IP Survey

- Overheads for module 4:
- Copyright Law

Copyright

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries

U.S. CONST., art. I, § 8, cl. 8.

Patent versus Copyright Law

Patent	©
Subject matter	Subject matter (expression / idea; merger; functionality)
Utility	Threshold – original expression fixed in a tangible medium
Novel – not anticipated	n/a (independent development is a defense)
Nonobvious	n/a
Specification support (written des., enablement, best mode, definiteness)	Formalities (~~notice~~ ~~{publication}~~, registration, deposit)
Duration (20)	Duration (life + 70 for individuals)
Inventorship and Ownership	Authorship and Ownership
Right to exclude others who make, sell, use, offer for sale, or import	Right to prevent unauthorized exercise of the rights granted by a valid copyright: (i) reproduction (copying); (ii) derivative works; (iii) distribution; (iv) public display; and (v) public performance
n/a	Limitations to the exclusive rights: Fair Use and others; first sale limitation on distribution right; limits on display right
Infringement - literal and DOE analysis	Infringement – analysis on a right by right basis; reproduction right infringement has two elements: (i) copying (actual copying); and (ii) improper appropriation (legal copying)

17 USC § 102(a)

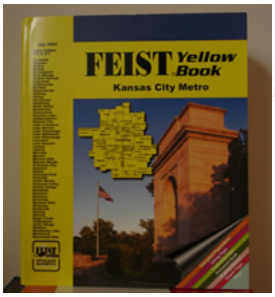
- Copyright protection subsists, in accordance with this title, in original works of authorship ***fixed*** in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a ***machine*** or ***device***.
  - Words in blue bold italics have definitions in section 101.
  - The definitions section also describes various types of “works of authorship”

37 C.F.R. § 202.1

- The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:
  - (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;
  - (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;
  - (c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;
  - (d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.
  - (e) Typeface as typeface.

Feist v. Rural Tel. Service (RTS) (1991) (O'Connor)

- RTS has control of telephone white pages listings for part of the area covered by Feist's NW KS directory
  - What does Feist first attempt to get access to the listings?
- In what way are Feist and RTS competitors?
- How does RTS prove that copying occurred?



Feist

- Subject matter at issue?
  - Facts versus compilations of facts?
- Standard of originality?
  - Independently created
  - Modicum of creativity
- To which “components” of the work does copyright extend?
  - Selection and arrangement
- Disposition of issue in case?
  - Is RTS’ selection and arrangement protectable?

Feist – notes & problem 4-1

- Note 4 - American Dental Assn v. Delta Dental Plans (7th 1997) – case quotes
  - All dental procedures are classified into groups;
  - each procedure receives a number, a short description, and a long description.
  - For example, number 04267 has been assigned to the short description "guided tissue regeneration--nonresorbable barrier, per site, per tooth (includes membrane removal)", which is classified with other surgical periodontic services.
  - A taxonomy is a way of *describing* items in a body of knowledge or practice; it is not a collection or compilation *of* bits and pieces of "reality".
- Prob. 4-1
  - What outcome?

Fixation definition - §101

§101 - A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

§102(a) - Copyright protection subsists, in accordance with this title, in original works of authorship ***fixed*** in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a ***machine*** or ***device***.

- Questions:
  - What about perforated rolls used in “player pianos”?
  - Is the projection of this overhead fixated?
  - Opening a file from a computer’s hard drive?

White-Smith

Formalities

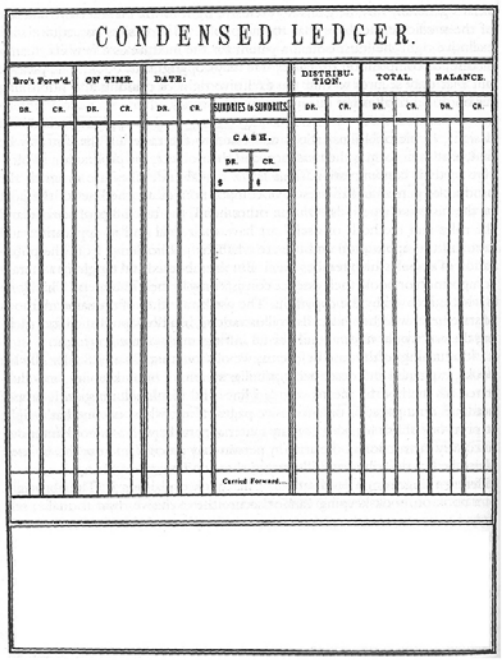
	Notice	Publication	Registration	Deposit (library)
1909 Act	Required, must provide date, author, copyright word/symbol	Required (divestive / investive) [not defined]	Not required, but prerequisite for renewal or bringing claim	"Mandatory," some potential for forfeiture
1976 Act / pre-Berne	Still required, but more lenient if fail to provide notice	Not required, but triggers notice requirement [defined term]	Not required, but: (I) prima facie validity (ii) required before claim (iii) statutory damages and fees	"Mandatory," but only penalty is a fine
1976 Act / post-Berne	Not required, but if notice, limits innocent infringement mitigation	Not required	Same, except that for foreign (Berne country) works registration is not required pre-suit	Same

Idea-Expression Dichotomy

102(a)	Copyright protection subsists, in accordance with this title, in original works of authorship . . . ***[expression]***
versus	
102(b)	In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. ***[idea]***

Baker v. Selden

- If Selden's forms (or something in his book) are protectable, is what Baker took infringement?
  - Is Baker's expression a copy of, or similar to, Selden's expression?
- Assuming that there is protectable subject matter in Selden's book
  - Is what Baker took part of that?
- Expression is protected
  - "conveying information"


CONDENSED LEDGER.

Bro't Forw'd. | ON TIME. | DATE: | DISTRIBU-TION. | TOTAL. | BALANCE.

DR. CR. | DR. CR. | DR. CR. | SUNDRIES to SUNDRIES. | DR. CR. | DR. CR. | DR. CR.

CASH.

DR. CR.

$ $

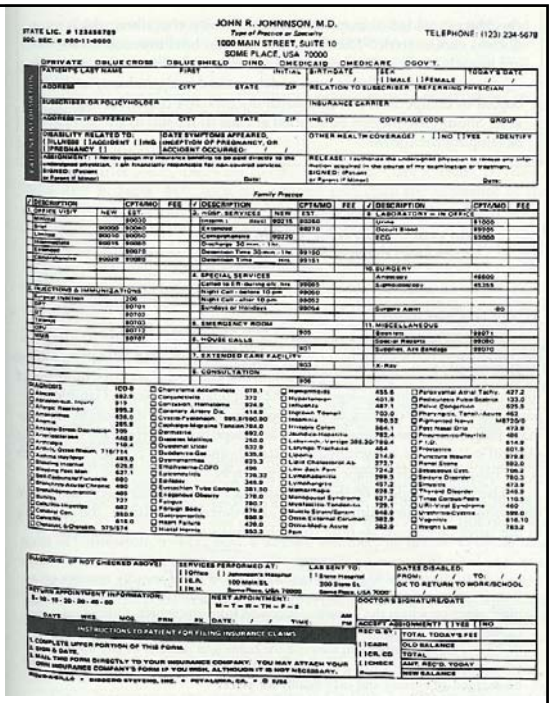
Carried Forward...

Idea-Expression Dichotomy

- Cookbook example
  - List of ingredients
  - Description of specific steps
  - Pictures illustrating techniques
  - Pictures illustrating finished dishes
  - Description of history of dishes
- Which elements are a "procedure, process, or system"?

Problem 4-3, Mediforms

- Do the forms embody expression that
  - "conveys information" more so than Selden's forms?
- What about the selection and arrangement of the information?



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Morrissey v. Procter & Gamble (1st 1967) - Merger

1. Entrants should print name, address and Social Security number on a Tide boxtop, or ***on*** [a] plain paper. Entries must be accompanied by Tide boxtop ***(any size)*** or by plain paper on which the name 'Tide' is copied from any source. Official rules are ***available*** on Tide Sweepstakes packages, or ***on*** leaflets ***at*** Tide dealers, ***or you can send a stamped, self-addressed envelope to***: Tide 'Shopping Fling' Sweepstakes, P.O. Box 4459, Chicago 77, Illinois.

If you do not have a Social Security number, you may use the name and number of any member of your immediate family living with you. Only the person named on the entry will be deemed an entrant and may qualify for a prize.

Use the correct Social Security number, belonging to the person named on ***the*** entry--wrong numbers will be disqualified.

- Merger Doctrine
  - Where there are only one or a few ways to express an idea, not copyrightable
  - Otherwise, effectively grants protection to the idea
    - Exhaust all possibility for future use
- "Thin" copyright? – limits on the number of ways to express
  - Effect on protection?

Copyright – concepts thus far

- § 102(a) - Copyright protection subsists in
  - original works of authorship [Feist, American Dental Association]
  - fixed
  - in any tangible medium of expression [a "copy"]
  - now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. [White-Smith "player piano"]
- § 102(b) – "copyright protection for an original work of authorship [does not] extend to any idea . . ."
  - Idea-expression dichotomy [Baker v. Seldon, problem 4-3]
  - Other limitations
    - merger
      - [Morrissey]
    - Historical facts and research
    - Scenes à faire

Copyright – fixation – wisdom from the Copyright Office

How do I protect my sighting of Elvis? Copyright law does not protect sightings. However, copyright law will protect your photo (or other depiction) of your sighting of Elvis. Just send it to us with a form VA application and the $30 filing fee. No one can lawfully use your photo of your sighting, although someone else may file [her] own photo of [her] sighting. Copyright law protects the original photograph, not the subject of the photograph.

Useful Article Doctrine – section 101 definitions

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall ***include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned***; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be ***identified separately from, and are capable of existing independently of***, the utilitarian aspects of the article.

A "useful article" is an article having an ***intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information***. An article that is normally a part of a useful article is considered a "useful article".

Mazer v. Stein (1954)

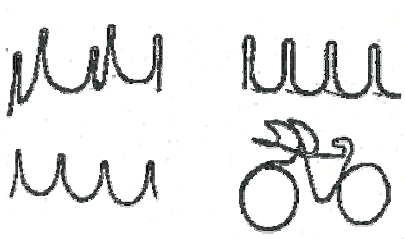
works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned

Test:

- ***an expressive element of a useful article is physically separable if it can stand alone from the article as a whole and if such separation does not impair the utility of the article***

Brandir

Work of applied art or Industrial design?



such design incorporates pictorial, graphic, or sculptural features that can be ***identified separately from, and are capable of existing independently of***, the utilitarian aspects of the article.

Physical versus conceptual separability?

Brandir Test:

- Where design elements can be identified as reflecting the designers artistic judgment exercised independently of functional influences, conceptual separability exists, e.g.,
- Aesthetic, potentially copyrightable elements, are not copyrightable if the product of industrial design

What test would the dissent use?

Conceptual Separability Tests

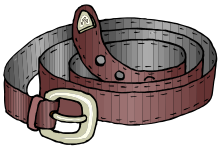
- Primary use
- Whether the aesthetic aspects of the work are "primary"
- Whether the article is marketable as art – economic effect test
- Newman's Test: the article stimulates in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function
- Brandir Test: where design elements can be identified as reflecting the designers artistic judgment exercised independently of functional influences, conceptual separability exists, e.g., aesthetic, potentially copyrightable elements, are not copyrightable if the product of industrial design
- Winter's Test: ordinary reasonable observer test – does design of a useful article, however intertwined with the article's useful aspects, cause an ordinary reasonable observer to perceive an aesthetic concept not related to the article's use
- Goldstein's Test: A pictorial, graphic or sculptural feature in the design of a useful article is conceptually separable if it can stand on its own as a work of art traditionally conceived, and if the useful article in which it is embodied would be equally useful without it.

Problems, pg 363-64

- Problem 4-6
- Disney sells a line of telephones in the shape of Mickey and Minnie
  - Pushbuttons on torso
  - Telephone receiver resting on the character's hand
  - Copyrightable?

Note: these two images do not correspond to Prob. 4-6, they are for further discussion

- Problem 4-7
- Arnold Artist designs a gold and silver belt buckle considered "abstract art" based on shape
  - Sell for $200 to $6,000 in jewelry stores
  - Some designs at an art collection
  - Copyrightable or useful article?



Illustrative Works - § 102

1) literary works
   - including non-literal elements such as structure, organization and sequence, but not extending to names, titles and slogans; the less developed a literary character, the less it can be copyrighted
2) musical works, including any accompanying words
3) dramatic works, including any accompanying music
4) pantomimes and choreographic works
   - Protection extends to written or otherwise fixed instructions for performing a work of art
5) pictorial, graphic, and sculptural works
   - Useful article doctrine poses a significant limitation on the scope of protection; scope of protection runs with degree to which author has delineated the subjects of the work; In some cases, such as photographs, drawings and maps, the limited range of expressive choices necessarily limits the scope of protection
6) motion pictures and other audiovisual works
7) sound recordings
8) architectural works
   - New category after Berne implementation in US law; pictorial representations permitted (if building visible from a public place); alterations and destruction allowed, regardless of 106(2)

Illustrative Works - § 102

1) literary works
2) musical works, including any accompanying words
   - Work must be original in its melody, harmony or rhythm, individually or in combination.
     - But, rhythm is the least likely aspect in which originality may be manifested
   - Non-dramatic musical compositions are subject to a compulsory license once released to the public – "cover license" under § 115
3) dramatic works, including any accompanying music
4) pantomimes and choreographic works
5) pictorial, graphic, and sculptural works
6) motion pictures and other audiovisual works
7) sound recordings
   - Since 1972, sound recordings are protectable independently of the musical, dramatic, or literary works which are recorded; they are a separate work; does not include sounds accompanying a motion picture or audiovisual work; no mechanism such as the "cover license;" embodied in a "phonorecord"
   - No general public performance right
   - Sometimes not clear who the "author" of a sound recording is; singer, band, studio engineer? – typically handled by contract
8) architectural works

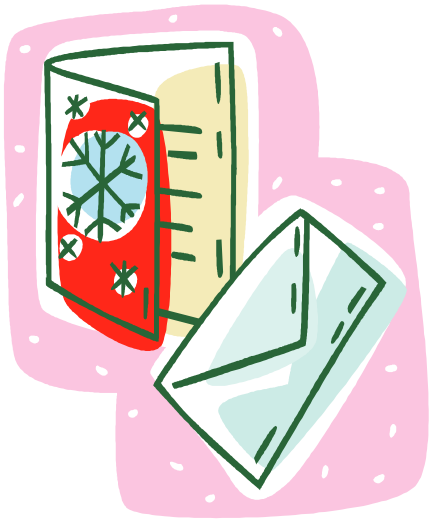
Illustrative Works - § 102

1) literary works
2) musical works, including any accompanying words
3) dramatic works, including any accompanying music
   - one that portrays a story by means of dialog or acting and [that] is intended to be performed. It gives direction for performance or actually represents all or a substantial portion of the action as actually occurring rather than merely being narrated or described
4) pantomimes and choreographic works
5) pictorial, graphic, and sculptural works
6) motion pictures and other audiovisual works
   - AV works
     - series of related images which are intrinsically intended to be shown by the use of machines . . . together with accompanying sounds, if any . . .
   - Motion pictures
     - A subset of AV works – "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any"
7) sound recordings
8) architectural works

Derivative Works; Compilations

- is “based upon one or more preexisting works . . . [and is any] form in which a work may be recast, transformed, or adapted”
- Examples include:
  - translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation
  - a work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship
- Why have derivative works protection?
  - Chain of products; new expression from public domain materials; different markets & licensing
- Compilations
  - a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works
- Effect of section 103?

Roth Greeting v. United Card



- Need to consider card as a whole – text, arrangement, art work, association between art and text
- View of dissent?
- Good law after Feist?
  - Is selection or arrangement original? meet the modicum of creativity?

Works for Hire – CCNV v. Reid (US 1989)

- § 101 - A "work made for hire" is –
  - **(1)** a work prepared by an ***employee*** within the ***scope of his or her employment***; or
  - **(2)** a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas,
    - if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.
      - For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and
      - an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.
- works prepared by employees AND within the scope of employment (and also § 201(b) requirement that work be prepared FOR the employer)

Works for Hire – CCNV v. Reid (US 1989)

- According to the U.S. Supreme Court, is the work a work for hire under either part of the definition in section 101 of the 1976 Copyright Act?
- What is the Court's reasoning?
- What is the correct test for determining when a work was prepared by an employee?
  - possible tests for when a work is prepared by employee in scope of employment
    1. Right to control the product test
    2. Actual control test
    3. Agency Law test
    4. Formal Salaried Employee test
  - Supreme Court uses statutory interpretation, legislative history, and policy argument (based on need for certainty) to conclude that the Agency Law test applies.

Works for Hire – CCNV v. Reid (US 1989)

- Agency Test
  - Nonexhaustive list of factors, no one factor is determinative.
    - the hiring party's right to control the manner and means by which the product is accomplished
    - the skill required
    - the source of the instrumentalities and tools
    - the location of the work
    - the duration of the relationship between the parties
    - whether the hiring party has the right to assign additional projects to the hired party
    - the extent of the hired party's discretion over when and how long to work
    - the method of payment
    - the hired party's role in hiring and paying assistants
    - whether the work is part of the regular business of the hiring party
    - whether the hiring party is in business
    - the provision of employee benefits
    - and the tax treatment of the hired party

Joint Works

- A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."
- Each co-owner enjoys undivided ownership in the copyrighted work and may exercise independently the "exclusive" rights.
- Requirements to prove a joint work
  - Contemporaneous collaboration, or
  - Evidence that each author knows at the time the work was created that her contribution would be later integrated as an inseparable or interdependent part of a unitary work.

NY Times v. Tasini (US 2001)

- § 201(c) Contributions to Collective Works. - Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, ***any revision of that collective work***, and any later collective work in the same series.

- What about online databases?
  - ***online databases are not, under 201(c), revisions or later collective works in the same series***
- Effect?

Duration and Renewal

Date Work Created	Protected From	Term of Protection
January 1, 1978 or thereafter	When the work is fixed in a tangible medium of expression	Life + 70, if corporate, anonymous, pseudonymous entity, earlier of 95 from publication or 120 years from creation.
Published between start of 1964 and end of 1977	When published with notice	28 years for first term, automatic extension for 67 years for second term
Published between 1923 and end of 1963	When published with notice	28 years for the first term, could be renewed for 67 years for second term.
Created before January 1, 1978, but not yet published	January 1, 1978, the effective date of the 1976 Act which eliminated common law copyright protection	Life of the author + 70 years, or at least until 2003 if the work remains unpublished, if the work is published by 2003, term expires in 2048.
Sound recordings created prior to February 15, 1972	Depends on treatment under applicable state law. § 301(c).	

Ownership, Division, Transfer

- Ownership, § 202:
  - Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.
- Example – Jones authors a letter and sends it to Smith:
  - Smith can view it, show it to others; but can't make copies, derivative works, distribute it (other than the first copy), or perform or display it publicly
- Under § 201(d), for example, Jones can assign to Williams the right to distribute copies of the letter, and exclusively license to Thayer the right to display the letter publicly
- Under § 203, for example, Jones can terminate the transfer to Williams between the 35th and 40th year after the assignment

Exclusive Rights in © Works - § 106

- Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
  - **(1)** to reproduce the copyrighted work in copies or phonorecords [material object in which sound is fixated . . .];
  - **(2)** to prepare derivative works based upon the copyrighted work;
  - **(3)** to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
  - **(4)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
  - **(5)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
  - **(6)** in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission

Right to Make Copies – Arnstein v. Porter

Arnstein – "I Love You Madly"

Porter – "Night and Day"

- Arnstein sued Cole Porter for infringement of Arnstein's compositions
  - 3 compositions alleged to infringe
  - Including
    - "I love you madly"
      - Allegedly infringed by "Night and Day"
    - "A mother's prayer
      - Allegedly infringed by "My Heart Belongs to Daddy"
  - Right allegedly infringed – reproduction right

Right to Make Copies – Arnstein v. Porter

Arnstein – "I Love You Madly"

Porter – "Night and Day"

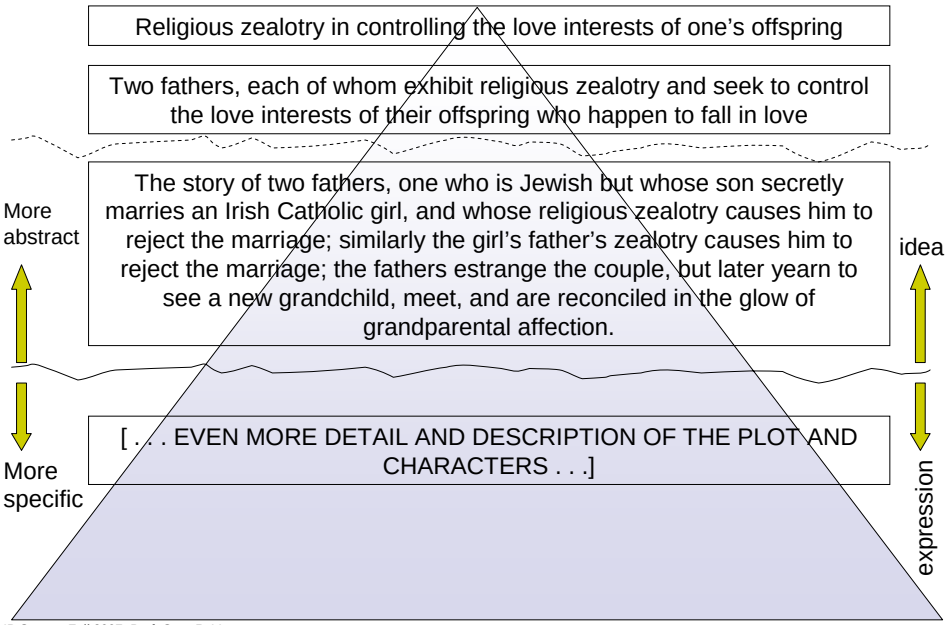
- If evidence of access and similarities exist – allow fact finder to determine whether the similarities are sufficient to prove ***copying***
- If copying, did it go so far as to constitute ***improper appropriation*** - infringed if reproduce it in whole or in any substantial part

http://library.law.columbia.edu/music_plagiarism/case_page.html

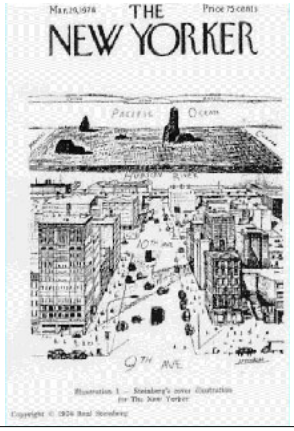
Nichols v. Universal Pictures

- Improper Appropriation
  - Distinguishing protected versus unprotected expression
    - Abie's Irish Rose
    - The Cohens and the Kelleys
  - Characters and sequence of incident
    - Development of plot and characters
  - Common matter of plot
    - a quarrel between a Jewish and an Irish father
    - the marriage of their children
    - the birth of a grandchild
    - a reconciliation
  - Character comparison

Nichols v. Universal – Abie's Irish Rose



Improper Appropriation – Steinberg v. Col.



- Does the court analyze copying and improper appropriation separately?
- Use of Access + Similarity? Use of sliding scale?
- Idea is not merely taken: "idea of a map of the world from the view of an egocentrically myopic perspective "
- Items taken are not merely "scenes a faire" – "incidents, characters or settings which, as a practical matter, are indispensable or standard in the treatment of a given topic"

Copyright Infringement Problems

- Problem 4-22
  - Musical composition by "sampling" from others' work
- Problem 4-23
  - J. D. Salinger's letters

Derivative Works

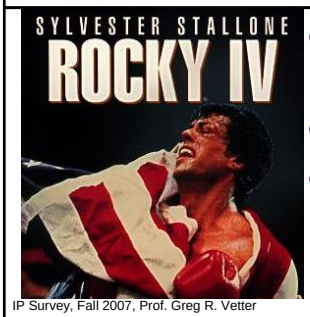
- § 101 Definition:
  - [A] work based upon one or more preexisting works,
    - such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation,
    - or any other form in which a work may be recast, transformed, or adapted.
    - A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work"

Derivative Works

- § 103
  - (a) copyright . . . includes compilations and derivative works, but protection for a work ***employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully***
  - (b) copyright in a compilation ~~or derivative work~~ extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

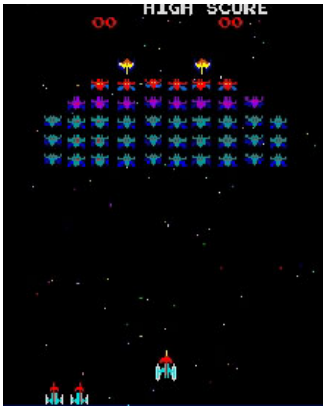
Derivative Works

Derivative Work		Compilation
Underlying work tends to pervade		infringing portion is easily severable; scope of the compilation author's authorship is easily identifiable (ascertainable).
New screen play for a new story using only previously developed characters		Poetry anthology



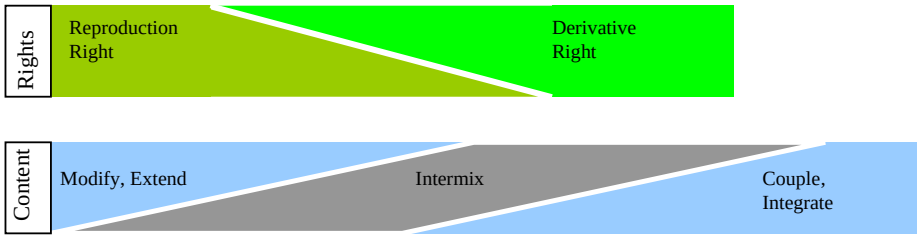
- Uncertainty as to what is and is not a derivative work
- Principle of "severability"
- General rule is that a derivative work using underlying material unlawfully is not eligible for copyright protection itself

Midway Mfg. v. Artic Int'l



- A speeded up video game is held to be a derivative work
- Opinion can be thought to apply one well-known copyright scholar's test for the fuzzy line between a mere reproduction as compared to a derivative work:
  - the point where the contribution of independent expression to an existing work effectively creates a new work for a different market

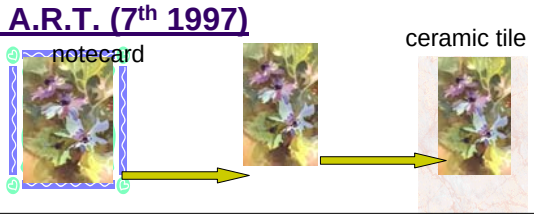
Derivative Works – contrast with non-literal infringement of the reproduction right



Distribution Right

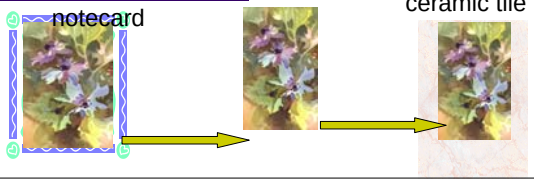
- § 106(3):
  - "Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . .
    - to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending"
- "First sale" doctrine - § 109(a):
  - "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of ***that*** copy or phonorecord."
    - But, § 109(a) does not apply to the rental of phonorecords or computer programs for profit. See § 109(b)

Lee v. A.R.T. (7th 1997)



- A.R.T. trimmed the card images, adhered the cards to a ceramic tile, and covered the image with a clear epoxy resin. A.R.T. did not reproduce any of Lee's cards.
- The Seventh Circuit found that this was not infringement of Lee's exclusive rights
  - "one might suppose that this is an open and shut case under the doctrine of first sale"
- Lee argued that the tile-mounted art was a derivative work, which would mean that the first sale doctrine of §109(a) (which only limits the distribution right) would not bar infringement.
  - The Seventh Circuit disagreed; the tile did not fit into any of the classic statutory terms used to describe a derivative work, and was not a "transformation" under the catch-all provision.
    - "the copyrighted note cards and lithographs were not "transformed" in the slightest"

Lee v. A.R.T. (7th 1997)



- The Seventh Circuit reasoned that tile-mounting is merely a means of displaying the original work.
  - A.R.T.'s mounting of Lee's works on tile is not an "original work of authorship" because it is no different in form or function from displaying a painting in a frame or placing a medallion in a velvet case. No one believes that a museum violates § 106(2) every time it changes the frame of a painting that is still under copyright, although the choice of frame or glazing affects the impression the art conveys, and many artists specify frames (or pedestals for sculptures) in detail. [The Ninth Circuit cases which hold that tile-mounting is a derivative work] acknowledge that framing and other traditional means of mounting and displaying art do not infringe authors' exclusive right to make derivative works.
- There is a circuit split with the Ninth Circuit as to whether tile-mounting creates a derivative work.

Public Performance and Display Rights

- § 101 - to "***display***" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially
- § 101 - to "***perform***" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible

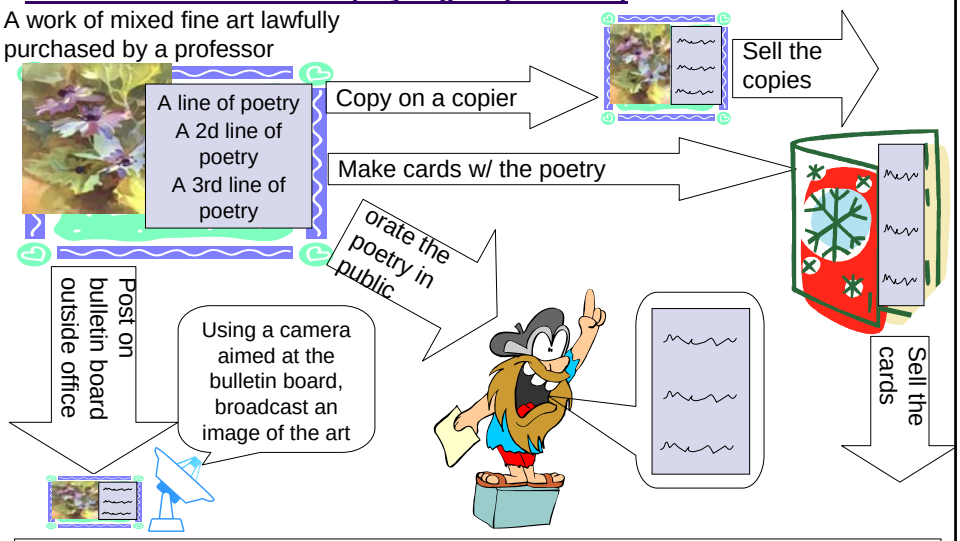
Public Performance and Display Rights

- If it moves, it's a performance; if its stays still, it's a display
- § 101 - to perform or display a work "***publicly***" means –
  - **(1)** to perform or display it at a place
    - open to the public or
    - at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
  - **(2)** to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

§ 109(d)

- The privileges prescribed by subsections
  - 109(a) [first sale doctrine] and
  - 109(c) [limitation on the display right]
  - do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

Public Performance & Display Rights (& others)



- Considering section 109, but ignoring any other possible exemptions arising from sections 107 through 121, which actions infringe which rights?

Statutory Limits on Rights

- Libraries
  - can make 1-3 copies for certain noncommercial purposes (replacement of damaged copy; archival; etc.) § 108
    - *no* general exemption for libraries
- Certain public performances
  - classroom performances §110(1)
    - *any work*
  - transmissions by govt. or nonprofit education org. §110(2)
    - *nondramatic only*
    - *received in classroom or handicapped space*
  - for church services §110(3)
    - *literary work (nondramatic only)*
    - *musical works (dramatic or nondramatic)*
    - *does not cover plays §110(3)*

Statutory Limits on Rights

- Certain nonprofit performances §110(4)
  - literary or musical work
  - dramatic or nondramatic
  - free admission
  - no $$ to performers or organizers; net proceeds to charity
  - copyright owner can object
- Radio/TV at small businesses §110(5)(a)
  - radio and TV in stores, restaurants, bars
  - can't have any charge for the transmission
  - must have "private homes" type gear
  - any type of work

Statutory Limits on Rights

- Radio/TV music at eateries §110(5)(b)
  - music only
  - non-food/drink place: < 2,000 sq. ft.
  - food-drink place: < 3,750 sq. ft., < 7 speakers! TV < 55-in.!
  - no charge for the music
- Compulsory Licenses
  - Secondary transmissions under certain circumstances where not for profit and not content controlled
  - "cover" license; jukeboxes; public broadcasting
- Exclusions - §112
  - Entities authorized to transmit a performance or display are allowed to keep a small number of copies for archival and security purposes in some cases; but can't claim derivative rights

Problem 4-27

- Ralston hotels, a national chain, offers guests an "in-room video rental"
- A menu is displayed on interactive TV, guest selects movie and starting time
- Movie company sues Ralston, claiming that each selected movie is a "public performance"

Fair Use

- Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work,
  - including such use by reproduction in copies or phonorecords or by any other means specified by that section,
- for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

- In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
  - (1) the purpose and character of the use, including whether such use is of a 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; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors

Harper & Row v. Nation

- purpose and character of the use
  - news reporting [of a sort – "making" news]
  - commercial, not nonprofit
  - the proprietary of the defendant's conduct – fair use presupposes good faith and fair dealing
  - took the most expressive elements, exceeding that necessary to disseminate the facts
  - the Nation article was hastily put together and contained inaccuracies; no independent research, commentary, or criticism
- nature of the copyrighted work
  - unpublished
    - ordinarily, "author's right to control the first public appearance of [her] undisseminated work will outweigh a claim of fair use"
  - historical narrative or biography – factual work to some degree
    - but, the work also had expressive descriptions of public figures

Harper & Row v. Nation

- amount and substantiality of the portion used
  - Nation took the "heart" of the work - the most interesting and powerful passages – because they were President Ford's expression
    - even though the amount taken was quantitatively an insubstantial portion
  - OPPOSITE FACTOR - amount of Nation article taken from Ford's manuscript was approximately thirteen percent of the Nation article; but it served as the focal point
- effect of the use upon the potential market for or value of the work [the most important factor]
  - considering the lone effect of the use, or if it became widespread; for the work and the exclusive rights attaching to the work (such as the derivative works right)
  - because Ford's expression was quoted directly, adding a false air of authenticity to the Nation article, this use supplanted a part of the normal market

Sony v. Universal

- Contributory Infringement
  - One who with knowledge of the infringing activity induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a "contributory infringer"
    - What knowledge did Sony have?
- Staple article of commerce doctrine
  - Balancing a copyright holder's legitimate demand for protection, and the rights of others to engage in substantially unrelated areas of commerce
  - Sale of a product does not constitute contributory infringement if the product is widely used for legitimate purposes; it need merely be capable of substantial noninfringing uses
    - Dissent's test – primary purpose and effect of the device
- With respect to authorized time shifting . . .
  - Some content producers approved, in part because such time shifting had viewer-increasing potential

Sony v. Universal

- Fair Use defense for unauthorized time shifting
  - purpose and character of the use
    - time shifting for private home use is a noncommercial, nonprofit activity
    - time shifting yields societal benefits in expanding access to free TV programming [public benefit factor?]
  - nature of the copyrighted work
    - provided free of charge
  - amount and substantiality of the portion used
    - entire work is reproduced, but this does not have its "ordinary effect of militating against a finding of fair use"
  - effect of the use upon the potential market for or value of the work [the most important factor]
    - no harm to the market has been shown: no proof of past harm to plaintiffs' market and also no substantial likelihood of future harm

Am. Geophysical v. Texaco

- purpose and character of the use
  - personal convenience; systemic system of future retrieval and reference; facilitated by library circulation
  - COUNTERPOINT – portability for use of article subset in lab; eliminate exposure of original to lab
  - commerciality; transformative use
  - predominant archival purpose
  - DISSENT
    - reasonable and customary uses are likely to be fair
    - use does not become "unfair" when copyright holder finds a way to ask for payment
    - copying as a form of note-taking; articles not resold; institutional context should not matter
- nature of the copyrighted work
  - primarily factual – so not in the "core" of copyright protection

Am. Geophysical v. Texaco

- amount and substantiality of the portion used
  - entire articles copied
- effect of the use upon the potential market for or value of the work
  - relevant market is for individual articles
    - possibly look to the market for the composite work, journals, as proxy for impact on relevant market – but here it is a poor proxy
    - impact on subscriptions/back-issues
  - licensing of individual articles – copying rights – availability of a payment mechanism
  - DISSENT
    - subscription rate was double for institutions
    - no real market yet established for photocopy licensing
    - majority's reasoning is circular

Campbell v. Acuff-Rose (1994)

Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you, you're not the truth,
No one could look as good as you
Mercy
Pretty Woman, won't you pardon me,
Pretty Woman, I couldn't help but see,
Pretty Woman, that you look lovely as can be
Are you lonely just like me?
Pretty Woman, stop a while,
Pretty Woman, talk a while,
Pretty Woman give your smile to me
Pretty Woman, yeah, yeah, yeah
Pretty Woman, look my way,
Pretty Woman, say you'll stay with me
'Cause I need you, I'll treat you right
Come to me baby, Be mine tonight
Pretty Woman, don't walk on by,
Pretty Woman, don't make me cry,
Pretty Woman, don't walk away,
Hey, O.K.
If that's the way it must be, O.K.
I guess I'll go on home, it's late
There'll be tomorrow night, but wait!
What do I see
Is she walking back to me?
Yeah, she's walking back to me!
Oh, Pretty Woman

Pretty woman walkin' down the street
Pretty woman girl you look so sweet
Pretty woman you bring me down to that knee
Pretty woman you make me wanna beg please
Oh, pretty woman
Big hairy woman you need to shave that stuff
Big hairy woman you know I bet it's tough
Big hairy woman all that hair it ain't legit
Cause you look like 'Cousin It'
Big hairy woman
Bald headed woman girl your hair won't grow
Bald headed woman you got a teeny weeny afro
Bald headed woman you know your hair could look nice
Bald headed woman first you got to roll it with rice
Bald headed woman here, let me get this hunk of biz for ya
Ya know what I'm saying you look better than rice a roni
Oh bald headed woman
Big hairy woman come on in
And don't forget your bald headed friend
Hey pretty woman let the boys
Jump in
Two timin' woman girl you know you ain't right
Two timin' woman you's out with my boy last night
Two timin' woman that takes a load off my mind
Two timin' woman now I know the baby ain't mine
Oh, two timin' woman
Oh pretty woman

Campbell v. Acuff-Rose (1994)

- purpose and character of the use
  - Inquiry driven by the examples in the preamble; supplant the original or add something new?
  - transformative use versus commerciality
  - Parody versus satire
  - Threshold question:
    - Can a parodic character reasonably be perceived?
  - 6th erred on this factor by applying a Sony commercial use presumption
    - Commerciality is only one element of the first factor
- nature of the copyrighted work
  - Fair use more difficult to establish when works copied are at the "core" of copyright
  - Original song is at the core, but this does not significantly help the analysis since parodies almost invariably copy publicly known, expressive works

Campbell v. Acuff-Rose (1994)

- amount and substantiality of the portion used
  - Reasonable in relation to the copyrighted work as a whole? or reasonable in relation to the purpose of the copying?
    - This factor is assessed from facts that also underlie the fourth factor in assessing whether the parody is a substitute for the original
  - Parody needs to be able to take enough to "conjure up" its parodic twin – create a "recognizable allusion to its object through distorted imitation"
  - Remand for evaluation of this factor – for "repetition of the base riff" in the overall context of parody fair use
- effect of the use upon the potential market for or value of the work
  - Consider harm from the specific copying, and the potential harm if such copying is widespread and aggregated – harm to the market
    - via market substitution for the original or legitimate derivative works of it
  - No presumption of market harm when the "copying" is beyond mere duplication, even if for commercial purposes
    - In Sony, the copy was a verbatim copy, a clear market substitute
  - There is no protectable derivative market for criticism
    - Originators unlikely to trade in a market of works criticizing the original
  - Also have to remand for evaluation of this factor
    - the parody's effect on the market for non-parody, rap derivative works of the original

Other Defenses

- Independent creation
- Consent / license
- Inequitable conduct
- Copyright misuse
- First Amendment
- Immoral / illegal / obscene works
- Statute of limitations