

Tresóna Multimedia, LLC v. Burbank High School Vocal Music Ass’n
Nos. 17-56006, 17-56417, 17-56419, 2020 U.S. App. LEXIS 9128 (9th Cir. Mar. 24, 2020)

Year	2020
Court	United States Court of Appeals for the Ninth Circuit
Key Facts	This suit involves the use of four musical works in two medleys that the music director at Burbank High School, Brett Carroll, commissioned an arranger to create for the school’s competitive show choirs. The choirs performed these medleys at competitions as well as at fundraising events organized by a nonprofit boosters club for the choirs. After these performances, Tresóna, a licensing company that had acquired certain rights in the musical works through a series of assignments, brought copyright infringement claims against Burbank High School, Carroll, and the choir booster club and its parent members. The district court found that Tresóna lacked standing to sue for infringement of three of the songs because it held only nonexclusive licenses for those works. Tresóna’s remaining infringement claim concerned the rearranged use of approximately twenty seconds of the song “Magic” (originally sung by Olivia Newton-John in the movie <i>Xanadu</i>) in the last two minutes of an eighteen-minute medley called “Rainmaker,” an original theatrical work about a “Dust Bowl-era community ravaged by drought.” As to this work, the court granted summary judgment for Defendants on qualified immunity grounds. Tresóna appealed.
Issue	Whether a high school choir’s use of a portion of a musical work in a theatrical medley is a fair use.
Holding	The appellate panel affirmed the district court’s conclusion that Tresóna lacked standing to bring an infringement claim as to three of the songs, but found that the ruling in favor of the defendant on qualified immunity grounds “elided the question” of fair use, a question “that begs to be answered.” The court first noted that although “teaching” is one illustrative example of fair use in the preamble to Section 107, a complete analysis of all four factors is required. The court determined that the first factor, the purpose and character of the use, strongly weighed in favor of fair use because the use of “Magic” was for educational, and associated nonprofit fundraising, purposes. The arrangement of a portion of the song in a medley of songs as part of a new theatrical work with a different message was also transformative. The second factor, the nature of the copyrighted work, weighed against a finding of fair use because the song was “undoubtedly” creative in nature rather than informational. Regarding the third factor, the amount and substantiality of the portion used, the medley used twenty seconds of a four-minute and twenty-two second song. However, the song’s chorus—the “central element”—of the song was repeated several times during the medley. The court stated that despite this repeated use, the arranger “embedded that portion into a larger, transformative choir showpiece that incorporated many other works, and imbued that entire piece with new expression and meaning not contained within any of the individual works.” Thus, the third factor did not weigh against fair use. On the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, the panel concluded that no one would buy the sheet music for the arranged medley as a substitute for the sheet music of the song. Weighing the factors together, the court held that the use of portions of “Magic” in the medley was fair use. The court also found Tresóna’s fair use argument to be “objectively unreasonable” in holding that Defendants were entitled to attorneys’ fees.
Tags	Education/Scholarship/Research; Music
Outcome	Fair use found