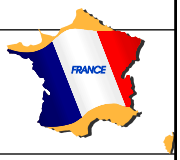
Int'l IP

- Module 2
- Copyright

Copyright and Related Rights

- "A Tale of Two Copyrights"

	Copyright	Author's rights
Origins	Common law 	Civil law 
Primary policy orientation	Instrumentalist – incentive for creativity and production of a wide variety of works	Natural rights and the inherent right of an author to the fruit's of her intellectual endeavors
Exemplary areas of difference	Work for hire	Moral rights - right of attribution - right of integrity
"neighboring rights"	No separate concept of "neighboring rights" - "works of authorship" - but, US law provides unique rules applicable to broadcasting and phonorecords	"neighboring rights" for producers of phonographs, broadcasters, and performers (not considered "authors")

Copyright and Related Rights

- Copyright treaties
  - Berne
    - Original formation in 1886
    - US did not accede until 1989-90
  - Universal Copyright Convention (UCC)
    - US led effort in 1950s to establish minimum protection
    - "tuned" to US law – Berne members viewed it as retrogressive
    - Effectively ended US "working" requirement for protection of foreign works in bilateral arrangements
  - Berne & UCC
    - Neither deal with rights of performers or producers of sound recordings
  - Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcast Organizations
    - Minimum rights
    - National treatment
    - BUT – US is not a member

Copyright and Related Rights

- Berne
  - Works protected
    - any original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.
    - Derivative works receive the same protection as originals (Art. 2(3))
    - Protection of some categories of works is optional
  - Rights protected
    - the right of translation (Article 8),
    - the right of reproduction in any manner or form, which includes any sound or visual recording, (Article 9),
    - the right to perform dramatic, dramatico-musical and musical works (Article 11),
    - the right to broadcasting and communicating to the public by wire, by broadcasting or by loudspeaker or any other analogous instrument of the broadcast of the work (Article 11bis),
    - the right of public recitation (Article 11ter),
    - the right of making adaptations, arrangements or other alterations of a work (Article 12) and
    - the right of making the cinematographic adaptation and reproduction of a work (Article 14)
  - Certain types of "fair use" are available

Berne Convention Implementation Act

- original Berne Convention:
  - five objectives
    - (1) the development of copyright laws in favor of authors in all civilized countries;
    - (2) the elimination over time of basing rights upon reciprocity;
    - (3) the end of discrimination in rights between domestic and foreign authors in all countries;
    - (4) the abolition of formalities for the recognition and protection of copyright in foreign works; and
    - (5) ultimately, the promotion of uniform international legislation for the protection of literary and artistic works
  - Two cardinal principles
    - The Union
    - National Treatment
  - Other considerations
    - Independence of rights
    - Rights not contingent on formalities (registration, deposit, notice, publication)

Berne Convention Implementation Act

- 1908 Berlin Act. The principal achievement of the Berlin Revision Conference was the ***prohibition of formalities*** as a condition of the enjoyment and exercise of rights under the Convention.
- 1928 Rome Act. This revision was the first to recognize expressly the "***moral rights***" of authors: the right to claim authorship of a work and the right to object to modifications of the work which prejudiced the honor or reputation of the author.
- 1948 Brussels Act. This revision established the ***term of protection*** of life of the author and fifty years *post mortem* ***as mandatory***. It added [other] improvements in copyright protection
- 1967 Stockholm Act. For the first time, the implicit ***right of reproduction*** was expressly established in the Convention and special rules governing ***exceptions*** to that right were also included. . . . Finally, this revision established a "Protocol Regarding Developing Countries," which would have allowed developing countries broadly to limit rights of translation and reproduction. The 1967 Stockholm Act has not and will not come into force. It has effectively been superseded by the 1971 Paris Act.
- 1971 Paris Act. The 1971 Paris Act of Berne—the only Act now open to accession—is essentially the 1967 Stockholm Act with significant revisions made to the Protocol Regarding Developing Countries.

Points of Attachment

- Relationship between the concept of the Berne Union and points of attachment as given in Articles 3 & 4
- Prob. 2-2
- Prob. 2-3

Berne Prohibition on Formalities

- Reasons for the elimination of formalities; who does this benefit; who does it harm?
- Prob. 2-5
- Prob. 2-7

Dam Things v. Russ Berrie & Co. (3d 2002)

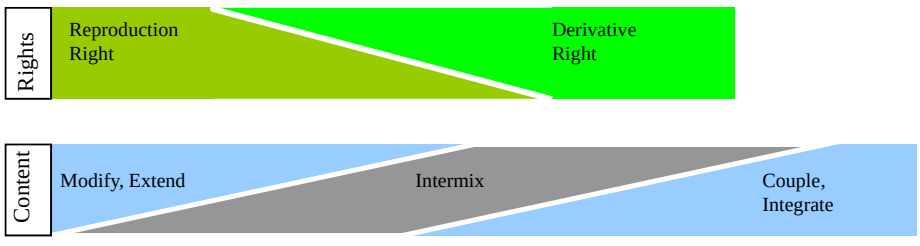
- Basic Good Luck Troll © allegedly restored under 104A.
- Appellate court says:
  - Yes, restored
  - But, mishandled infringement / derivative works tests
    - conflated them; if derivative work, there is a S/H
    - comparison of infringing item to original faulty
- Trolls
  - 1961 design patent filing to "girl" troll
  - 1964 / 1965 attempts to register copyright
  - Result: into public domain in U.S. (why?)
  - Berrie is a distributor; then independent; allegedly making modifications by 1987
- Restoration S/H
  - Sell copies made
  - Compulsory license for derivative works

A troll is a troll?

Restoration Elements:

1. Not expired in source country
2. U.S. public domain due to formalities
3. Author is national/domiciliary of eligible country
4. *First published in eligible country 30 days before U.S. publishing* (which troll? P1 or the "girl" troll)

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



Pts. of Attachment – Neighboring Rights

- Handling under Berne for performer's rights; effect of a country including them in "copyright"
- Points of attachment under Rome Convention
  - Performers
  - Producers of phonograms or recordings
  - Broadcast organizations
- Prob. 2-9

Bruce Springsteen & His Band (Sup. Ct. Germany 1998)

- 6/5/92 LA performance, Shane Fontayne, lead guitarist of accompanying band, British national; FirstP
- FirstD distributed CD of performance on German market
  - How was this CD made? What was its source?
- Trial ct allowed claim in full; appeals ct denied claim for damages for infringement of FirstP's neighboring right for lack of fault – basically finding no violation of German copyright law
- Sup. Ct. reverses appeals ct
  - EU National Treatment lets British national claim German law protection, which includes excluding others from trafficking in bootleg recordings regardless where made (*Phil Collins* case)
  - While the broadcasts into various countries creates points of attachment, the Sup. Ct. says that the infringing copies need to be sourced from the broadcasts

Rome points of attachment

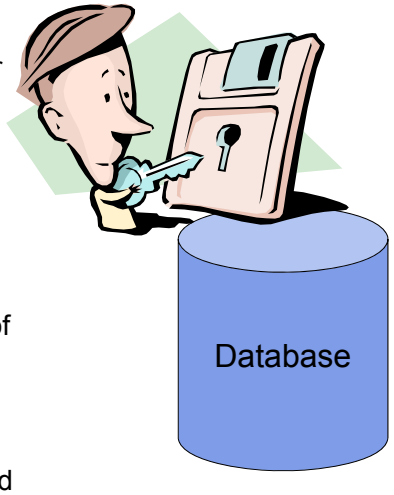
- Prob. 2-10

Ownership / Transfer; Subject Matter

- Ownership
  - Berne vests ownership with authors
  - Work for hire? Corporate authors?
  - Diversity of approaches as to limits on alienability; whether for economic copyright or moral rights
- Subject Matter
  - TRIPS Art. 9
  - TRIPS Art. 10
  - Berne Art. 2
  - Fixation – Berne Art. 2(2)

Database Protection

- Issues / concerns
  - Is additional legal protection needed?
  - If so, form?
    - Property right, or tort concept similar to unfair competition or misappropriation
  - How to define critical terms
    - Database
    - Substantial investment
    - Substantial or insubstantial part
  - How to protect public interest users of databases
  - Duration of protection?
  - How to handle "sole source" data
    - situations where the data contained in a protected database is not available elsewhere



Directive on the Legal Protection of Databases (1996)

- Dual scheme – harmonize via ©, and provide sui generis right for aspects of database not protectable via ©
- Design
  - Chap. II, Art. 3(1) – originality in that database [schema, design, fields, . . .] must be a collection of works or materials which by reason of selection and arrangement, constitute an author's intellectual creation
- Contents
  - Chap. III, Art. 7(1) – for database contents – right to prevent extraction or re-utilization if substantial investment in obtaining, verifying or presenting the contents
- Art. 10 – 15 year term after first made public OR after any substantial change to the database is made
- Art. 11 – reciprocity provision to prod other states to adopt a similar sui generis right
- TRIPS impacted this directive, caused it to include all databases, not just electronic ones
- Preamble (17) – "database" means "collections of independent works, data or other materials which are systemically or methodically arranged and can be individually accessed"

Database Protection

- WIPO Committee of Experts – database protection terms
- Scope
  - Beyond copyright – Sui generis
- Definitions
  - "database" means a collection of independent works, data or other materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means
- Rights
  - Maker has the right to authorize or prohibit extraction or utilization or database's contents
- Exceptions
  - Traditional 3-step test

Database Protection

- Beneficiaries (any Contracting State), National Treatment, Independence
- Term
  - 15 or 25 years
  - But, can be "updated" (term clock is "reset")
    - "Any substantial change to the database, evaluated qualitatively or quantitatively, including any substantial change resulting from the accumulation of successive additions, deletions, verifications, modifications in organization or presentation, or other alterations, which constitute a new substantial investment, shall qualify the database resulting from such investment for its own term of protection."

Database Protection – recent U.S. Bill

- Database and Collections of Information Misappropriation Act of 2003
- Section 2 - definitions
  - §2(5)(A) - database
    - "Subject to subparagraph (B), the term ''database'' means a collection of a large number of discrete items of information produced for the purpose of bringing such discrete items of information together in one place or through one source so that persons may access them."
    - §2(5)(B) includes: "a work of authorship, other than a compilation or a collective work;" communications protocol information; multichannel programming; DNS registration unless provided for public access.
    - §2(5)(C) - DISCRETE SECTIONS – "The fact that a database is a subset of a database shall not preclude such subset from treatment as a database under this Act."

Database Protection – recent U.S. Bill - § 3 - misappropriation

(a) LIABILITY.—Any person who makes available in commerce to others a ***quantitatively substantial*** part of the information in a database generated, gathered, or maintained by another person, knowing that such making available in commerce is without the authorization of that person (including a successor in interest) or that person's licensee, when acting within the scope of its license, shall be liable for the remedies set forth in section 7 if—
(1) the database was generated, gathered, or maintained through a ***substantial expenditure*** of financial resources or time;
(2) the ***unauthorized making available in commerce occurs in a time sensitive manner and inflicts injury*** on the database or a product or service offering access to multiple databases; and
(3) the ***ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened***.
(b) INJURY.—For purposes of subsection (a), the term ***"inflicts an injury"*** means ***serving as a functional equivalent in the same market*** as the database in a manner that causes the displacement, or the disruption of the sources, of sales, licenses, advertising, or other revenue.
(c) TIME SENSITIVE.—In determining whether an unauthorized making available in commerce occurs in a time sensitive manner, the court shall consider the ***temporal value of the information in the database, within the context of the industry sector involved***.

Database Protection – recent U.S. Bill

- Section 4 – permitted acts
- Section 5 – exclusions (certain government information, computer programs – not protected, but if database "resides in a computer program," it can still be protected)
- Section 6 – relation to other laws
- Section 7 – civil remedies
- Sections 8 and 9 – statute of limitations (2 years) and effective date
- Section 10 - nonseverable

British Horseracing Board v. William Hill Org. (ECJ 2004)

- One million horses; many races; clear horses for races into which they are entered
- Cost to run database: £4million/year
- Hill takes and displays a small amount of daily information
- What should be counted in "substantial investment" in order to obtain protection under the EU sui generis database right to prevent extraction and reutilization?
  - Investment in the data selection, to run the races, relates to the creation of the data
    - It does not "constitute investment in obtaining the contents of the database"
  - Prior checks to enter a horse in a race constitute investment in the creation of the data and not in the verification of its contents
- Investment in obtaining = seek out and collect, not create
- Investment in verification = monitor accuracy for reliability, initially and in an ongoing fashion

Problem 2-12

Copyright and Related Rights

- Berne
  - Works protected
    - any original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.
    - Derivative works receive the same protection as originals (Art. 2(3))
    - Protection of some categories of works is optional
  - Rights protected
    - collections of speeches (Article 2bis)
    - the right of translation (Article 8),
    - the right of reproduction in any manner or form, which includes any sound or visual recording, (Article 9),
    - the right to perform dramatic, dramatico-musical and musical works (Article 11),
    - the right to broadcasting and communicating to the public by wire, by broadcasting or by loudspeaker or any other analogous instrument of the broadcast of the work (Article 11bis),
    - the right of public recitation (Article 11ter),
    - the right of making adaptations, arrangements or other alterations of a work (Article 12) and
    - the right of making the cinematographic adaptation and reproduction of a work (Article 14)
    - resale right, droit de suite (Article 14ter)
  - Certain types of "fair use" are available

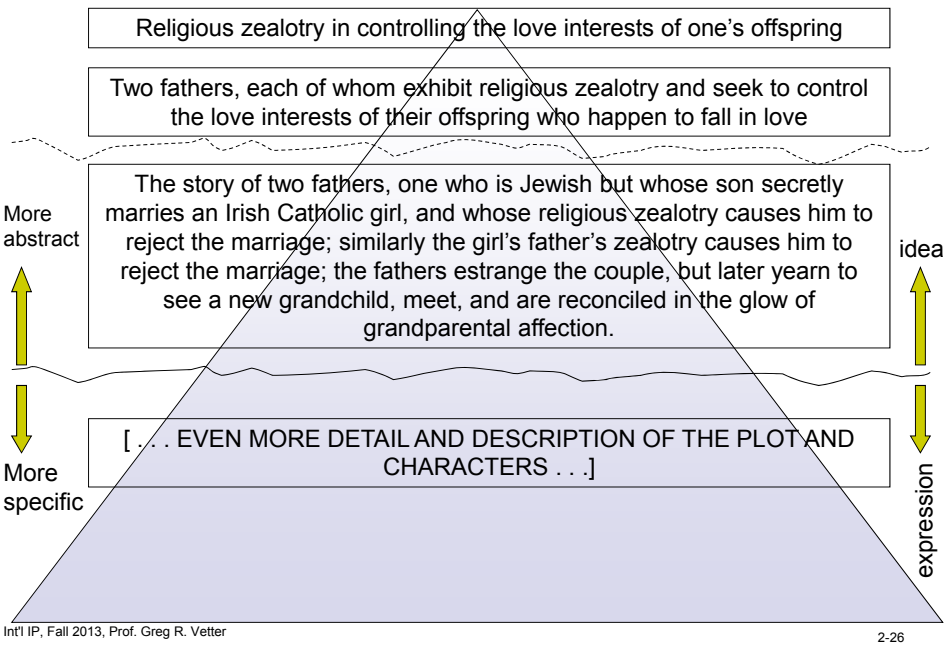
Illustrative Works – 17 U.S.C. § 102

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

Exclusive Rights in © Works - 17 U.S.C. § 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

Nichols v. Universal – Abie's Irish Rose



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

Exclusive Rights problems

- Prob. 2-14
- Prob. 2-15

China – WTO Panel Report (2009)

- 2007 WTO DSB request by U.S.
  - "denial of copyright and related rights protection and enforcement to works that have not been authorized for publication or distribution within China"
- How to think about Article 4(1)?
  - Denial of authority to publish or denial of copyright?
- Use of *Inside Story (1998)* case in China in panel's analysis
- Article 17 of Berne – basis for "defense" by China?

Article 4(1) [_agreed translation_] - Works the publication and/or dissemination of which are prohibited by law shall not be protected by this [Chinese Copyright] Law.

Infopaq Intl. v. Danske Dagblades Forening (EU Ct. of Justice, 2010)

- Infopaq operations
  - Danish newspaper article summaries
- DDF as a copyright enforcement organization
- Analysis
  - Articles are literary works
  - Scanning and searching process likely puts "lengthy fragments" into Infopaq's temporary possession
  - Are 11-word extracts a "reproduction in part"?
- Implications

Article 2(a) and 5 of Directive – reproduction right as given by the directive and temporary acts of reproduction

TRIPS Exceptions – arising from language of Berne 9(2) exceptions to reproduction right

	Patent TRIPS Art. 30	Copyright TRIPS Art. 13	Trademark TRIPS Art. 17
Evaluated against the specific right(s) infringed - Not the "right" to "work" the patent - Not against the entire © work	Members may provide ***limited exceptions***	Members shall confine limitations or exceptions to exclusive rights to ***certain special cases***	Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms
Evaluating the right economically	Not unreasonably ***conflict with the normal exploitation*** of the right	[SAME]	
	Not unreasonably ***prejudice the legitimate interests*** of the right owner	[SAME]	take account of the legitimate interests of the owner of the trademark
	Taking into account the legitimate interests of third parties		and of third parties
	Technology antidiscrimination rule – any inventions in all fields of technology (TRIPS Art. 27.1)		

WTO DSB – US 110(5) "Home Style" Exception (2000)

- 17 USC §110(5)
  - Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(5) (A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a ***single receiving apparatus of a kind commonly used in private homes***, ***unless*** -
(i) a direct ***charge*** is made to see or hear the transmission; or
(ii) the transmission thus received is ***further transmitted*** to the public;
(B) communication ***by an establishment*** of a transmission or retransmission embodying a performance or display of a ***nondramatic musical work*** intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if –
(i) in the case of an establishment other than a food service or drinking establishment, [PARAMETERS – size & equipment]
(ii) in the case of a food service or drinking establishment, [PARAMETERS – size & equipment]
(iii) ***no direct charge*** is made to see or hear the transmission or retransmission;
(iv) the transmission or retransmission is ***not further transmitted*** beyond the establishment where it is received; and
(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed;

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Subparagraph (B) – the "business" exception
- Below particular sizes for each type of business, any equipment can be used
- Above these sizes, the establishment must meet the equipment specifications

§110(5)(A)	§110(5)(B)
As to musical works, anything else, i.e., that is not a nondramatic musical work	Nondramatic musical works
music that is part of an opera, operetta, musical or other similar dramatic work when performed in a dramatic context	Includes individual songs taken from dramatic works when performed outside of any dramatic context
EXAMPLE: a communication of a broadcast of a dramatic rendition of the music written for an opera	EXAMPLE: an individual song taken from a musical and played on the radio

- Role of collective management organizations
  - ASCAP, Broadcast Music, Inc., and SESAC, Inc.

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Does 17 USC §110(5) conflict with Berne Art. 11bis(1)(iii) and Art. 11(1)(ii) as incorporated into the TRIPS agreement?
- If so, do the TRIPS "Limitations and Exceptions" save §110(5)?

Primary EC claim Berne Art. 11bis(1)(iii)	Secondary claim Berne Art. 11 (1)(ii)
Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) ***the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work***.	Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; (ii) ***any communication to the public of the performance of their works***.

WTO DSB – US 110(5) "Home Style" Exception (2000)

- TRIPS Art. 13
  - Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder
- Is this a Limitation or Exception that saves §110(5)?

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Scope of TRIPS Art. 13
  - Derived from and similar to Berne Art. 9(2), which applied only to the reproduction right
- Three part test for Art. 13
  - certain special cases
  - which do not conflict with a normal exploitation of the work and
  - do not unreasonably prejudice the legitimate interests of the right holder
- But – the test "cannot have more than a narrow or limited operation"

WTO DSB – US 110(5) "Home Style" Exception (2000)

- "certain special cases"
  - Member defined or well-defined and narrow?
  - If the purpose of the exception is relevant, is any specific policy sufficient, or are only certain purposes/policies legitimate?
  - Interpretation
    - certain – means clearly defined but not necessarily enumerated
    - special – means limited in field of application or scope, narrow in a quantitative and qualitative sense, narrow scope with exceptional or distinctive objective
    - a limitation or exception may be compatible with the first condition ***even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned***. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute. However, ***public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition***.

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Application of "certain special cases"
  - Subparagraph (B) "business" exception
    - Clearly defined because of the 110(5) parameters, or not certain & special because so many types of businesses can use the exception
    - It is probably a "certain" exception, the issue is whether it is "special"
    - Percentages of establishments that fall within the size limits
      - EC notes that, based only on the size parameter, approximately 70% of eating and drinking establishments and 45% of retail establishments are ***potential*** users of 110(5)
      - Percentages would be higher considering equipment type parameter
    - Court holds that it is the ***scope of potential users*** that informs whether the exception is "special"
    - This is too broad, not a "certain special case" exception
      - The Brussels Act Berne conference documents stated that Art. 11bis(1)(iii) [loudspeaker] was designed to cover places where people met

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Application of "certain special cases"
  - Subparagraph (A) exception
    - Is "a single receiving apparatus of a kind commonly used in private homes" certain? Or, is it a moving target due to technology development?
    - How did US courts implement it under the original 1976 Act wording?
    - The phrase is sufficiently certain given the history of US courts applying it
      - Even if equipment changes over time or from country to country
      - Meaning of "certain" did not require enumeration of all instances
    - The potential users or beneficiaries "is limited to a comparably small percentage of all eating, drinking and retail establishments in the United States"
    - Exception is also narrow and "special" because subparagraph (A) covers a lesser scope of music – dramatic works
      - Whereas subparagraph (B) covers most music played on the radio or TV
    - While statements of policy are not requirement to establish that the exception is "narrow and certain" – the US policy behind the exception is evidence that it is intended to be narrow in scope

WTO DSB – US 110(5) "Home Style" Exception (2000)

- "do not conflict with a normal exploitation of the work"
  - interpretation
    - Exploit – means extracting economic value from the rights in a work
    - Normal – has two connotations (i) empirically what is regular or ordinary, (ii) normatively, what is the type or standard and does it change over time?
    - The mere existence of TRIPS Art. 13 means that "normal" means something less than full use of the exclusive right
      - Which rights in the bundle are being exploited?
      - Evaluate rights individually or work as a whole?
    - Degree of commercial benefit of the use is relevant, even if listeners are not charged, consider aggregation
    - Foregone market is part of the analysis
      - If the exception operates for a use for which the work owner would not typically recoup revenue anyway, then it is more likely to meet the second prong – i.e., not conflict with the normal exploitation of the work

WTO DSB – US 110(5) "Home Style" Exception (2000)

- "do not conflict with a normal exploitation of the work"
  - interpretation
    - The standard must also consider the potential economically valuable uses of a work and work to reserve these to the owner
    - Standard is whether the use enters "into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of ***[potential or actual]*** significant or tangible commercial gains"
    - "Thus we need to take into account those whose use of musical works is free as a result of the exemptions, and also those who may choose to start using broadcast music once its use becomes free of charge"

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Application of "do not conflict with a normal exploitation of the work"
  - Subparagraph (B) "business" exception
    - US argues
      - that the CMOs never effectively exploited this market (administratively difficult), and one particular group license agreements had a similar exception
      - Also, much of this market already exempted by original "homestyle" exception – so no expectation of revenues
    - The court does not want to equate "normal exploitation" with current remuneration practices in licensing
    - The exception could create an incentive for establishments to switch from licensed recorded music to 110(5)(B) covered "free" radio music
      - Administrative challenges to license are the same regardless of the media for distribution
    - Thus, subparagraph (B) does conflict with the ***potential*** normal exploitation of the works

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Application of "do not conflict with a normal exploitation"
  - Subparagraph (A) exception
    - No licensing mechanisms for "dramatic" musical works
    - Thus, "the homestyle exemption, as limited to works other than nondramatic musical works, could [not] acquire economic or practical importance of any considerable dimension for the right holders of musical works."
    - Based primarily on the type of music covered by subparagraph (A), it does not conflict with the normal exploitation of the work

WTO DSB – US 110(5) "Home Style" Exception (2000)

- "not unreasonably prejudice the legitimate interests of the right holder"
  - Interpretation
    - Interests – means, progressively, legal right or benefit, potential detriment or advantage, or an item of importance, not necessarily limited to economic advantage or detriment
    - Legitimate – means both lawful and normatively legitimate, i.e., conformable to a recognized standard type
    - Prejudice – means damage or harm
    - Not unreasonable – means a slightly stricter threshold than reasonable
    - Key question here is whether the prejudice is "not unreasonable" because legitimacy of the interests is not in dispute
    - Best proxy for prejudice is to look at effect on economic value, even thought this is to some degree incomplete
      - Unreasonable loss of income is the standard

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Application of "not unreasonably prejudice the legitimate interests of the right holder"
  - Subparagraph (B) "business" exception
    - Arguments
      - The EC offers the high percentages of potential users of the exception
      - The US starts with past licensing and tries to reduce that amount by showing in five categories how many potential users could not or would not use 110(5)(B)
    - The court finds an unreasonable prejudice because of the potential for users to start playing the "free" music, or switch from recorded licensed music to "free" music – all to the determent of the ***potential*** revenue stream
      - The court's analysis is predicated on sufficient ***product substitutability*** comparing recorded music to radio music
    - Also, there is a "chicken and the egg problem"
      - Because of the previously existing "homestyle" exception, licensing revenues may never have built up because there was no legal protection to support them
    - Estimates of annual loss – approx. 100x order of difference
      - US - $122,000 to $586,332 - "top-down" - starts with actual CMO payments, only EC rights holders, BUT, does not take into account likely reactions of CMOs to compensate for potential lost revenues in other ways
      - EC - $53.56 million – "bottom-up" – start with user base, all rights holders
    - Court finds subparagraph (B) to unreasonably prejudice the legitimate interests of the right holder

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Application of "not unreasonably prejudice the legitimate interests of the right holder"
  - Subparagraph (A) exception
    - Does not unreasonably prejudice the legitimate interests
    - No history of any licensing revenues
    - Limited scope of music covered by this subparagraph

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Conclusion summary

		110(5)(B)	110(5)(A)
1.	certain?	yes	yes
	special?	no	yes
2.	conflict with normal exploitation?	yes	no
3.	Legitimate interests	yes	yes
	Not unreasonably prejudice	no	yes
	Conclusion – in conformity with TRIPS Art. 13?	NO	YES

WTO DSB – US 110(5) "Home Style" Exception (2000)

- Implications of the "Home Style" case
  - Does the US Fair Use standard meet the "certain and special" standard?
  - Decision to not evaluate the normative "correctness" of the policy underlying the exception?
    - Option to evaluate relationship between stated policy behind an exception and the means used to implement it (rational? well-tailored? least burdensome?)
  - Can a single US district court decision generously applying the HomeStyle exception put the US in violation of TRIPS?
  - Is subparagraph (A) really as limited in the types of music as the parties stipulated?

Berne and copyright term

- 2-18
- 2-19
- 2-20

EU Copyright Term Directive

- General Parameters
- Three categories?
  - Works under copyright in all countries where published
  - Works under copyright in some countries but in the public domain in other countries
  - Works in the public domain in all countries
- Problem 2-21

Author's Rights versus Copyright – "moral rights" example

- "moral rights"
  - Right of Disclosure
    - Publish the literary or artistic work, or not
  - Right to correct or withdraw works previously disclosed to the public
    - Subject to indemnification for the loss that the correction or retraction may cause the holder
  - Right of Attribution
    - Have the work attributed to its author or artist
  - Right of Integrity
    - Object to modifications of the work

Author's Rights versus Copyright – "moral rights" example

	Berne	US Copyright Law (excluding VARA)
Disclosure	Art. 3(b)(3): "published works" means works published with the consent of their authors	Reproduction, display and performance right?
Correct/ Withdraw	Not in Berne directly, possibility that it exists in local law recognized in Berne Appendix, Art. II(8): No license shall be granted under this Article when the author has withdrawn from circulation all copies of his work.	Termination of transfer provisions of 17 U.S.C. §203
Attribution	Art. 6bis(1): Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to - claim authorship of the work	Reproduction, display and performance right? Lanham Act unfair competition law
Integrity	and to - object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.	Derivative works right? Lanham Act unfair competition law

Author's Rights versus Copyright – "moral rights" example

- BUT
  - TRIPS exempts Berne Art. 6bis from mandatory coverage
  - TRIPS Art. 9(1):
    - Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.

Author's Rights versus Copyright – "moral rights" example

- VARA – 17 USC ¶106A - Rights of certain authors to attribution and integrity

a) Rights of Attribution and Integrity. - Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a ***work of visual art*** -
(1) shall have the right -
(A) to claim authorship of that work, and
(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
(2) shall have the ***right to prevent the use*** of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
(3) subject to the limitations set forth in section 113(d)[EXCEPTION FOR THE WHEN THE WORK IS INCORPORATED INTO THE STRUCTURE OF A BUILDING], shall have the right -
(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
(B) to prevent ***any destruction of a work of recognized stature***, and any intentional or grossly negligent destruction of that work is a violation of that right.

Author's Rights versus Copyright – "moral rights" example

- VARA – 17 USC ¶106A - Rights of certain authors to attribution and integrity

(b) Scope and Exercise of Rights. - Only the author of a work of visual art has the rights conferred by subsection (a) in that work, ***whether or not the author is the copyright owner***. . . . .
(c) Exceptions. - (1) The modification of a work of visual art which is a result of the ***passage of time or the inherent nature of the materials*** is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).
(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.
(3) [The rights only apply to the original – not to ***reproductions or when the work is a work for hire***]
(d) Duration of Rights. - (1) . . . endure for a term consisting of the ***life of the author***.
. . .

Author's Rights versus Copyright – "moral rights" example

- VARA – 17 USC ¶106A - Rights of certain authors to attribution and integrity

(e) Transfer and Waiver. - (1) The rights conferred by subsection (a) ***may not be transferred***, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. . . .
[T]he waiver shall apply only to the work and uses so identified. . . . .
(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

Author's Rights versus Copyright – "moral rights" example

35 USC 101:
A ''work of visual art'' is -
(1) a ***painting, drawing, print, or sculpture***, existing in a single copy, in a limited edition of ***200 copies or fewer*** that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of ***200 or fewer*** that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
(2) a ***still photographic image produced for exhibition purposes only***, existing in a single copy that is signed by the author, or in a limited edition of ***200 copies or fewer*** that are signed and consecutively numbered by the author.
A work of visual art does not include -
(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
(iii) any portion or part of any item described in clause (i) or (ii);
(B) any work made for hire; or
(C) any work not subject to copyright protection . . .

Huston v. Turner (French Cour de Cassation) [1992]

- Location of court?
- Issue?
- Law applied?
- Is this law mandatory or optional?
- Can parties opt out of this law?
- Who has which rights?
  - Huston – director/author
  - Turner - producer
- Should the court "oust" American law and the contracts between the parties?

Gilliam v. ABC (2d 1976)

- Work(s) at issue?
  - Group -> scripts to BBC
  - BBC rights to license
  - Prior broadcasting in the U.S.?
  - BBC deal with Time-Life (edited the programs)
  - Time-Life deal with ABC
- District court
  - Denied preliminary injunction
- Copyright law
  - Licensing law
- Trademark law
  - Designation of origin
- Concurrance

Berne Convention Implementation Act

- Self executing?
- Treatment of moral rights?
  - Copyright
  - Lanham act
  - State statutes
  - Common law principles