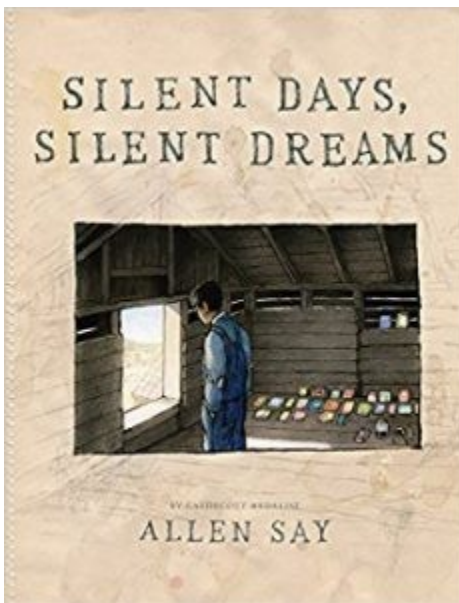


Copyright Fair Use in the Land of Famous Potatoes

November 3, 2017 – *The TMCA*

by J. Michael Keyes



It isn't all that often that copyright decisions get handed down by the federal district court in the great state of Idaho, so the recent decision in *James Castle Collection v. Scholastic, Inc.* caught our attention. The Court's fair use analysis caught our attention too, particularly the first factor that analyzes the "purpose and character of the use" by the Defendant. Before we get there, though, here's a brief background of the relevant facts:

James Castle was born in 1899. He grew up and lived in Idaho until his death in 1977. Castle was deaf from birth and never learned how to communicate orally or in writing. Yet, he became a prolific (and self-taught) artist,

renowned for creating his works from any number of resources such as discarded papers, soot, and saliva, to name just a few. His works have been showcased at major museums, including the Philadelphia Museum of Art (of Rocky Balboa fame), the Museo Nacional in Madrid, and the Smithsonian American Art Museum. Castle's works are owned and maintained by the James Castle Collection and Archive.

Enter Defendant Allen Say, an author and illustrator who wrote and illustrated a children's book entitled "*Silent Days, Silent Dreams*." *Silent Days* is story written from the perspective of Castle's fictional nephew. It contains copies of 28 of Castle's original art works, and more than 100 other works created by Say that were intended to "mimic" Castle's "unschooled style."

The James Castle Collection did not take kindly to *Silent Days* and sued to enjoin the release of the work. The Court denied the TRO motion, finding at this early stage that

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fair use prevailed.

The bulk of the Court's analysis focused on the first factor, the "purpose and character of the use." This factor was found to weigh "heavily" in favor of fair use due to the "transformative" nature of Defendant's use. Why is that? Because according to the Court, the author attempted to "see the young Castle's silent world through his eyes." In this regard, the Court stated that "the book draws on facts but also included speculation based on reasonable inferences from facts (he was bullied by classmates for being deaf and mute) or just pure speculation (he was slapped by his father and locked in an attic by his parents)." In sum, the Court found that the author "created a version of Castle as a self-taught artist who was isolated by his disabilities and driven by his artistic passion, ultimately finding salvation in his art from a harsh world."

The Court's fair use analysis is a bit curious. It relied pretty heavily on the Billy Graham Archives case where the 2nd Circuit found it was fair use to use "thumbnail images" of posters from Grateful Dead concerts in order to explain the significance of those posters in a much larger anthology on the history of the Grateful Dead. But *Silent Days* appears to be largely a fictionalized version of James Castle's life—an "imagined biography" as the Defendant Say called it. And, the prominent use of 28 original sketches seems fundamentally different than using thumbnail images of posters for historical context. The larger issue, though, is whether a fictionalized work of this type should be viewed as sufficiently "transformative" under the first fair use factor. If so, "imagined biographies" of Andy Warhol, Salvador Dali, and Pablo Picasso—complete with reproductions of their famous works—could be in the offing. That would probably go over with the estates of these artists like a giant sack of famous potatoes.