

Sandro Miller and John Malkovich: ALA "Fair Use" Worksheet

by A. D. Coleman

The "fair use" exception to the U.S. Copyright Law considers four statutory factors, plus the idea of "transformativeness."

The synopsis below represents the outcome of my weighing the indicated project according to those guidelines via "Thinking Through Fair Use," an online tool created by the Office for Information Technology Policy of the American Library Association, as it appears at the website of the University of Minnesota Libraries. It does not constitute a legal opinion, simply a summation of my own input as emailed to me when I finished the worksheet.

The Notes that follow the "for and against" lists for each factor are my own, as entered into that field in the worksheet. To view a blank version of this worksheet, go to <https://www.lib.umn.edu/copyright/fairthoughts>. — A. D. C.

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Thinking Through Fair Use - Analysis Summary

Here's your "Thinking Through Fair Use" results! As a reminder, these results have not been analyzed or processed in any way, except to format the input you provided into one document. These results don't claim to tell you whether a proposed use is fair or not, and do not constitute legal advice. For formal legal advice, please contact an attorney.

Work considered: Sandro Miller and John Malkovich: "Malkovich, Malkovich, Malkovich — Homage to Photographic Masters"

Factor #1: Purpose and character of the use

You thought that *purpose* was *strongly against* fair use.

You highlighted these elements as relevant to [the] proposed use:

Favors Fair Use

(none)

Weighs Against Fair Use

- * Commercial activity
- * Profiting from use
- * Decorative or other non-critical, non-commentary use

Notes: Explicitly non-parodic purpose, which is stated by the photographer who made the derivatives as "homage" to the originals and their makers. The derivative works offer neither criticism of nor commentary on the originals, attempting instead to replicate

them as faithfully as possible.

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Factor #2: The nature of the copyrighted work

You thought that *nature* was *somewhat against* fair use.

You highlighted these elements as relevant to [the] proposed use:

Favors Fair Use

- * Published source

Weighs Against Fair Use

- * Creative, artistic, or fiction source

Notes: All of the original images that serve as sources for these derivative works have been previously published. While a few of the 40 copyrighted images were made by photojournalists, and might therefore be considered recordative and/or documentary in nature, thus "factual," the majority are studio portraits understood by their makers, the subjects, and the original publishers as creative interpretations of their subjects.

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Factor #3: Amount and substantiality of the portion used

You thought that *amount* was *strongly against* fair use.

You highlighted these elements as relevant to [the] proposed use:

Favors Fair Use

(none)

Weighs Against Fair Use

- * Entire work, or proportionally large extract
- * Portion used is heart of the work

Notes: The derivative works deliberately seek to replicate, in every detail, the entirety of the originals, substituting the familiar face (and less familiar figure) of a famous actor for the individuals portrayed in the originals.

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Factor #4: Effect on the potential market for or value of the work

You thought that *market* was *strongly against* fair use.

You highlighted these elements as relevant to [the] proposed use:

Favors Fair Use

(none)

Weighs Against Fair Use

- * Many copies made
- * Repeated use
- * Easy to redistribute, or to make additional copies of the product of [the] use (i.e. digital file, online use)
- * License/permission available

Notes: Since the derivative works have been and will be presented to the market through the same photo-gallery system that markets prints of the originals, buyers will face a choice between these products. (This goes to the question of whether "Use directly substitutes for a sale that would otherwise have been made.") If understood as parody — certainly possible, albeit *contra* the stated intent of the maker of these derivative works — they could negatively affect a prospective buyer's opinion of the original, thus affecting sales. (This goes to the question of "Impairs market for original work.") Because these effects on sales are not susceptible to proof, I haven't checked them on the "against" list. The maker of these derivatives did not seek permissions before producing them; as all the originals and their makers are well-known, licenses from them, their agents or estates, are presumably available.

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When looking over your results, remember that no single factor is decisive of fair use. There also may be other relevant considerations, specific to your use, that do not appear in the results from this general-purpose tool. Many considerations are relevant, and only by looking at the whole picture, across all the issues, can you make a reasonable guess about whether your use is fair or not!