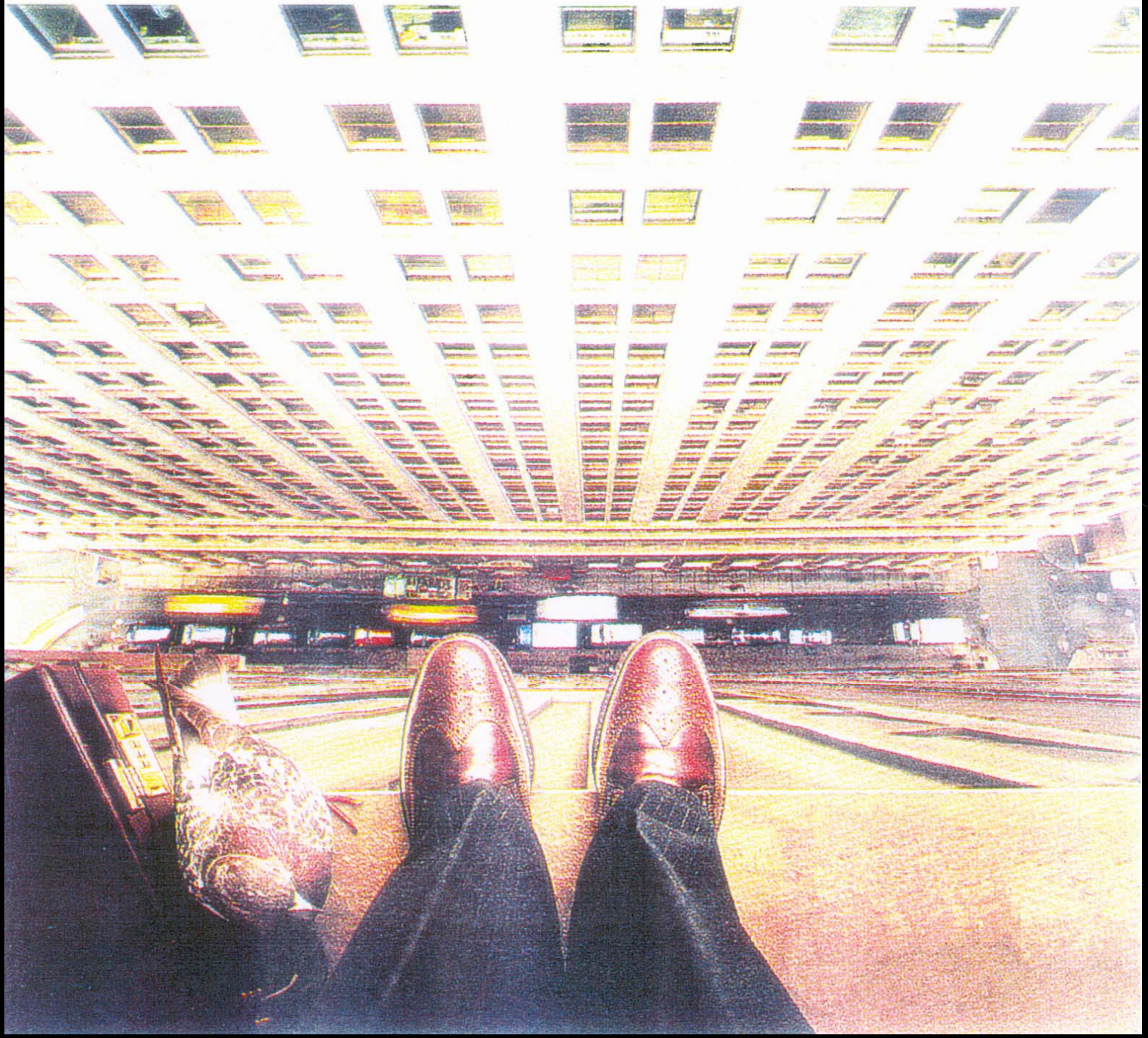


ON TOP

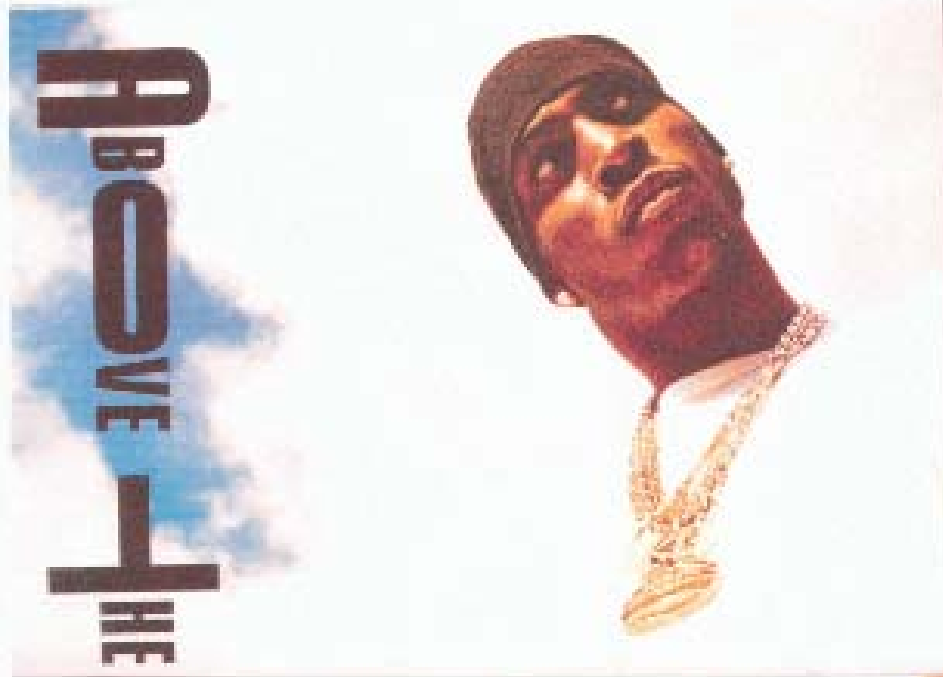
WITH
PETER B.
KAPLAN

7 E. 20TH ST. SUITE 41R
N.Y.C., N.Y. 10003
STOCK AVAILABLE
THROUGH STUDIO
212-995-5000
FAX 212-529-3511

REPRESENTED BY MARY ENGEL
FOR ASSIGNMENTS
212 580-1051



The Original

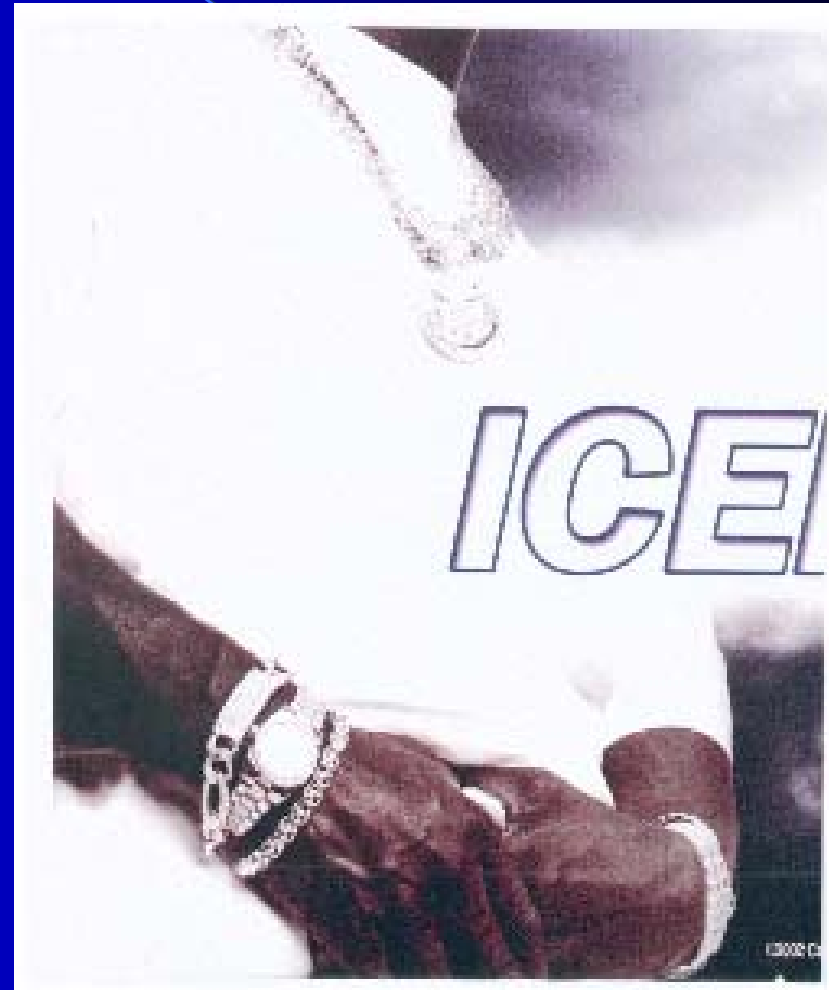


AS KEVIN GARNETT'S GAME—AND HIS BANK ACCOUNT—HAVE SOARED HIGHER AND HIGHER,
HIS FEET HAVE REMOVED HIMSELF FIRMLY ON THE GROUND

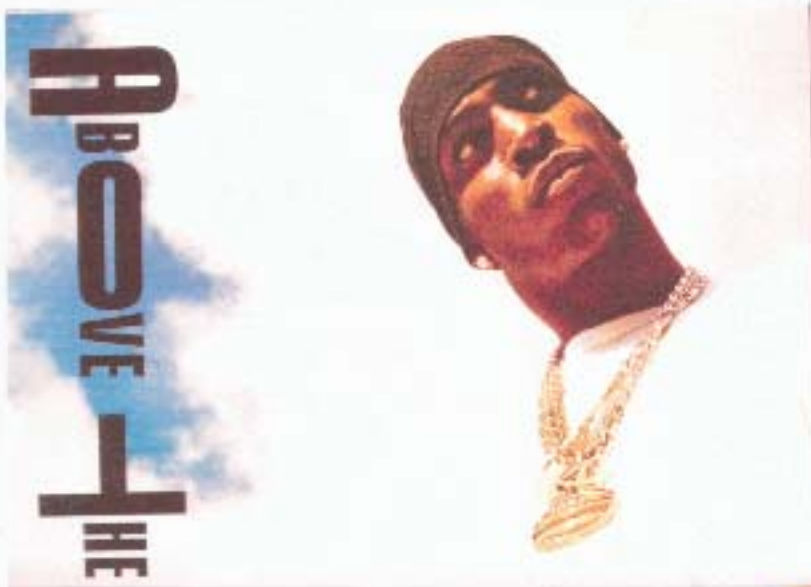
RELEASED 1998
Clouds



The Final Ad

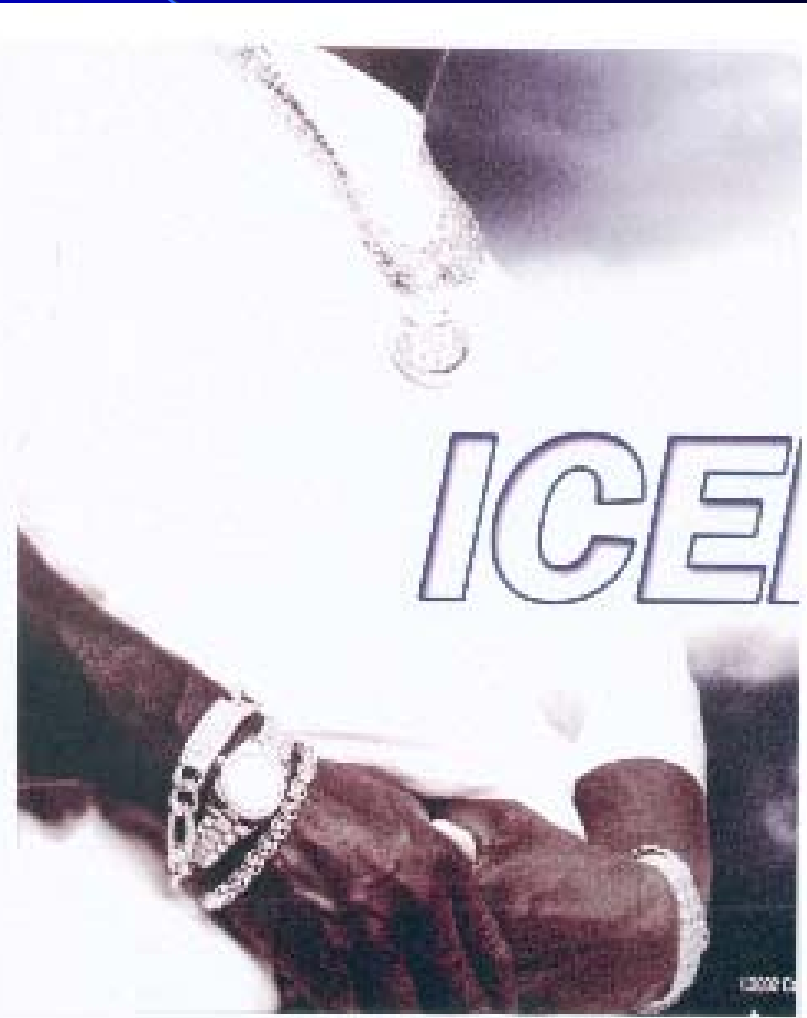


Bling, bling ?



AS KEVIN SPACEY'S GAME—AND HIS BANK ACCOUNT—BARE SCALPED HIGHER AND HIGHER, HIS FEET HAVE REMAINED PLANTED FIRMLY ON THE GROUND

Above the Clouds
BY MURKINER SCORIN LA



Copyright Infringement

- Copyrightable Element
- Substantial Similarity
- Access

Fair Use

- Nature of the Use
- Created to be Licensed
- Substantial
- Lost License Income

FAIR USE: 1

- Scholar or Freeloader?

FAIR USE:2

- Value as a Copyright?

FAIR USE: 3

- The Heart of the Work

Harper & Rowe v. Nation

(U.S. 1985)

FAIR USE: 4

- **Lost License Fees/ Market Substitute**

NEED TO USE

Rogers v. Koons

(2nd Cir. 1992)





PARODY

- Conjure up
- Satirize/ Criticize

Campbell v. Acuff & Rose

(U.S. 1994)

PARODY

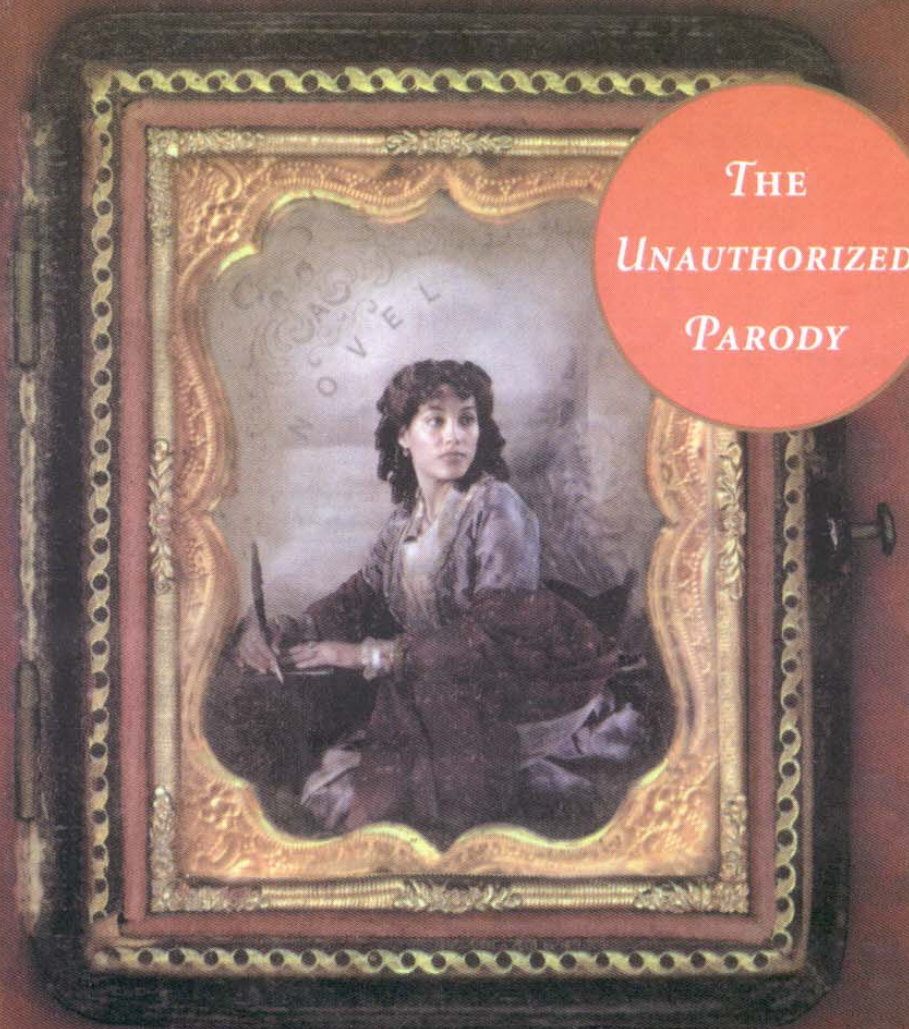
- **Minimum Necessary to Conjure up/ Criticize**

Suntrust Bank v. Houghton Mifflin

(11th Cir. 2001)

A provocative literary parody that explodes the mythology perpetrated by a Southern classic

THE WIND DONE GONE



THE
UNAUTHORIZED
PARODY

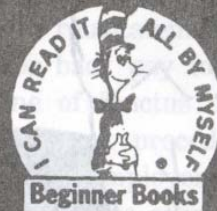
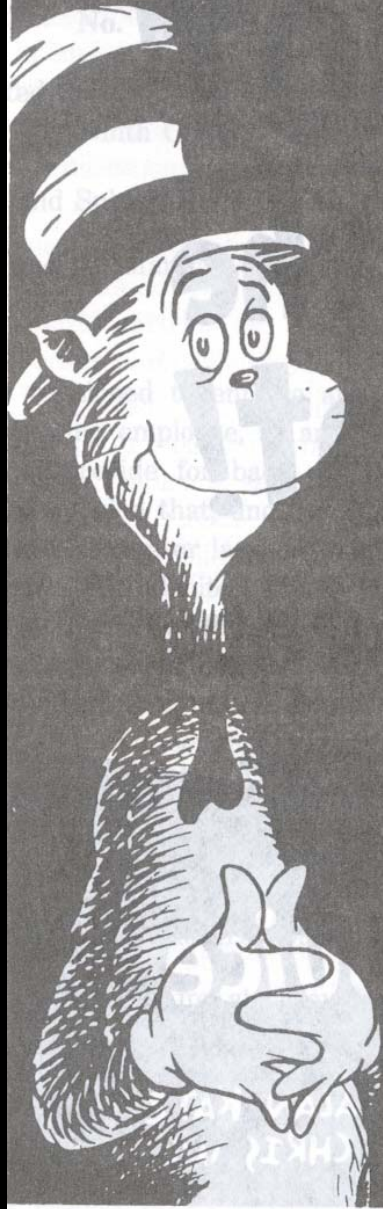
ALICE RANDALL

COMMENT / CRITICIZE

Dr. Seuss v. Penguin

(9th Cir. 1997)

THE CAT IN THE HAT



By **Dr. Seuss**



The Cat NOT in the Hat!

A PARODY

By
Dr. Juice

AS TOLD TO ALAN KATZ
ILLUSTRATED BY CHRIS WRINN

NEED TO USE

Blanch v. Koons

(2nd Cir. 2006)







PARODY

commentary

Leibovitz v. Paramount

(2nd Cir. 1998)

VANITY FAIR

AUGUST 1991/\$2

More Demi Moore

by Nancy Collins

DARYL GATI
Is L.A.'s Top Ci
to Blame
by Fredric Dann

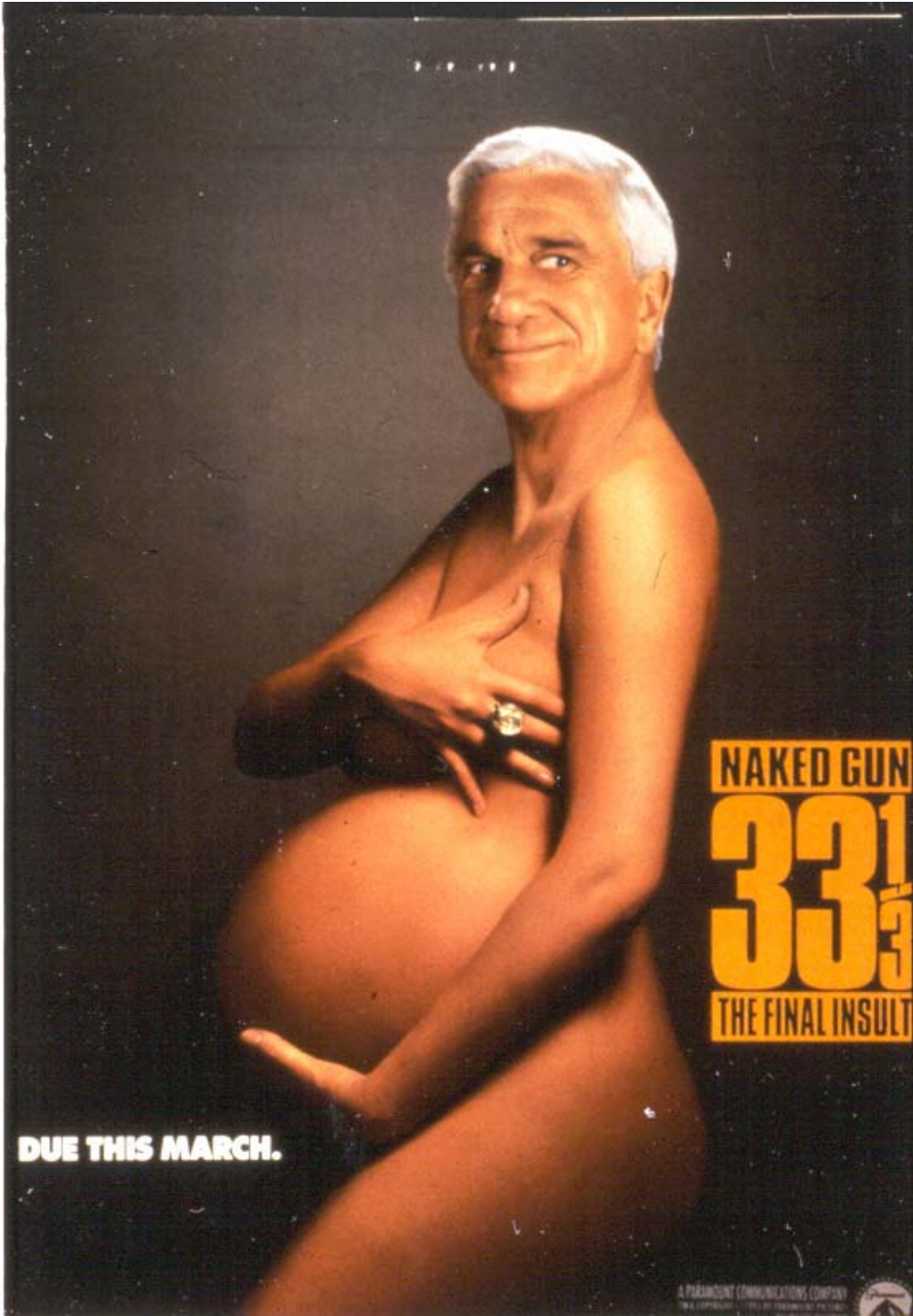
HOW SADD
SURVIV
by Gail Shee

SHOWDO
AT TI
BARNES COLLECTI
by John Richards
and David D'Ar

VACLAV HAV
Philosopher Ki
by Stephen Sch

HOLLYWO
MAYHE
What
Joe Eszterha:
Basic Instinc
by Lynn Hirschbe





DUE THIS MARCH.

NAKED GUN
333
THE FINAL INSULT

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VANITY FAIR

AUGUST 1991/\$2

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NAKED GUN
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THE FINAL INSULT

THIS MARCH.



A PARAMOUNT COMMUNICATIONS COMPANY

Comparative Advertising

Fair Use

- **Used For Comment**
- **Not Created for License**
- **Use Minimal Amount**
- **No Loss of Fees**

A photograph of two men in cowboy attire standing in a field. The man on the left is wearing a light-colored cowboy hat, a blue denim jacket over a red shirt, and a large silver belt buckle. He is looking towards the man on the right. The man on the right is wearing a darker cowboy hat, a dark jacket over a blue shirt, and glasses. He is looking back at the first man. A horse is partially visible on the right side of the frame. The background shows rolling green hills under a clear sky. The text "Bob, I've got emphysema." is overlaid in white, bold, serif font across the middle of the image.

Bob, I've got emphysema.

Fair Use

- **What to do when other's use our content?**
- **Claims v. litigation (public) positions**
- **Content Owners are also Fair Users**
- **Different views of your own businesses**

The Future

Aggregator and
Content Owner

?

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