

**TCA Television Corp. v. McCollum,
No. 1:16-cv-0134 (2d Cir. Oct. 11, 2016)**

Year	2016
Court	United States Court of Appeals for the Second Circuit
Key Facts	Plaintiffs TCA Television Corp., Hi Neighbor, and Diana Abbott Colton, the heirs of Abbott and Costello, asserted ownership in the copyright of the infamous comedy routine <i>Who's On First?</i> Defendants, Kevin McCollum and additional producers of the critically-acclaimed Broadway dark comedy <i>Hand to God</i> , used one minute and seven seconds of dialogue from <i>Who's On First?</i> in a scene where the main character, Jason, tries to impress a girl by performing the routine with his sock-puppet. When Jason claims to have made up the routine, his sock-puppet calls him a liar and tells the girl that the sketch “is a ‘famous routine from the Fifties’”—creating a scene that sets the “starting point for the gradual exposure of the darker side of Jason’s personality.” Plaintiffs brought a copyright infringement claim against defendants’ unauthorized use of part of <i>Who's On First?</i> in <i>Hand to God</i> . The district court dismissed the claim, finding that defendants’ use of the routine had a “new and different function” in the play and was therefore a transformative fair use. Plaintiffs appealed.
Issue	Whether defendants’ unauthorized use of part of plaintiffs’ recorded comedy routine in a Broadway comedy qualifies as fair use.
Holding	Finding that all four factors weighed against fair use, the Second Circuit concluded that “defendants’ verbatim use” of the comedy routine “was not a fair use.” The court, however, affirmed the district court’s dismissal of the suit on the alternative ground that plaintiffs did not allege a valid copyright interest in the routine. As to the first factor, purpose and character of the use, the Second Circuit found that defendants’ commercial exploitation of the routine weighed against fair use and that the use could not be “deemed transformative” despite incorporation of the routine into “a sharply different context from its original authors” because “there is ‘nothing transformative’ about using an original work ‘in the manner it was made to be’ used.” Rather, the court reasoned, “the critical inquiry is whether the new work uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created.” If this were not the test, “any play that needed a character to sing a song, tell a joke, or recite a poem could use unaltered copyrighted material with impunity, so long as the purpose or message of the play was different from that of the appropriated material.” Additionally, the court noted that “even a correct finding of transformative use is not necessarily determinative of the first statutory factor, much less of fair use.” Next, the court held that the second statutory factor, the nature of the work, weighed “strongly” in the plaintiffs’ favor because the creative, as opposed to factual, nature of <i>Who's On First?</i> “lies at the heart of copyright’s intended protection.” The court also found that the third factor, the amount of work used, “weigh[ed] strongly in favor of plaintiffs” because defendants engaged in “substantial copying” of the routine without a “persuasive justification.” Lastly, with regard to the fourth factor, the effect of the use on the potential market for the work, the Second Circuit found that the district court erred in “disregard[ing] the possibility of defendants’ use adversely affecting the licensing market for the [r]outine.” In its <i>de novo</i> review, the Second Circuit found that plaintiffs alleged “the existence of a traditional—and active—derivative market for licensing the [r]outine” and that defendants’ unauthorized use would “negatively affect[the] commercial market for future licensing.”

Tags	Second Circuit; Film/Audiovisual
Outcome	Fair Use Not Found

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