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PubPol 688/SI 519 - Intellectual Property and Information Law, Fall 2008

Pilz, Bryce

Copyright Background

Class 3 – September 19, 2008

SI 519/PubPol 688

Bryce Pilz

Fall 2008
Copyright Background

• Why – Rationales for Copyright
• What – The Rights
• What Not – The Exceptions and Material Not Covered
• Other Stuff
Copyright Background

• Why – Rationales for Copyright
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Art. I, Sec. 8, Cl. 8:

“The Congress shall have the power... To Promote the Progress of Science and the useful Arts by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries.”
Rationales For Copyright in General

• Natural Rights
  – Everyone is entitled to the product of one’s labor
  – European

• Utilitarian Rights
  – Providing an incentive for innovation by giving creators and distributors a return for their investment
  – Economics-based
Not the Rationale

• “sweat of the brow” rationale is dead

• *Feist* – no protection for the amount of effort in creating your work; protection is for the expression
  - White pages of phone directory not entitled to copyright protection
  - Directory as a whole is protected because there is originality in the introductory language and in arrangement of yellow pages
Rationale for U.S. Copyright Law

• To Promote Learning

  – “Science” meant learning in the 18th century

• It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." [] It is, rather, "the essence of copyright," and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.
Other Influences

• Berne Convention (1989 – U.S. signed)
  – Countries must treat works from signatory country as they would their own
  – Minimum of life + 50 (individuals)/75 (works for hire)
  – No formalities
Other Influences

• Why is copyright act so long?

• Significant corporate monetary interests at stake

Copyright Background

- Why – Rationales for Copyright
- **What – The Rights**
- What Not – The Exceptions and Material Not Covered
- Other Stuff
What Copyright Covers

• Original works of authorship fixed in a tangible medium
  – (literary, dramatic, musical, visual, architectural, and other kinds of works)
  – Compilations?
Copyright Online

• Expressions of authorship
  – Source code underlying a work
  – Traditional works of authorship included online
  – Look and feel of webpage? (sufficiently original and not functional or methods of operation)
The Rights

- Reproduction right
- Derivative works
- Distribute
- Perform publicly
- Display publicly
Enforcing the Rights

• (1) Validly owned copyright; (2) copying of original elements of protected work (access and similarities); (3) defenses?

• Copying can be literal or non-literal
Copyright Background

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The Exceptions

• Sec. 107-122 give various exceptions
• 107 – Fair Use
• 108 – Libraries
• Other relatively specific exceptions
Rights Not Covered

- Right to perform privately
- Use of a specific work after the first sale
- Ideas
- Facts
- Functional elements
Rights in an Original Work of Authorship

106
- Reproduce,
  Derivative works,
  Publicly perform,
  Distribute,
  Publicly display

107-122
Ex) fair use

Ideas
Facts
Functional elements
Use after first sale
Private performance
Copyright Background

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Term

- **Individual**: Life of author + 70 years
- **Works for hire**: 120 years after creation or 95 years after publication; whichever is shorter

![Chart showing duration of copyright term by year and act](http://creativecommons.org/licenses/by-sa/3.0/deed.en)
Statutory Damages

• Up to $150,000 per work
  – No need to show lost profits
DMCA

• Forbids circumvention of DRM systems
• Outlaws development or trafficking of any DRM circumvention device or technology
• Limited exceptions to liability – no fair use
• Limits service provider liability for merely transmitting information over the Internet – “take down notices”
Formalities

- No need to provide notice or register
- Notice – no innocent infringement defense
- Registration –
  - required to file lawsuit;
  - prima facie evidence of valid copyright;
  - eligible for statutory damages
Kelly v. Arriba

• Discussion
Fair Use Drill

• 1) Star Wars
• 2) Napster
• 3) Copying for research purposes
• 4) Video game screen shots
• 5) Abstracts of news articles
• 6) Seinfeld Aptitude Test
• “Galaxy Encyclopedia”
• Alphabetical index of every character, location, theme, weapon, etc.
• Contains some plot summaries, some direct quotes and close paraphrasing
• Section on Luke Skywalker, for example, is 11 pages long
• Lucasfilm is planning their own encyclopedia
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• Software allows users to upload/download MP3 files of copyrighted songs
• Users are anonymous
• No fee
• Some users sample songs on Napster before buying
### Napster

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**Fair Use?**

Unfair

• Employs 400-500 research scientists working on alternative energies
• Subscribes to numerous scientific journals; 3 subscriptions each
• Circulation list for journals
• Scientists often copy articles; may not use
• Ex) one scientist had copied 8 articles, only used 5 of them in research
## Texaco

1) Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes | Unfair

2) Nature of the copyrighted work | Fair

3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole | Unfair

4) Effect of the use upon the potential market for or value of the copyrighted work | Unfair

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Reference: American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995)
• Developer creates “software emulator” which allows console games to be played on personal computers

• Games have higher resolution on PCs

• In advertising, developer shows screen shots from Sony PS3 games next to better resolution screen shots of same game on PC used with “software emulator”
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**Fair Use?**

Fair

Abstracts

• Defendant takes Japanese news articles, pre-edits them, translates them into English, puts them in uniform abstract style and sells them

• Takes 36 minutes on average for each translation/abstraction
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**Fair Use?**

Unfair

“Seinfeld Aptitude Test”

• 132 pages, 643 questions, some multiple choice, some matching, some short answer
• Different levels of difficulty
• Pictures of characters throughout and some direct quoting
• Popularity of show increased upon SAT hitting market
### “Seinfeld Aptitude Test”

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**Fair Use?** Unfair

Reference: Castle Rock Entertainment Inc. v. Carol Publishing Group, 150 F.3d 132 (2nd Cir. 1998)
Week 4 Preview

• Eldred
  – Consider whether CTEA is consistent with purpose of U.S. copyright law (other rationales)
  – Consider how copyright meshes with the First Amendment (p.29)

• National Geographic (Tasini)

• DMCA (1998) – higher ed. setting

• Orphan works (formalities)

• Lessig – copyright reform