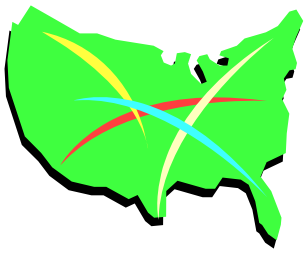
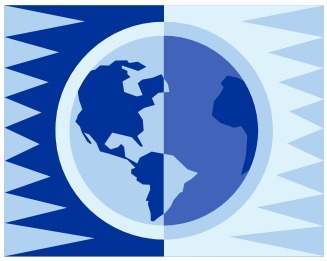
IP Survey

- Module 4
- Copyright

Yu, The Copyright Divide





- Views of
  - Dickens
  - Trollope
  - Twain
- What changed since the founding to cause the U.S. to become interested in heightened copyright protection?

Mazer v. Stein, 347 U.S. 201 (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***

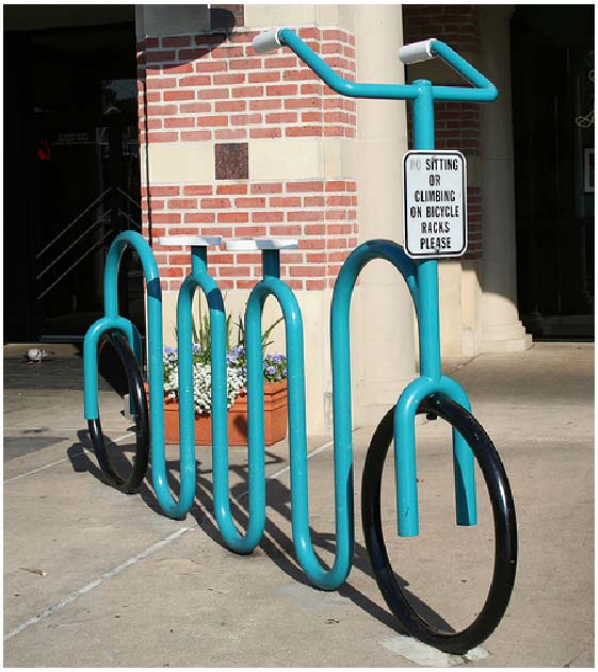
Mazer v. Stein, 347 U.S. 201 (1954) – 1976 Act Codification

§101

"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, 347 U.S. 201 (1954)

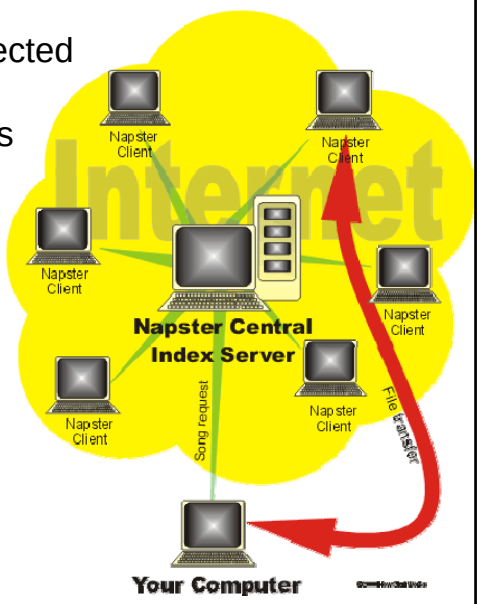


Copyright contrasted with Patent

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)

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)

- Collective directory to show availability of currently connected client computers
- Uploading file names violates distribution right
- Downloading files violates reproduction right
- Fair Use?
  - Purpose & character
    - Not transformative
    - Commercial
  - Nature of the work
  - Amount used
  - Effect on market



Eldred v. Ashcroft, 537 U.S. 186 (2003)

- Issue?
  - Copyright Term Extension Act (CTEA)
  - Prior extensions?
    - Major – 1831, 1909, 1976
  - Apply to existing and future works?
- Limited Times
  - Life plus 70?
- Why did the U.S. enact the CTEA?
  - Interest groups?
  - Int'l pressures?
- Outcome?
  - originality?
  - progress?
  - quid pro quo?
  - First Amendment?

17 U.S.C. §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"

§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.

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.

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]***

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?

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

Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)

- Plaintiff photographer, Sarcony
- Defendant lithographic company has made reproductions and distributed them
- To what in the picture does copyright attach?
- What other types of pictorial or graphic works are similar?
- Impact of photography as new technology?

The Portrait of Oscar Wilde by Napoleon Sarony

Copyright – fixation – wisdom from the Copyright Office

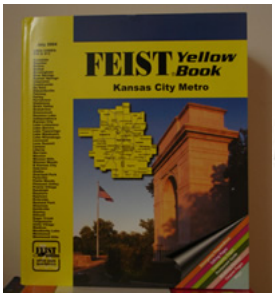
How do I protect my sighting of Elvis? Copyright law does not protect sightings. However, copyright law will protect your photo (or other depiction) of your sighting of Elvis. Just send it to us with a form VA application and the $30 filing fee. No one can lawfully use your photo of your sighting, although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

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)

- Should copyright protection attach to posters used to advertise a circus?
- Not “fine art”?
- Does this matter?

Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340 (1991)

- 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?

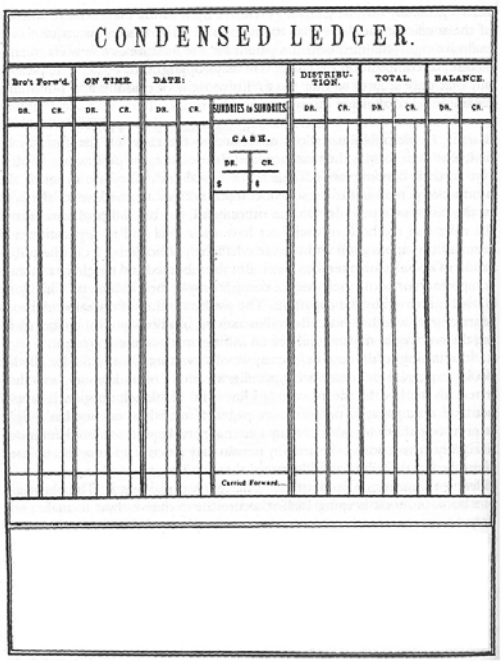


Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340 (1991)

- 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?

Baker v. Selden, 101 U.S. 99 (1879)

- 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...

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?

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"?

Boyle, The Search for an Author: Shakespeare and the Framers

- Conceptions of authorship
  - Romantic
    - heretical
    - bardolatrous
  - Shakespeare as . . .

- Why might medieval Europe put copiers and scribes above the author?
- Craft + external inspiration
- Internal inspiration

Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998)

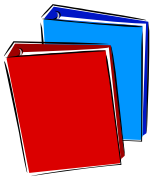
- Thomson's role in 1995 and early 1996 in relation to helping Larson
- Possible standards
  - Unitary Whole?
  - Two-pronged test?
- Independently copyrightable contribution
- Intended to be co-authors
  - Mutual
  - Indicia of ownership / authorship
  - Dominant author situations

Works for Hire

- § 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)

Hays v. Sony Corp. of America, 847 F.2d 412 (7th Cir. 1988)

- District court action
- Was the authorship within the scope of employment?
- Other examples . . .

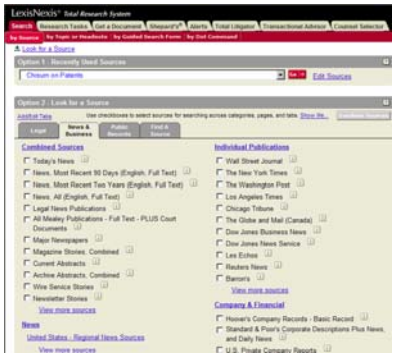


New York Times Co. v. Tasini, 533 U.S. 483 (2001)

- § 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.

New York Times Co. v. Tasini, 533 U.S. 483 (2001)

- Activity of authors
- Print publications
- Electronic publications
  - Nexis
  - NYTO
  - GPO
- Issue?



- Basis of Supreme Court's decision
  - Similarity of format and presentation
  - Effect of "media neutrality"
- "strange library" hypothetical
- dissent

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

Exclusive Rights in © Works - § 106

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  - **(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

Grand Upright Music v. Warner Bros. Records, Inc., 780 F. Supp. 182 (1991)

- Posture?
- Material Copied?
- Ownership issue?
- Evidence of Copying?
  - Direct evidence?
  - Access plus Substantial Similarity?
- Sufficient Copying to be infringement?

gilbert o'sullivan "alone again (naturally)" 1972

Derivative Works

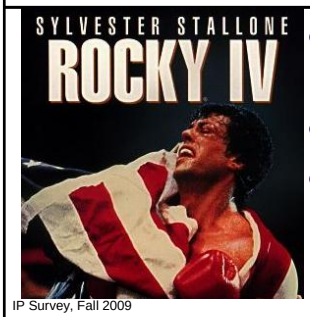
- § 101 Definition:
  - [A] work based upon one or more preexisting works,
    - such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation,
    - or any other form in which a work may be recast, transformed, 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.

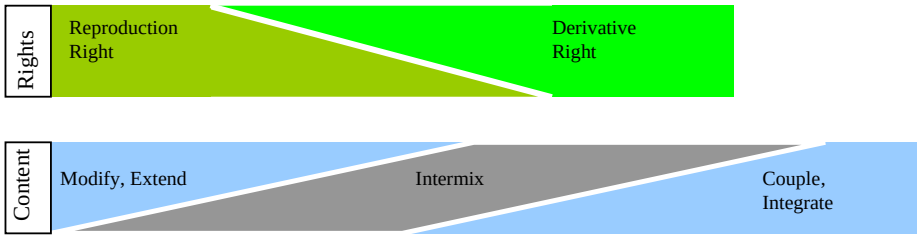
Derivative Works

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



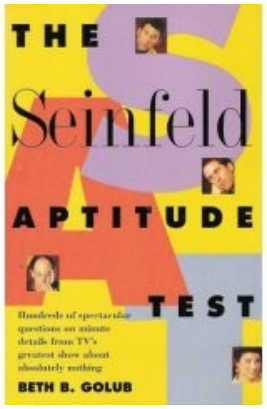
- Uncertainty as to what is and is not a derivative work
- Principle of "severability"
- General rule is that a derivative work using underlying material unlawfully is not eligible for copyright protection itself

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

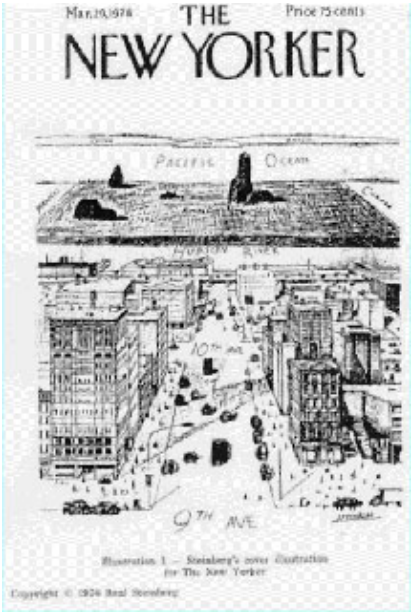


Castle Rock v. Carol Pub. Group, Inc., 150 F.3d 132 (2d Cir. 1998)

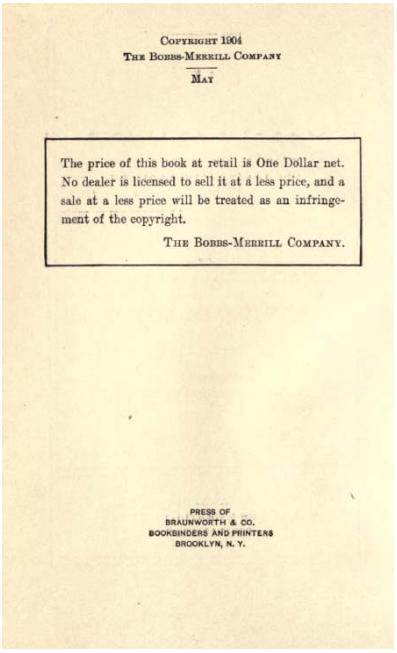
- Question and correct answers rooted in a fictional moment from the show
  - Incorrect answers by Golub
- Copying that is sufficient to meet substantial similarity?
  - From episodes, or show?
  - quantitative
  - qualitative
- Test for substantial similarity inapplicable here
  - Ordinary observer
  - Total concept and feel
  - Fragmented literal similarity / comprehensive nonliteral similarity



Steinberg v. Columbia Pictures (S.D.N.Y. 1987)



Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908)



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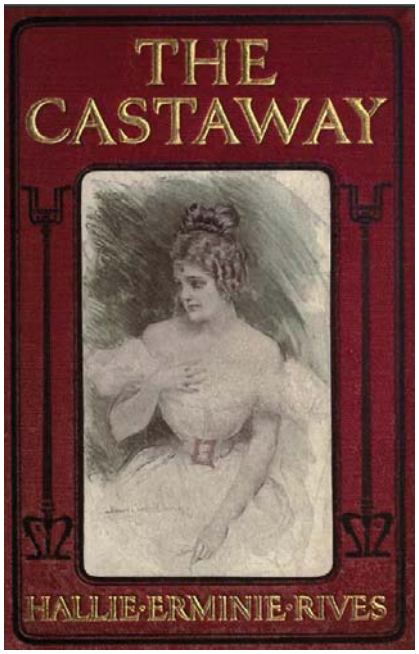
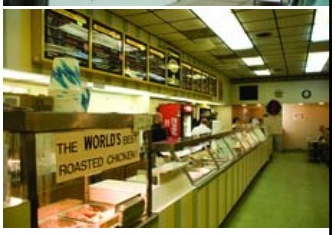


Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975)

Some customers carry out the food they purchase, while others remain and eat at counters or booths. Usually the 'carry-out' customers are in the restaurant for less than five minutes, and those who eat there seldom remain longer than 10 or 15 minutes.

A radio with outlets to four speakers in the ceiling receives broadcasts of music and other normal radio programming at the restaurant. Aiken usually turns on the radio each morning at the start of business. Music, news, entertainment, and commercial advertising broadcast by radio stations are thus heard by Aiken, his employees, and his customers during the hours that the establishment is open for business.



- Fortnightly and Teleprompter cases (cable TV)
- Making this a public performance is inequitable
  - Have to leave radio off to be sure of no infringing broadcasts
  - More licensing revenue tribute than necessary; unwieldy to collect?

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

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

- 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 Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

- 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

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)

- 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 Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)

- 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

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (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 Music, Inc., 510 U.S. 569 (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

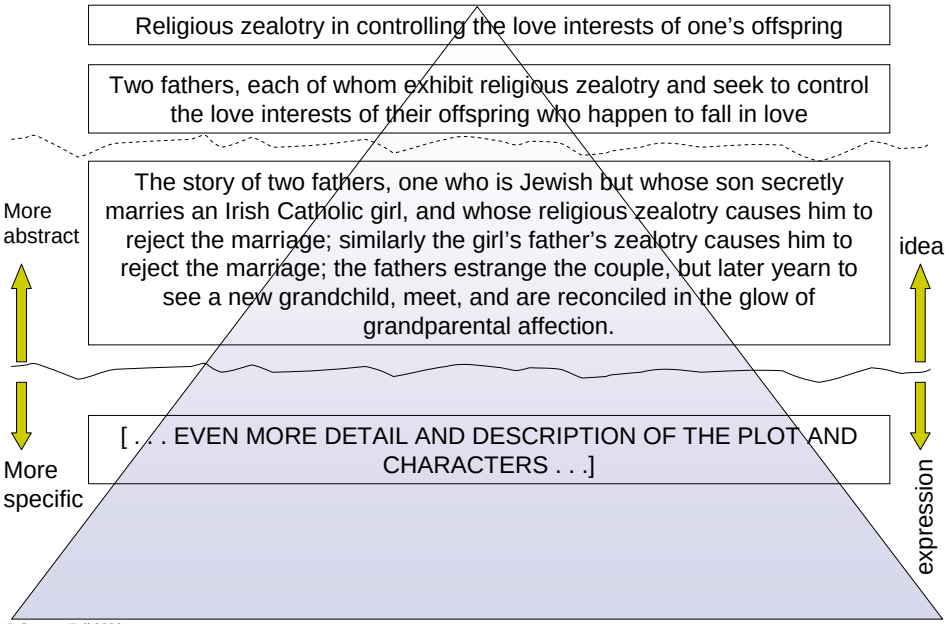
Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)

- 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

Sid & Marty Krofft v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)

- Copyrighted work?
  - Fanciful characters
  - Fantasyland of Living Island
- Licensing of copyrighted work?
- Alleged infringing copy?
  - McDonaldland
- Substantial Similarity
  - Extrinsic test part
  - Intrinsic part based on ordinary reasonable person – total concept and feel
- Access

Nichols v. Universal



Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000)

- Isley Brothers' "Love is a Wonderful Thing"
- Bolton's "Love is a Wonderful Thing"
- Ownership
- Infringement:
  - Copying: access plus substantial similarity (intrinsic/extrinsic)
  - Improper Appropriation

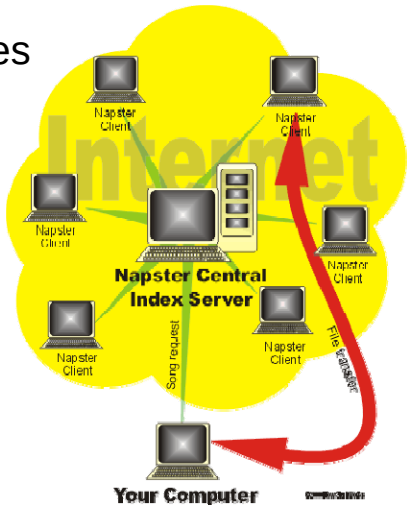
Indeed, this is a more attenuated case of reasonable access and subconscious copying than *ABKCO [Harrison].* In this case, the appellants never admitted hearing the Isley Brothers' "Love is a Wonderful Thing." That song never topped the Billboard charts or even made the top 100 for a single week. The song was not released on an album or compact disc until 1991, a year after Bolton and Goldmark wrote their song.

Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996)

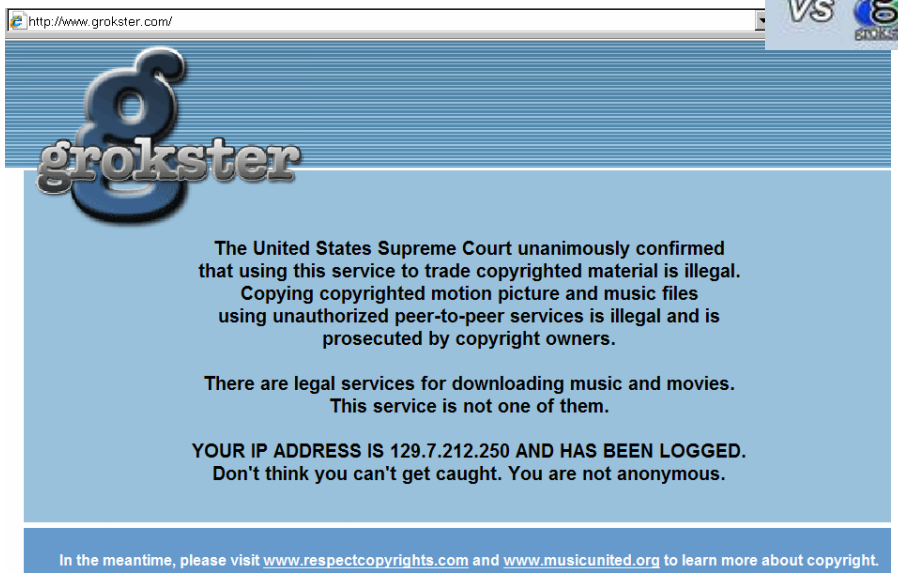
- Fonavision as copyright holder
- Cherry Auction as swap meet operator
- Two of three third-party/secondary copyright liability doctrines
- Vicarious liability
  - Power over the actions – control premises (L/T versus dance hall) – right and ability to supervise
  - Financial benefit - direct
- Contributory liability
  - Knowledge
  - Facilitation of infringing activity: "induces, causes or materially contributes"

A&M Records v. Napster (9th.2001)

- Collective directory to show availability of currently connected client computers
- Uploading file names violates distribution right
- Downloading files violates reproduction right
- Fair Use?
  - Purpose & character
    - Not transformative
    - Commercial
  - Nature of the work
  - Amount used
  - Effect on market



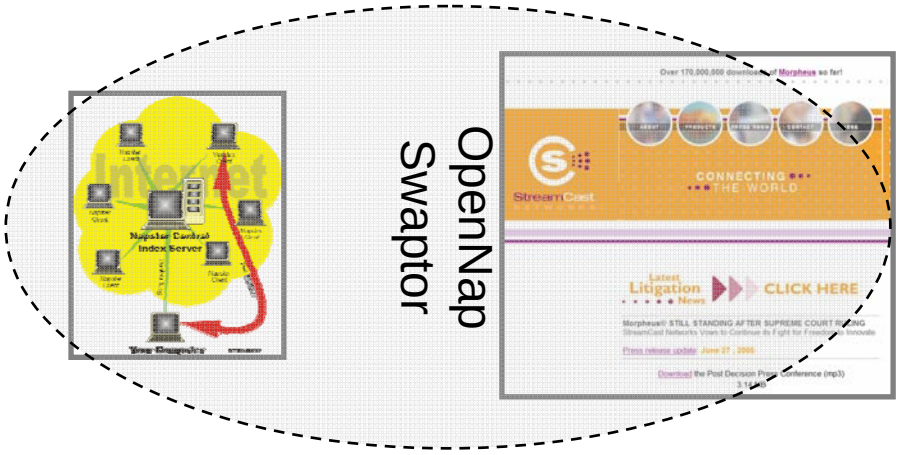
Metro-Goldwyn-Mayer v. Grokster (2005)



Metro-Goldwyn-Mayer v. Grokster (2005)

- Defendants
  - Grokster/FastTrack
  - Streamcast: Morpheus/Gnutella
- Some responses to user emails with guidance about playing downloaded movies
- “active steps to encourage infringement”
  - Streamcast trying to harvest from Napster users
- Business model?
- District Court?
- 9th Circuit?
  - No liability under Sony “safe harbor” to contributory infringement
- MGM argued a vicarious liability theory

Metro-Goldwyn-Mayer v. Grokster (2005)



Time

Metro-Goldwyn-Mayer v. Grokster (2005)

- For copyright, Supreme Court uses a new mode of indirect (secondary) liability
- Inducement
  - "Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple-article rule will not preclude liability."
  - "For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who **distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement**, is liable for the resulting acts of infringement by third parties. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, . . . mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on **purposeful, culpable expression and conduct**, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise. "
- Evidence of "**clear expression or other affirmative steps**" and "**purposeful, culpable expression and conduct**"
  - Inducing message[s] to users and internal statements
  - "neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software"
  - "complement to the direct evidence . . .[ad networks]"

17 U.S.C. 512(a)

(a) Transitory digital network communications.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if--

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

17 U.S.C. 512(b)-(d) in part . . .

(b) System caching.--
(1) Limitation on liability.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which--
(A) the material is made available online by a person other than the service provider;
(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and
(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A), if the conditions set forth in paragraph (2) are met. . . .

(c) Information residing on systems or networks at direction of users.--
(1) In general.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider-- . . . .

(d) Information location tools.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider-- . . .

17 U.S.C. 512(c)

(c) Information residing on systems or networks at direction of users.--
(1) In general.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--
(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.
(2) Designated agent.--The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3) . . .

17 U.S.C. 512(c)

(c) Information residing on systems or networks at direction of users.—
. . . .
(3) Elements of notification.--

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:
(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B) (i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.
(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

17 U.S.C. 512(d)

(d) Information location tools.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider--

(1) (A) does not have actual knowledge that the material or activity is infringing;
(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) [_identify w/ sufficiently specific information to locate_] shall be **identification of the reference or link**, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

17 U.S.C. 512(k)

(k) Definitions.--

(1) Service provider.--(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).