

# SBAC Performance Task – Grade 11 Explanatory Fair Use

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## ***Student Directions***

### **Fair Use Explanatory Performance Task**

#### **Task:**

As president of your school’s Art Club, you are in charge of choosing the pieces that will be displayed in your school’s annual art show. In order to attract a larger audience, you’ve partnered with your school’s video, music, and literary clubs in order to make this year’s show a multi-media extravaganza that will attract the show’s biggest audience ever.

When you meet with the leaders of the different clubs, you realize a common theme in much of the work people would want to present: it is all built on the works of other famous artists, producers, writers, and pop culture in general. You decide to call the show, “Standing on the Shoulders of Giants?” and focus it on how past and current works influence the work of new artists.

When you present the idea to the principal, she is very excited about your efforts to build a coalition amongst the school’s many clubs, but she is also concerned about the works you’ll be presenting. “I’m really worried about the school getting sued for copyright violations if you use the work of others,” she tells you. “I can only approve this if you promise you’ll research what is actually legal when using the work of others in new pieces of art. You’ll have to become an expert on what is called ‘Fair Use Doctrine’ in order to make sure you know whether or not pieces at your show violate copyright law.”

In order to prepare yourself to judge the legality of the works, you do some research on cases where the Fair Use Doctrine was in play, coming across a number of sources.

After you have reviewed these sources, you will answer some questions about them. Briefly scan the sources and the three questions that follow. Then, go back and read the sources carefully to gain the information you will need to answer the questions and finalize your research.

In Part 2, you will write an explanatory letter on a topic related to the sources.

#### **Directions for beginning:**

You will now examine several sources. You can re-examine any of the sources as often as you like.

#### **Research Questions:**

After examining the research sources, use the remaining time in Part 1 to answer three questions about them. Your answers to these questions will be scored. Also, your answers will help you think about the research sources you have read and viewed, which should help you write your explanatory letter.

You may click on the appropriate buttons to refer to the sources when you think it would be helpful. You may also refer to your notes. Answer the questions in the spaces provided below them.

## Part 1

### Sources for Performance Task

#### Source #1

*The United States Copyright Office is responsible for administering copyright law in the United States. The following is from their website: <http://www.copyright.gov/fls/fl102.html>*

## Fair Use

One of the rights accorded to the owner of copyright is the right to reproduce or to authorize others to reproduce the work in copies or **phonorecords**. This right is subject to certain limitations found in sections 107 through 118 of the copyright law (title 17, U. S. Code). One of the more important limitations is the doctrine of “fair use.” The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law.

Section 107 contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair.

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for, or value of, the copyrighted work

The distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission.

The 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law cites examples of activities that courts have regarded as fair use: “quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports;

incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.”

*phonorecords: soundrecordings, such as CDs, records, or tapes.*

## Source #2

*In the course of your research, you find the following article published by the New York Times on September 8, 2008: <http://www.nytimes.com/2008/09/09/nyregion/09potter.html?ref=media>*

# Rowling Wins Lawsuit Against Potter Lexicon

by John Eligon

For seven years, a Harry Potter fanatic worked on a guidebook to J. K. Rowling’s best-selling series, but in the end, a federal judge ruled on Monday, his book was too close to the work he admired.

“Plaintiffs have shown that the lexicon copies a sufficient quantity of the Harry Potter series to support a finding of substantial similarity between the Lexicon and Rowling’s novels,” Judge Robert P. Patterson Jr. of Federal District Court in Manhattan wrote in his 68-page ruling blocking publication of a Harry Potter Lexicon written by Steven Jan Vander Ark.

The decision, which came nearly five months after a four-day trial, was a victory for Ms. Rowling and Warner Brothers Entertainment, the company that produces the Harry Potter movies. They had sued to block a Michigan-based publisher from producing the lexicon. Judge Patterson awarded the plaintiffs \$6,750 in damages.

“I took no pleasure at all in bringing legal action and am delighted that this issue has been resolved favorably,” Ms. Rowling said in a statement. “I went to court to uphold the right of authors everywhere to protect their own original work. The proposed book took an enormous amount of my work and added virtually no original commentary of its own.”

Despite Ms. Rowling’s criticism of his book and a legal defeat, Mr. Vander Ark said he remained a fan and would welcome an opportunity to sit down and chat with Ms. Rowling.

“I have been a huge fan of the Harry Potter series and Ms. Rowling for 10 years; that’s not going to change,” Mr. Vander Ark said by telephone on Monday from his home in Brighton, England. “We had a disagreement about the definition of a particular book. It was a legal disagreement. I would rather that it wasn’t personal.”

Mr. Vander Ark, 50, who bears a striking resemblance to Harry Potter, said he wished he could come to a resolution with Ms. Rowling that would allow him to go forward with the lexicon, which he said was written in response to the demand of fans of his Web site, also called the Harry Potter Lexicon.

For now, however, Mr. Vander Ark has his sights on his next Harry Potter project: his book “In Search of Harry Potter” is scheduled to be released next month. It is a memoir

of his travels to locations similar to the ones described in the Rowling books. The book, Mr. Vander Ark said, should not land him back in Wizengamot — the wizards' high court of law depicted in the Harry Potter series.

"It's a travel memoir," he said. "It's not in any way the kind of a thing which should raise any red flags."

Mr. Vander Ark was a librarian and teacher at Byron Center Christian School in Byron Center, Mich., but now makes a living as a writer.

The lawsuit filed last year against the company trying to publish Mr. Vander Ark's lexicon, RDR Books, which is based in Muskegon, Mich., argued that the encyclopedia copied Ms. Rowling's material, while adding little or no new information and insight.

The trial played out like a novel, complete with catharsis and fury.

The opening day saw Ms. Rowling lash out at Mr. Vander Ark's work.

"I believe that this book constitutes the wholesale theft of 17 years of my hard work," she testified, going on to denounce the book as plagiarism and a waste of money.

### **Source #3**

*The United States has a system of courts. If one party is unhappy with the result of a court's ruling, that party can appeal it to a higher court, which can overturn the ruling of a lower court. The United States Court of Appeals is the second highest court in the country, below only the Supreme Court.*

*In the course of your research, you learn about a fair use case that was appealed. The following article, published by the New York Times on April 25, 2013, reports on the outcome of that appeal:*

<http://www.nytimes.com/2013/04/26/arts/design/appeals-court-ruling-favors-richard-prince-in-copyright-case.html>.

## **Court Rules in Artist's Favor**

by Randy Kennedy

In a closely watched copyright case with broad implications for the contemporary-art world, the United States Court of Appeals for the Second Circuit on Thursday decided largely in favor of the artist Richard Prince, who was found by a federal court in 2011 to have illegally used photographs from a book [of portraits] to create a series of collages and paintings.

The original decision, by Judge Deborah A. Batts, sided with Patrick Cariou, whose 2000 book featured portraits he took in Jamaica. Mr. Prince used dozens of the pictures as the basis for a series of dystopian works called "Canal Zone," which were exhibited at the Gagosian Gallery in 2008 and generated more than \$10 million in sales.

Mr. Prince argued that his appropriation of the photographs should be allowed under the fair-use exceptions to federal copyright protections, which permit limited borrowing of protected material for purposes like commentary, criticism, news reporting and scholarship. But Judge Batts wrote that for fair use to apply, a new work of art must be transformative — that it must

“in some way comment on, relate to the historical context of, or critically refer back to the original work.”

That reading of the law was viewed as unusual by many copyright experts, galleries and leading art museums, who warned that it could have a chilling effect on art that relies on appropriation, a controversial but longstanding postmodern artistic strategy.

The appeals court, which heard the case last May, ruled that Judge Batts’s interpretation was incorrect and that “the law does not require that a secondary use comment on the original artist or work, or popular culture,” but only that a reasonable observer find the work to be transformative.

In its decision, the appeals court wrote that a majority of Mr. Prince’s work manifested “an entirely different aesthetic” from Mr. Cariou’s pictures.

“Where Cariou’s serene and deliberately composed portraits and landscape photographs depict the natural beauty of the [Jamaican people] and their surrounding environs,” the decision stated, “Prince’s crude and jarring works, on the other hand, are hectic and provocative.” In her decision in 2011, Judge Batts gave Mr. Cariou the right to destroy the “Canal Zone” paintings that had not been sold to collectors, a remedy that was criticized by Judge Barrington D. Parker Jr. of the Second Circuit during oral arguments last year.

The court found that most of the works by Mr. Prince under consideration were permissible under fair use because they “have a different character” from Mr. Cariou’s work, give it a “new expression” and employ “new aesthetics with creative and communicative results distinct” from the work that Mr. Prince borrowed. But five other works, the court said, were so minimally altered by Mr. Prince that they might not be considered fair use by a reasonable observer. Those were sent back to the lower court for a determination using the appeals court standard.

Judge Batts based her decision in part on the fact that Mr. Prince, under oath, said that his works based on Mr. Cariou’s were not intended “to create anything with a new meaning or a new message.” But a majority of the appeals panel said that Mr. Prince’s intentions were not the only determining factor.

#### **Source #4**

*The Beastie Boys were a popular hip hop group in the 1980s and 1990s. Their album, Paul’s Boutique, first released in 1989, is considered by many to be one of the most important early hip hop records. In the course of your research, you find the following article published by the Los Angeles Times on May 20, 2012: [http://latimesblogs.latimes.com/music\\_blog/2012/05/beastie-boys-trouble-funk-lawsuit.html](http://latimesblogs.latimes.com/music_blog/2012/05/beastie-boys-trouble-funk-lawsuit.html)*

## **Beastie Boys’ sampling in ‘Paul's Boutique’ again in spotlight**

by Randall Roberts

Talk about bad timing.

Last week, a day before Beastie Boys founder Adam "MCA" Yauch passed away after a long battle with cancer, TufAmerica, Inc., which administers the rights to the recordings of Washington, D.C. go-go band Trouble Funk's catalog, filed a lawsuit in federal court accusing the Beastie Boys of **sampling** without permission the group's 1982 funk classics, "Drop the Bomb" and "Say What."

It's not the first time suit has been filed against "Paul's Boutique," which contains hundreds of samples and was created at a time when copyright law regarding sampling was in its infancy. But given that it's been 23 years since the album was released, that the existence of the Trouble Funk pieces on those records has been known for years -- the sample is easy to spot, given the awesome cowbell -- and that the Internet is teeming with annotated "Paul's Boutique" sites that identify each sample, the suit was a surprise.

TufAmerica contends that the Beastie Boys, along with co-defendants Universal Music Publishing, Brooklyn Dust Music and Capitol Records, infringed on its copyrights on at least three occasions by sampling "Drop the Bomb" and "Say What" without permission. For example, on "Car Thief," from "Paul's Boutique," "Drop the Bomb" was incorporated into the song and, according to the suit, "effectively concealed to the casual listener." Ditto "Hold It, Now Hit It" and "The New Style" from the Beastie Boys' debut, "Licensed to Ill."

TufAmerica's president and founder is Aaron Fuchs, longtime New York hip-hop and post-disco record man and early rap chronicler whose Tuff City imprint and its sub-labels over the past three decades have released hip-hop, dance hall, New Orleans jazz, and funk tracks. In fact, according to Dan Charnas' book on the business of hip-hop, "The Big Payback," Tuff City was the first hip-hop label to sign a production deal with a major label, when, in 1983, it hooked up with CBS and released early sides by Spoonie Gee, Davy DMX and the Cold Crush Brothers.

Tuff City's publishing arm has been successfully enforcing its copyrights for years, and has made a business out of buying the rights to old songs and then filing suit against artists who have sampled them without permission. For example, one of its songs, a Mardi Gras banger called "It Ain't My Fault," got sampled by New Orleans rapper Silkk the Shocker -- and that track was then used on Mariah Carey's "Did I Do That," resulting in a six-figure payout. Another, the Honey Drippers' "Impeach the President," earned his company money from Sony Music after both LL Cool J and EPMD used the song.

And the music of Trouble Funk, the percussive Washington, D.C., funk band, has been sampled dozens of times over the years; according to the online database whosampled.com, these include Dr. Dre, George Michael, Will Smith and the Black Eyed Peas.

"We've been signed with Tuff City publishing company over 10 years and they're pretty much going after people that have been using and abusing our stuff without our permission," original Trouble Funk bassist Tony Fisher recently told the Washington Post.

The suit doesn't surprise Kembrew McLeod, associate professor of communication studies at the University of Iowa, and co-author, with economist and researcher Peter DiCola, of the book "Creative License: The Law and Culture of Digital Sampling." "'Paul's Boutique' and other albums of that era are like ticking legal time bombs," says McLeod, who also co-produced the acclaimed documentary "Copyright Criminals." "For instance, in 2005, Run DMC was sued by

the Knack for using 'My Sharona' for its song 'It's Tricky.' And they were sued 20 years after the fact."

In "Creative License," he and DiCola specifically examined the samples in both "Paul's Boutique" and Public Enemy's "Fear of a Black Planet," two classics of hip-hop's sample era, and estimated the cost of legally producing, with all samples intact, those records today.

Says McLeod: "Based on the number of sales, both albums would have lost money per unit, and 'Paul's Boutique' would have lost somewhere in the neighborhood of \$20 million -- and we were being extremely conservative with our estimates."

**sampling:** using a small piece of a song or other recording in a new song. It is common technique in hip hop music.

### Source #5

*Sometime, two parties in a legal case will decide to settle the issue outside of the court. When this happens, both sides come to agreement, and the case is then dropped.*

*In the course of your research, you find the following article published by the Los Angeles Times on January 12, 2011: <http://latimesblogs.latimes.com/culturemonster/2011/01/shepard-fairey-to-settle-hope-poster-case-with-associated-press/comments/page/2/>*

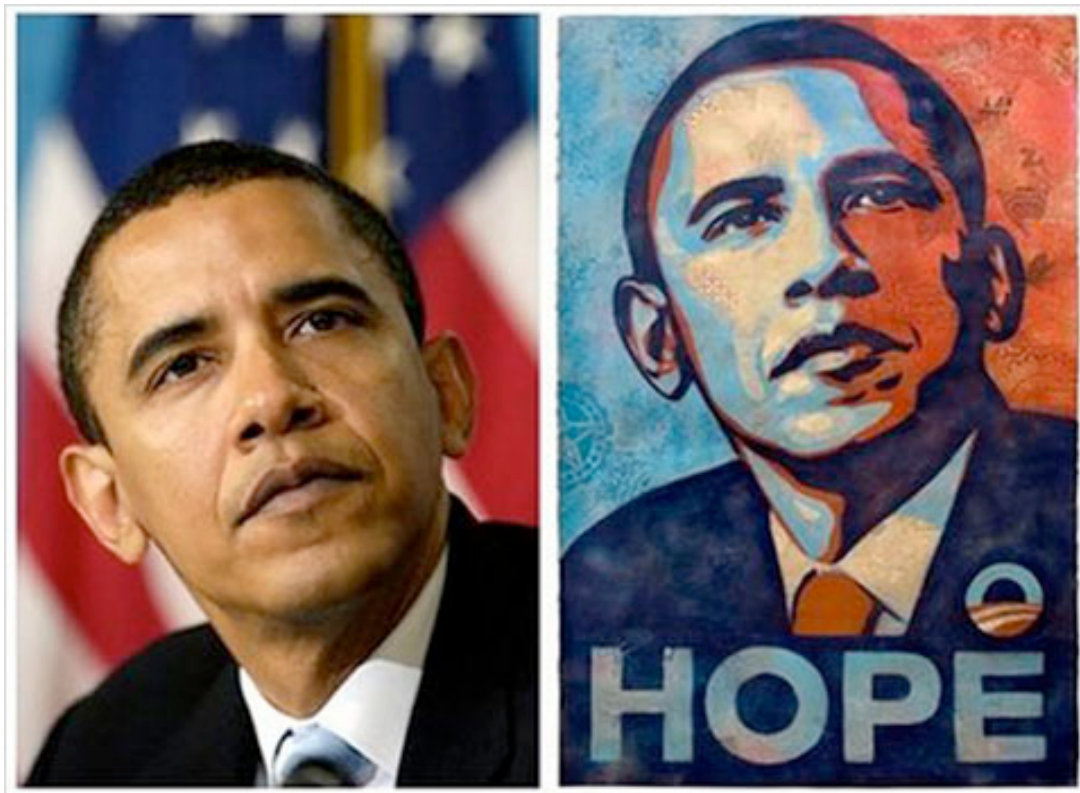


Image Source: <http://artsbeat.blogs.nytimes.com/2012/02/24/shepard-fairey-pleads-guilty-over-obama-hope-image/>

# Shepard Fairey to settle 'Hope' poster case with Associated Press

by David Ng

Artist Shepard Fairey and the Associated Press confirmed Wednesday that they are settling out of court their legal case that involves Fairey's "Hope" poster depicting then-Sen. Barack Obama. But a lawyer for the AP added that the news organization is still pursuing its case against Obey Clothing, in which Fairey is a partner and that has reproduced the image on various items of clothing.

Fairey's poster of Obama was inspired by a photograph taken by an AP freelancer in 2006. The AP subsequently accused the Los Angeles artist of copyright infringement, with Fairey maintaining that it falls under fair-use laws.

A settlement means that the March trial between Fairey and the AP in New York will not take place. As part of their settlement, Fairey has agreed he will not use another AP photo in his work without obtaining a license from the news organization.

The two sides also have agreed to share the rights to make the posters and merchandise bearing the "Hope" image. In addition, Fairey and the AP have agreed to additional financial terms that are confidential.

"I am pleased to have resolved the dispute with the Associated Press," Fairey said in a statement. "I respect the work of photographers, as well as recognize the need to preserve opportunities for other artists to make fair use of photographic images. I often collaborate with photographers in my work, and I look forward to working with photos provided by the AP's talented photographers."

A spokesman for Fairey said the artist did not have any further comment beyond his prepared statement. However, the spokesman said that the criminal investigation into Fairey, which involves the artist's admission that he knowingly submitted false images and deleted others as part of the case, is still ongoing.

An assistant at Fairey's L.A. studio said the artist was out of town on Wednesday and could not be immediately reached.

The AP's case against Obey Clothing has not been resolved, according to a lawyer for the AP. In the past, Obey has reproduced the "Hope" image on various items of clothing that are available for sale to the public.

"We believe that what Obey Clothing has done, which is to make lots of commercial use of the design, is quintessentially not fair-use," said Dale Cendali, a partner at Kirkland & Ellis in New York, who serves as the AP's lead counsel on this case. "But it is something that the AP would happily license."

Cendali declined to comment further on the Fairey or Obey cases.



## Item 1

Item Attribute	
ItemResponseType_E	Matching Table
PrimaryClaim_E	4
AssessmentTarget_E	2
PrimaryContentDomain_E	
PrimaryStandard_E	
SecondaryContentDomain_E	
SecondaryStandard_E	
Claim2Category_E	
RevisionSub-category_E	
PassageName-andor-ID_E	
AchievementQuintile_E	
MinimumGrade_E	11
MaximumGrade_E	11
ScorePoints_E	0,1,2
MaximumPoints_E	2
DepthofKnowledge_E	4
AdministrationDate_E	
SpecificationsVersion_E	2013
ScoringEngine_E	Automatic with key
Content-TaskModel_E	
PresentationFormat_E	T
EvidenceStatement_E	
Acknowledgements_E	
AdditionalLanguageComplexityMeasures_E	
EnemyItems_E	
Braille_E	
InterimDesignationCode_E	
PerformanceTaskComponentItem_E	Yes
PTEnemy_E	0
PTSequence_E	1

### STEM

A combination of court rulings and copyright laws have established criteria that can be used to evaluate whether something is allowed by the Fair Use Doctrine. In a typical fair use disagreement, only particular criteria are in dispute.

For each of the cases described in the sources, mark an X corresponding to an accusation that is explicitly made against the new work (regardless of how the court ruled). More than one accusation can be marked for a given case.

Do not mark an X unless it can be supported by a supporting detail in the sources.

	<b>Steven Jan Vander Ark's <i>Harry Potter Lexicon</i></b>	<b>Richard Prince's Collages</b>	<b>Beastie Boys' <i>Paul's Boutique</i></b>	<b>Shephard Fairey's Obama Hope Poster</b>
The new work does not transform the original work with new meaning or expression				
The primary purpose of the new work is commercial rather than educational, commentary, parody, or criticism				
The new work takes too much material from the original work				
The new work takes potential income away from the original work				

## RUBRIC

	<b>Steven Jan Vander Ark's <i>Harry Potter Lexicon</i></b>	<b>Richard Prince's Collages</b>	<b>Beastie Boys' <i>Paul's Boutique</i></b>	<b>Shephard Fairey's Obama Hope Poster</b>
The new work does not transform the original work with new meaning or expression	X	X		
The primary purpose of the new work is commercial rather than educational, commentary, parody, or criticism	X	X	X	X
The new work takes too much material from the original work	X	X	X	
The new work takes potential income away from the original work		X	X	X

Score	Rationale	Exemplar
2	The response provides at least 10 correct X's of the possible 12.	See rubric
1	The response provides 5–9 correct X's of the possible 12.	See rubric
0	The response provides 0–4 correct X's of the possible 12.	See rubric

## Item 2

Item Attribute	
ItemResponseType_E	Short Text
PrimaryClaim_E	4
AssessmentTarget_E	2
PrimaryContentDomain_E	RS
PrimaryStandard_E	
SecondaryContentDomain_E	
SecondaryStandard_E	
Claim2Category_E	
RevisionSub-category_E	
PassageName-andor-ID_E	
AchievementQuintile_E	
MinimumGrade_E	11
MaximumGrade_E	11
ScorePoints_E	0,1,2
MaximumPoints_E	2
DepthofKnowledge_E	
AdministrationDate_E	
SpecificationsVersion_E	2013
ScoringEngine_E	Hand scored
Content-TaskModel_E	
PresentationFormat_E	T
EvidenceStatement_E	
Acknowledgements_E	
AdditionalLanguageComplexityMeasures_E	
EnemyItems_E	
Braille_E	
InterimDesignationCode_E	
PerformanceTaskComponentItem_E	Yes
PTEnemy_E	0
PTSequence_E	3

## STEM

What is one example of a piece of art that violated Fair Use doctrine? Why was it considered a violation of it? Cite evidence from the sources that explains the violation.

## RUBRIC

Score	Rationale	Exemplar
2	•	
1		
0		

### Item 3

Item Attribute	
ItemResponseType_E	Short Text
PrimaryClaim_E	4
AssessmentTarget_E	4
PrimaryContentDomain_E	RS
PrimaryStandard_E	
SecondaryContentDomain_E	
SecondaryStandard_E	
Claim2Category_E	
RevisionSub-category_E	
PassageName-andor-ID_E	
AchievementQuintile_E	4
MinimumGrade_E	11
MaximumGrade_E	11
ScorePoints_E	0,1,2
MaximumPoints_E	2
DepthofKnowledge_E	4
AdministrationDate_E	
SpecificationsVersion_E	2013
ScoringEngine_E	Hand scored
Content-TaskModel_E	
PresentationFormat_E	T
EvidenceStatement_E	
Acknowledgements_E	
AdditionalLanguageComplexityMeasures_E	
EnemyItems_E	
Braille_E	
InterimDesignationCode_E	
PerformanceTaskComponentItem_E	Yes
PTEnemy_E	0
PTSequence_E	2

## STEM

According to Source 1, “The distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined.” What are two examples where even after an official decision was made, there was still disagreement over whether or not a piece of work represented Fair Use? Cite evidence from the sources that explains the difference of interpretation.

## RUBRIC

Score	Rationale	Exemplar
2	.	
1		
0		

## Student Directions for Part 2

You will now review your sources, take notes, and plan, draft, revise, and edit your letter. You may use your notes and refer to the sources. You may also refer to the answers you wrote to the questions in Part 1, but you cannot change those answers. Now read your assignment and the information about how your letter will be scored; then begin your work.

### Your assignment:

After you explain what you’ve learned about Fair Use to the principal, she is impressed. She asks you to **draft a letter that explains to students who are applying to present their work in the show when it is okay to use parts of other people’s artistic work in their own.**

You agree to write this letter using the information provided in the sources. You are now ready to craft a thesis to explain to fellow students how copyright and fair use apply to their artistic work. Once you have a thesis statement, select the most relevant information from several of the sources, and write a multi-paragraph letter explaining your thesis so that students will understand this issue of copyright.

### Explanatory Letter Scoring

Your explanatory letter will be scored using the following:

1. **Statement of purpose and organization:** How well did you state your thesis, and maintain your thesis with a logical progression of ideas from beginning to end? How well did you narrow your thesis so you can develop and elaborate the conclusion? How well did you consistently use a variety of transitions? How effective was your introduction and your conclusion?

2. **Elaboration/evidence:** How well did you integrate relevant and specific information from the sources? How well did you elaborate your ideas? How well did you clearly state ideas using precise language that is appropriate for your audience and purpose?
3. **Conventions:** How well did you follow the rules of grammar usage, punctuation, capitalization, and spelling?

**Now begin work on your explanation.** Manage your time carefully so that you can:

1. plan your multi-paragraph explanation
2. write your multi-paragraph explanation
3. revise and edit the final draft of your multi-paragraph explanation

Word-processing tools and spell check are available to you.

For Part 2, you are being asked to write a multi-paragraph article, so please be as thorough as possible. Type your response in the space provided. The box will expand as you type.

Remember to check your notes and your prewriting/planning as you write and then revise and edit your article.