

Copyright - Outline

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- I. Policy
 - a. Copyright Rationales
 - i. Utilitarian View (economic)
 - 1) Encourage dissemination of creative works
 - 2) Incentive to creators of works (not really)
 - ii. O'Connor (*Feist*) - "Primary objective of CR is to encourage others to build freely upon ideas and information conveyed by a work."
 - b. No evaluation on quality of work needed for CR - why? Value of CR is dependent on the value of the work
 - c. **Nonrivalrous consumption** - idea that you can "consume" something while someone else still has it (intangible IP right vs actual book)
 - d. Purpose of the work irrelevant (*Bleinstein v Donaldson* - circus ad CR-able)
 - i. Exceptions - functional aspects, sculptures
- II. Copyrightability
 - a. Requirements for CR:
 - i. ORIGINAL - new + creative
 - ii. FIXED
 - iii. work of authorship - construed broadly (excludes: words, short phrases)
 - 1) Author = human (not machine, animal)
 - b. Originality - degree of creativity required
 - i. Photographs -
 - 1) Judge Kaplan Approach:
 - a) **Rendition** - lighting, arrangement, the HOW
 - b) **Timing**
 - c) **Creation of Subject** - photo may be original to the extent the photographer created the "scene or subject"; exception to idea that CR does not give right over subject matter of photo
 - 2) *Gross v Seligman* - Cherry stem photo case, photographer infringed on 1st photo when he used same model w/ Cherry stem after selling rights to 1st photo
 - ii. *Feist v Rural* - rejects "sweat of the brow" doctrine, phone book not CR-able
 - 1) Facts cannot be CR-ed
 - 2) Compilation must contain some originality - arranging names in alphabetical order is not original
 - iii. Copying an original - can the copy be CR-able?
 - 1) Art reproduction - sec 101 defines as derivative work
 - 2) *Batlin v Synder* - Uncle Sam's bank case - CR-able if copy is a little bit different, but here they were too similar
 - 3) *Meshworks v Toyota* - automobile structural rendering was deemed just a copy of the car and thus not protectable
 - iv. **Compilations** (included in definition of "collective works") - independent works are not protectable but they may be bound up in such a way so the whole is protectable
 - 1) **RULE** (*Feist*): compilations are protectable if they are original in their structure or collection of the material
 - 2) *Assessment Technologies v Wire Data* - database with names and addresses, Posner says it contains public info, thus not protectable, didn't really analyze whether compilation as a whole was protectable
 - 3) *Mathew Bender v West* - compilations of cases with extra material added by West (star pagination, arrangement of cases, parallel citations, etc)
 - a) 2nd Circuit - not CR-able, not creative enough

- b) 8th Circuit (identical facts) - YES CR-able
 - 4) *Chinese Directory Case* - selection of categories and exclusion of certain shops was creative enough for CR, but only thin CR, lost suit for infringement
 - 5) European Database Protection - provides for right to prevent EXTRACTION & REUTILIZATION for 15 years (renewable w/ new version)
 - 6) **Abstraction-Filtration Comparison** (Software and other compilations):
 - a) Abstraction - reduce program to set of functional processes
 - b) Filtration - eliminate unprotectable elements
 - c) Comparison - see if what's left is substantially similar to P's work
 - c. Expression
 - i. Idea/Express Dichotomy - you can CR the expression of the idea, not the idea itself
 - 1) *Baker v Selden* - accounting system using ledger forms, forms were not protectable; method is not protectable
 - 2) Merger doctrine - idea is so intertwined with expression that you can't separate them; idea prevails and thus not protectable
 - 3) *Mattel v Goldberger Doll* - features of doll's face are common, but the expression cannot be copied exactly, suggests breath of protection may go beyond the expression
 - ii. Facts - not protectable, only expression protectable
 - 1) *Nash v CBS* - if work is presented as historical fact, it is not protectable (but you can call it fiction, the CR protection allowed)
 - iii. Scenes a faire - part of the environment of a story
 - iv. Utilitarian Works
 - 1) Statute ("useful articles") - are CR-able if "capable of being identified separately from and exist independently of the utilitarian aspects of the work"
 - a) *Mazer v Stein* - lamp base case, purpose behind creation of statue is irrelevant, can be CR-able
 - b) *Masquerade Novelty v Unique Industries* - court ignores statutory language and declares masks have no utility that does not derive from appearance
 - c) Other examples: belt buckles, animal mannequins, torso forms
 - 2) Judge Newman test: aesthetic features are conceptually separable if the article stimulates in mind of beholder a concept that is separate from the concept evoked by the utilitarian function (doesn't match up with statute)
 - v. Protection of Characters - was a new and different character created?
 - 1) *Warner Bros v ABC* - ABC's show "Superboy" did not infringe on character of Superman (court assumed character was CR-ed) b/c shows were different
 - d. "Fixed" works - evidentiary and policy reasons - constitution requires a "writing"
 - i. International Hologram Manufacturers Association - CR office issuing CRs, prof doesn't think they are protectable
 - ii. Examples: sand castles, fireworks displays
 - iii. *Case example* - computer program is considered "fixed" even though it only exists on a RAM drive
 - e. Excluded Subject Matter
 - i. Functional Aspects
 - ii. Infringing material
 - iii. Government Works (Fed only) - can't be CR-ed (case opinions can't be CR-ed by West)
 - f. Thin Copyright - protects only verbatim copying of the work
 - i. Examples: news story
- III. Bundle of Rights of CR Owner
 - a. Sec 106 Rights
 - i. Rights you get with CR:
 - 1) **Reproduce in copies or phonorecords**
 - a) Not all copying unlawful
 - i) *Cartoon Network v CSC Holdings* - DVR case, can cable company copy programs? Court couldn't distinguish from Sony, public policy reasons

- Buffering - 1.2 seconds in "buffer" was too short a time, constitutional limit, not "fixed"
 - ii) *Sony v Universal* - VRC copying was considered "time shifting," substantial non-infringing uses
- 2) **Derivative works** - no fixation required
- a) Preexisting work that is recast, transformed, or adapted
 - i) Examples = translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction
 - b) Limited derivative works definition:
 - i) CR-able: Derivative work not created unless material added with sufficient creativity to create a new CR-able work (9th circuit disagrees)
 - Prof says statute doesn't say anything about "originality" required
 - ii) Substantial Similarity - no infringement unless D-work is substantially similar to original work
 - c) Possible to infringe both derivative work and underlying work (pirated copies of translation of book ex)
 - d) *Lee v Art Co* (7th cir) - purchasing picture and placing it on tile is not a derivative work, recasting means some sort of *change* to the work (9th cir disagrees, borderline case)
- 3) **Distribute copies to public**
- a) **First Sale Doctrine** - exception to "stick 3", if you obtained copy of a work lawfully, you can do what you want with it (sell it, destroy it, etc)
 - i) **Grey markets** - goods are lawfully *made* (unlike black market)
 - *King Quality Goods v L'anza* - hair product made in US, legally sold to foreign co, then re-imported to US (cheaper prices), court said this is protected by 1st Sale doctrine, holding only applicable to "round trip" goods
 - *Cosco v Omega* (9th Cir) - 1st sale doctrine only applicable to goods made in US (territorial view of CR law), USSC granted cert
- 4) **Perform work publicly** (literary, musical, dramatic, choreographed, pantomimes, motion pictures, and other audiovisual works only)
- a) What is a "public performance"?
 - i) Public (101 def) - place open to public or place where substantial number of persons outside of normal circle of family/friends are gathered; or transmitted to multiple public locations, commercialization irrelevant
 - ii) *Columbia Pics v Redd Horne* - transmit movies from central place in video store to private viewing rooms violated public performance right
 - iii) *Columbia Pics v Aveco* - private viewing rooms in public place where customer brings in video tape still considered public b/c any person could use them (still open to public)
 - iv) *Columbia Pics v Professional Real Estate* - renting movies in hotel rooms is different, not public performance (prof disagrees)
 - b) Small business exception - must be "commonly found in homes"
 - i) *NFL v McDee & Reynolds* - satellite receivers were not "commonly found in homes" (1986) so small business exception did not apply to bar rebroadcasting "blacked out" football game to patrons
 - ii) *Aiken* Exception - imposes liability where proprietor uses a commercial sound system
- 5) **Display the work publicly** (literary, musical, dramatic, choreographed, pantomimes, motion pictures, and other audiovisual works only)
- 6) **Sound recordings only - perform publicly by means of a digital audio transmission**
- a) Compulsory mechanical license - royalty scheme for non-dramatic musical works, defined by statute (but most don't use statutory scheme, handled by Harry Fox Agency), purpose: radio station music play

- i) *Leadsinger v BMG* - Karaoke machine, words + music reproduced on screen is something MORE than what is covered by CML, must negotiate license with rights-holder, not covered by CML statute
 - ii. Sound recordings - not conferred all of "bundle of rights" - not performance rights
- b. Quasi Copyrights of DMCA
 - i. 17 USC 1101 - unauthorized acts subject to same remedies as infringer of CR (quasi-CR)
 - 1) Fixes or reproduces sounds or images of live musical performance
 - 2) Transmits or communicates to public sounds of live musical performance
 - 3) Distributes, sells, rents, or traffics in copy regardless of whether fixation occurred in US
 - 4) Unconstitutional? Not commerce clause-based, not really CR protection (IP Clause based)
- c. CR Ownership & Transfer
 - i. Ownership - vests initially with author of work
 - 1) Author - not defined in statute, case law says "one to whom a work owes its origin"
 - 2) Multiple Ownership -
 - a) Co-owners - can exercise ALL rights of owner
 - b) Joint author requirements:
 - i) Intent (artistic control is key)
 - ii) Contribution must be independently CR-able
 - 3) Collective Works
 - a) Publisher - holds CR to collective work; can only reproduce & distribute:
 - i) Contribution as part of collective work
 - ii) Revised collective work
 - iii) Later collective work in same series
 - b) Individual author - still holds CR to individual work
 - c) *Jarvis v K2* - photos used as part of collage ruled collective work
 - 4) Works made-for-hire
 - a) Employer owns CR (unless written agreement to contrary)
 - i) Two scenarios:
 - Works prepared by employee in scope of employment
 - ▶ Agency Law principles (SSA & Fed taxes most important)
 - Works specifically ordered or commissioned for use:
 - ▶ As contribution to collective work
 - ▶ Part of motion picture or other audio visual work
 - ▶ As translation, supplementary work, or compilation
 - ▶ Instructional text, test, or answer material for test, or atlas
 - b) Written agreement timing:
 - i) 2nd cir - doc can be written later, but must be confirming earlier agreement
 - ii) 7th cir - before work commenced
 - iii) *Playboy v Dumas* - implicit agreement, writing confirmed prior agreement after initial checks signed
 - ii. Transfer - can transfer intangible rights in whole or in part by operation of law
 - 1) Writing required for effective transfer (204(a))
 - a) *Playboy v Dumas* - question of whether or not there was a "writing", term "copyright" not mentioned in language on back of checks endorsed by artist
 - 2) Non-exclusive assignment = license
 - 3) Termination of transfers
 - a) 1976 act:
 - i) Can be terminated by author, or person who has more than 1/2 interest, or majority of authors
 - ii) At the end of 35 years you can terminate during 5 year period
 - iii) Advance notice on CR owner required (2 years)

- b) *Penguin v Steinbeck* - widow renegotiated agreement once, court said heirs court not terminate b/c statute only gave right to renegotiate once
 - c) Derivative work rights - keep CR, even if made by separate author during transfer period
 - d. Duration of Copyright - life of author + 70 years (1976 act, retroactive)
 - i. Works for hire - 95 years from date of publication, or 120 years from creation, whichever expires first
 - ii. Joint works - life of last surviving author + 70 years
 - iii. Constitutional? Court defers to Congress
 - e. Moral Rights? Not in CR act, independent from economic rights
 - i. **VARA** - Visual Artists Rights Act - only applies to "visual" artists
 - 1) Visual art - painting, drawing, print or sculpture (single copy, or fewer than 200 limited ed copies) OR still photographic image for *exhibition purposes only*
 - 2) Rights conferred:
 - a) Claim authorship of work
 - b) Prevent use of name associated with work he/she did not create
 - c) Prevent intentional distortion, mutilation, or modification of work which would be prejudicial to honor or reputation
 - d) Prevent intentional or negligent destruction of work of "recognized stature"
 - i) Recognized stature - not defined, might be jury question or:
 - Viewed as meritorious
 - Recognized by art experts or other members
 - 3) Can be waived in a signed writing (inconsistent with true moral rights)
 - 4) Site specific / integrated art - place can be integral to the art, court says not protected by VARA
 - a) Public preservation exception
 - ii. Case examples
 - 1) *Crimi v Rutgers Presbyterian Church* - church contracted w/ painter for fresco, didn't like it and had it painted over, artist objected. Court said no moral rights, not even CR rights - church bought fresco, they can do what they want with it
 - 2) *Gillian v ABC* - court used Lanham act as basis for siding with Monty Python ("reverse passing off"), but did they really create moral rights? USSC stopped in *Dastar*
 - 3) *Ed Ruscha Case* - mural on side of building completed before VARA but after CA statute, artist prevailed in trial court, but settled for \$1M before appeal
 - iii. Other rights not recognized by US:
 - 1) Personality rights - Germany - publisher can speak in name of author
 - 2) Equitable remuneration - additional payment in exchange for giving up certain rights (inalienable)
 - iv. Berne Convention - requires countries to recognize moral rights of authors (is US in compliance?)
 - v. States? Some courts say moral rights fall under state jx, problem is when states try and enact, they get preempted by CR act (VARA, unless rights are not "equivalent")
 - 1) New York Artist Authorship Rights Act
 - 2) California Artist Protection Act
- IV. Infringement - exact copies & substantially similar copies ("creative copying")
- a. TEST:
 - i. Copying or independent creation
 - 1) Proved by:
 - a) Access to work AND (striking similarity can substitute for access)
 - b) Sufficient similarity to work
 - i) 9th cir - 2 step test: (*Equalizer Case*)
 - Substantial similarity of ideas [extrinsic]
 - Substantial similarity of protectable expression [intrinsic]
 - ii) 2nd cir - 3 step test:

- Copying or independent creation [intrinsic]
 - Unlawful appropriation [abstraction]
 - Directly compare works, are they similar? [extrinsic]
 - ii. Unlawful appropriation - "too much of the good stuff?"
 - 1) QUALITY and QUANTITY of what was taken
 - a) Original expression (strongly protected), facts (unprotected), or thinly protected material?
 - 2) De Minimum copying - is there a minimum amount you can take that is ok?
 - b. Fair Use
 - i. Categories (statute): criticism, comment, news reporting, teaching, scholarship, research
 - ii. Factors (court):
 - 1) Nature of the work - if unpublished, scope of FU is narrow
 - a) Derivative vs transformative - can "jump the gap" and argue for fair use
 - 2) Purpose of the use - profit from CR material w/o paying for work?
 - a) Parody/satire - transformative use + social value
 - i) Parody - can take more "good stuff"
 - ii) Satire - using a vehicle to make fun of something else (*Dr. Seuss v Penguin*)
 - 3) Amount of use
 - 4) Effect on market - most important element
 - iii. *Harper Row v Nation* - part of manuscript published before release date, HR lost contract w/ Time, court said not a fair use b/c of economic impact (really about control)
 - iv. *Salingerv Random House* - unpublished material used, so no fair use found
 - v. *LA News Service v K-CAL* - court did not analyze strength of CR, maybe fair use should be easier for less protected material?
 - vi. *Campbell v Acuff-Rose* - 2 Live Crew use of "Pretty Woman" considered parody, transformative use
 - vii. *Wall Data v LS County Sherriff* - seems to say if you negotiate for a license, you can't argue fair use (over-installation of software program)
 - viii. *BMG v Gonzales* - fair use defense for downloading songs for "preview" purposes failed
- V. Procedural Aspects
- a. Preemption
 - i. Before 1976 act - preemption the exception, not the rule (*Goldstein v CA Sup Ct*)
 - ii. 1976 act - preemption clause (explicit if rights are equivalent)
 - 1) 2 step analysis:
 - a) Work subject to dispute must be within scope of 302 (CR act)
 - i) Applies to works in the scope of CR act, but may not be protectable
 - b) State cause of action which created legal or equitable right equivalent to 106 right? If so, preempted
 - i) Must SINGULALRY conflict w/ bundle of rights
 - iii. *INS v AP* - court created "hot news" exception based on unfair competition, maybe field preemption?
 - b. Remedies
 - i. Registration - have to register before filing suit (statute = "before award of damages made")
 - 1) Circuit split:
 - a) 5th - registration before end of suit
 - b) 11th - registration in hand before suit filed
 - ii. Injunctions - presumption of irreparable injury in IP cases
 - iii. SOL= 3 years
 - c. Vicarious & Contributory Infringement - must establish primary liability first
 - i. Vicarious - based on agency principles (respondeat superior) - create environment and encouraging or promoting actual infringement (KNOWING = key)
 - 1) CONTROL + BENEFIT (economic or other)
 - ii. Contributory - create environment where infringement activities may (but not necessarily) occur

- 1) Staple article of commerce doctrine - defense, something that has substantial non-infringing uses (*Sony* DVR case)
 - d. Formalities - largely unnecessary now
 - i. 1909 act - required publication & notice (©) for CR
 - ii. Registration - not necessary for CR protection, but required if seeking statutory damages
 - 1) Dates work, provides prima facie evidence of validity
 - 2) Registration, refused registration, or application on file (9th circuit only) required for infringement suit
 - iii. Notice requirements:
 - 1) 1989 - present - notice is optional
 - 2) 1978 - 1989 - notice required, but omission can be cured
 - 3) Before 1978 - notice required
- VI. General
- a. Berne Convention - 1883
 - i. US didn't sign for >100 yrs
 - ii. Eliminated formalities, gives moral rights to authors
 - 1) Is US really in compliance RE: Moral rights?
 - b. US Copyright Law
 - i. IP Clause - Art I, sec 8 - "Congress shall have the power...to promote progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."
 - 1) No other country has clause in constitution for CR works = UNIQUE
 - 2) "writings" - Congress has expanded this term to encompass much more
 - a) *Oscar Wilde Case* - court defers to Congress on definition of "writing"; meant to be interpreted liberally
 - ii. Copyright Act - 1909
 - iii. Copyright Act - 1976
 - iv. Sony Bono CR Term Extension Act - 1998 - extends CRs into near in perpetuity
 - v. DMCA - 1998 - prevents others from developing technology that infringes on others CRs