# Relevant Portions of Work are Subject to Copyright Protection

## Originality

### Required

#### Independent Creation

* + 1. Created by author as opposed to discovered

#### Modest Amount of Creativity

* + 1. USA – minimal level of creativity. ***Feist*** *(minimal degree of creativity but white pages mostly facts)*.
       1. Photos.
          1. A photograph may be original in three respects: rendition (angle, lighting, exposure); timing (natural) – weakest element; and composition/creation of the subject – strongest element. ***Mannion*** *(basketball star photo likely copyrightable but had given permission)*; ***See Jumpman*** *(ongoing case about Nike Jumpman logo)*.
    2. EU - work reflects author’s personality and the author made free and creative choices and thus stamped her personal touch on the work. ***See Natascha*** *(kidnapped girl photo by school photography copyrightable)*.

### Not Required

#### Complete Originality

#### Labor

#### Artistic

* + 1. ***Bleistein*** *(circus advertisements copyrightable although not artistic)*.

#### Novelty

* + 1. One of a kind
    2. But relevant for showing not independently created.

#### Intent to be original

* + 1. Mistake can lead to creativity

#### Noncommercial

* + 1. ***Bleistein*** *(advertisement)*.

## Idea/Fact/Expression

### Ideas/Facts Unprotectable

#### Constitutional requirement – First Amendment

#### Scenes a Faire Unprotectable

* + 1. Definition – elements commonly found in works of certain genre
    2. ***Alexander*** *(slavery elements in book are scenes a faire so no infringement)*.
    3. ***Nichols*** *(elements of story about difficulties from Jewish man marrying Irish woman are scenes a faire)*
    4. ***Bill Biodata*** *(women’s fashion shoes while sitting on toilet is scenes a faire so no infringement)*.

#### Abstractions Approach

* + 1. Definition – Ideas at a relatively high level of abstraction are unprotected.
    2. The less developed a character, the less they can be copyrighted. ***See Nichols***.

### Expression Protectable

#### Exception – Merger Doctrine

* + 1. Definition – the fewer ways to express an idea, the thinner the copyright protection

### Application

#### Fictional Characters

* + 1. Two Tests
       1. Old “Sam Spade” test – A character is protectable if he or she constitutes "the story being told.”
       2. Current view – A character is protectable if well delineated. ***Nichols***. E.g., Rocky
    2. Stock Characters unprotectable (related to scenes a faire)
    3. Complications – evolving characters over time; characters represented by different actors; fan fiction

#### Maps

* + 1. Location names symbols, etc. unprotectable but presentation, selection, etc. protectable.

#### Art or Science

* + 1. Description of art or science is protectable while use of art or science is not
    2. Uncopyrightable forms. E.g. blank forms, graph paper, diaries, address books, etc.
       1. Accounting forms. ***Baker***.
    3. Recipes – uncopyrightable but embellishments are copyrightable.

#### History

* + 1. Facts not protectable
       1. Copyright estoppel - speculations/stories represented as fact are not protectable
    2. Theories not protectable – ideas
       1. ***Hoehling*** *(theory and facts surrounding destruction of Nazi airship unprotectable)*.

#### Plagiarism

* + 1. Definition – copying exact wording or limited borrowing, without sufficient attribution, of another person's distinctive and significant research findings or interpretations.
    2. Not copyright law but can overlap with copyright law.

#### Databases

* + 1. Little to no copyright protection – facts not protectable, no protection for labor.
    2. Contract – use restrictions, shrink-wrap licenses. ***ProCD v. Zeidenberg***.
    3. Misappropriation, Encryption/Anticircumvention, Trademark, Trespass to Chattels, Sui Generis Legislation

## Subject Matter Coverage

### Literary Works

#### Software – forms of IP protection

* + 1. Trademark – public distribution of object code does not forfeit Trade Secret protection, so long as source code was kept secret and is hard to reverse engineer
    2. Contracts (1950’s – 1980’s but still used but not depended on heavily today)
       1. Shrink-wrap licenses – inconclusive legal validity
       2. State law trumped by federal copyright law
    3. Patents
    4. Copyright (1980’s – Present)
       1. Literal (object and source code) and Non-literal (Structure, Sequence, Organization) features protected
       2. Menu hierarchies - A command menu hierarchy is a “method of operation.” A system, method of operation, process, or procedure is foreclosed from protection by 17 USC 102(b). ***Lotus v. Borland (CA1)*** *(distances itself from Altai saying that 102(b) excludes not just ideas but methods of operation so doesn’t need to get into Altai test)*.
       3. Application Programming Interfaces
          1. ***Oracle v. Google (CA9)*** *(API defined header and structure are protectable but appealed to SCOTUS)*.

Merger: Declaring code merges or 7,000 lines could have been arranged differently?

Creativity: Short phrases unprotectable or can be strung creatively?

Method of Operation: unprotectable method of operation or Lotus doesn’t apply to CA9?

Interoperability: Interoperability about protection or just speaks to fair use?

Timing: Merger/Scenes a Faire measured at time of D’s work or P’s work?

Welfare Theory: Avoid duplicative programming efforts and forcing users to learn new language or provide incentives for innovation and progressing by not allowing convergence of industry standards?

* + - 1. Reverse engineering for interoperability – fair use. ***See Sega; Sony v. Connectix***.

### Dramatic Works

### Choreography

#### Dance and Pantomime protected.

#### Functional physical movements not protected.

* + 1. “[F]unctional physical movements that merely implement an idea, procedure, process, system, method of operation, concept...” such as “exercise routines, aerobic dances, yoga positions… athletic activities or competitive events… feats of physical skill or dexterity or other choreographed productions that do not involve the rhythmic movement of a dancer’s body.” ***Copyright Office***.

### Music Compositions and Sound Recordings

#### Public Performance license fee

* + 1. Not paid to record company in the U.S.



### Motion Pictures and Other Audiovisual Works

#### Copyright consolidated with producer

#### Producer does not transfer copyright but licenses it to many others



### Pictorial, Graphic and Sculptural Works

#### Useful Articles – Separability Tests

* + 1. Physical
    2. Conceptual
       1. Is form dictated by function? ***Barnhart*** *(shape of mannequins required by function so no separability)*.
       2. Is the aesthetically pleasing aspect of the article primary? ***Keiselstein Cord*** *(ornamental aspect of belt buckles was primary so separability)*.
       3. Separate Concept
          1. Temporal Displacement – can think of utilitarian and non-utilitarian functions separately at different times. ***Barnhart dissent***.

Factors: Object been displayed or used apart from utilitarian function? Extent of such display? Did such displays result from purchases? Expert Opinion? Surveys?

* + - * 1. Temporal Displacement + added appeal. ***Polakov***.
        2. Simultaneous Distinct Concepts. ***Chosun***.
      1. Can it stand on its own as a work of art?
         1. Goldstein version – would useful article be equally useful without it? Note: how do you define art?
         2. Nimmer version (more popular) – is it likely that if it had no useful aspect it would still be marketable to significant segment of community because of aesthetic qualities? ***Harrah’s***.
      2. Intent of Creator
         1. Reflects designer’s artistic judgment exercised independently of functional influences.

***Brandir*** *(Ribbon bike racks design influenced by function so not separable)*.

***Pivot Point*** *(creative process of creating high-fashion mannequins was unfettered by functional concerns. Just received instructions that they have hungry-look so separability)*.

* + - * 1. Problem – can be manipulated

### Architecture

#### Buildings, architectural plans or drawings

* + 1. Buildings - uninhabitable and habitable; free-standing; monuments are sculptures and architecture

#### Infringement

* + 1. Total concept and feel test combined with more discerning observer test. ***Shine***.
    2. Exceptions – pictorial representations permitted; owner can alter or destroy building notwithstanding 17 USC 106(2) (derivative works) provisions.
    3. Courts reluctant to grant injunctions.

## Fixation

### Standard

* 1. Only required in U.S.
     1. US Constitution Art. 1, Sec. 8, Cl. 8 – “writings” so not ephemeral
  2. “Fixed in tangible medium of expression”
     1. “[S]ufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 USC 101
     2. Transmission counts. 17 USC 101.
  3. Examples
     1. Jazz improvisation – live unrecorded performance may not be protectable
     2. Mandalas – embodiment in sand is fixed
     3. Choreography – more easily protected nowadays with video recording.

# P Owns the Copyrighted Work

## Authorship

### Author

* 1. Definition – The person who expresses an idea in tangible form is presumptive author. ***See Lindsay***.
  2. “Not essential that the author have physical control over the tools of creativity.” ***Lindsay*** *(Titanic wreck site)*.
  3. Not Authors – nature, animals, plants. ***Copyright Office***. ***See Macaque Pictures***.

### Sole

* 1. Copyright vests initially in the author. 17 USC 201.

### Joint

* 1. Requirements
     1. Two or more authors make copyrightable contributions to a work
        1. Author – originator, maker, inventor or mastermind, decision-making authority, exercise control (***Aalmuhammed***).
        2. Contributions independently copyrightable
     2. All intend that their contributions be merged into a unitary whole – objective
        1. All regard the others as co-authors. ***Thomson (Rent Case)*** *(Thomson had no decision-making authority and was not co-billed as an author so not joint author)*. ***Aalmuhammed*** *(listed toward bottom of movie credits as consultant and even Spike Lee had to sign work for hire agreement so not joint author)*.
     3. Note: U.S. law hostile to join authorship – economic efficiency and incentives, romanticism, classical liberalism
  2. Effects
     1. Copyright vests initially in the authors. 17 USC 201.
     2. Share undivided halves
     3. Each may use the work or license it unilaterally
        1. Presumption of equal shares of license fees which can be overridden by agreement. If don’t split fees, subject to suit for “accounting”
     4. No right of survivorship – If joint author dies, interest passes to heir, not other joint authors

### Work for Hire

* 1. Two routes – 17 USC 101
     1. (1) a work prepared by an employee within the scope of his or her employment; or
        1. Employee
           1. Factors – Hiring party’s right to control; Skill required; Source of the Tools; Location of the labor; Duration of the relationship; Right to assign additional projects; Control over hours of work; Method of payment; Right to hire assistants; Business of the hiring party; Employee benefits; Tax treatment. ***CCNV*** *(sculptor of homeless nativity not an employee because factors favored him)*.
           2. Exception – university faculty
        2. Scope of employment
           1. Falls within scope of employment if meets three requirements:

It is the kind of work that the employee has been hired to perform;

The work is created substantially within the authorized work hours and space; and

Creation of the work is motivated, at least in part, by a purpose to serve the employer. ***Avtec***.

* + - * 1. Wrong rulings explained by Romanticism

Oklahoma City Bombing – building inspector within scope of employment. Court doesn’t see him as artist.

Boban and Molly Cartoon in India – cartoon artist supposedly not within scope of employment. Court sees him as artist.

* + - 1. Can contract out of work for hire agreement. 17 USC 201.
    1. (2) 9 Types of commissioned works by independent contractor and says work for hire in written agreement
       1. Types: contribution to a collective work, part of a motion picture or other audiovisual work, translation, supplementary work, compilation, instructional text, test, answer material for a test, an atlas.
          1. Collective works – authors maintain copyright in separate contributions. Owner of copyright in the collective work presumed to have rights of reproduction and distribution in that work, revisions of work, or later works in series. Other rights maintained by authors of separate contributions unless transferred expressly. 17 USC 201.

Record companies argue sound recordings fall here but not legally conclusive

Databases that reproduce and distribute articles standing alone and not in context are not “part of that particular collective work, any revision of that collective work, and any later collective work in the same series.” ***NYT v. Tasini (US 2001)*** *(Lexis Nexis not collective work)*.

* 1. Effects
     1. Copyright vests in employer or commissioning party. 17 USC 201.
     2. Moral rights not applicable
     3. Termination provisions not applicable
     4. Duration – 95 years from first publication or 120 years from creation
     5. Renewal rights for old copyrights

## Formalities

### Published v. Unpublished

* 1. 1909-1977
     1. State common law gave copyright in unpublished works
     2. Protections so that artists didn’t lose copyright protection
        1. Author has to authorize publication for it to be published.
        2. “General publication” – forfeit – work made available to the public without regard to their identity or what they intended to do with the work.
        3. “Limited publication” – no forfeit – work made available to only selected persons for limited purposes
        4. Public Display – Can constitute being published if done in way that allows unrestricted copying by general public but not if restrictions imposed.
        5. Performance – no matter how public, not publication (impractical to give notice).
        6. Phonorecords – distribution before 1978 did not constitute publication of musical works. 17 USC 303(b).
        7. ***MLK Speech*** *(performance and only distributed speech to journalists so limited distribution so not publication)*.
  2. 1978 – Present
     1. Federal copyright upon fixation

### Laws over Time – Notice, Registration, Deposit

* 1. Overview

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Published 1909-1977** | **Published 1978-1989** | **Published 1989-Present** |
| **Notice** | Mandatory upon (general) publication | Mandatory within 5 years of publication | Optional, but may affect statutory damages |
| **Registration** | Prerequisite for infringement suit (not copyright protection); mandatory for renewal | Application prerequisite for infringement suit; necessary for statutory damages & attorney fees | Application prequisite for infringement suit involving only US works; necessary for statutory damages & attorney fees |
| **Deposit** | With Library of Congress (LOC); failure punished with forfeiture & fines | With LOC; failure punished with fines (no forfeiture) | With LOC; failure punished with fines (no forfeiture) |

* 1. Berne Convention – banned formality requirements for copyright protection

## Duration

### Published before 1923

* 1. No longer under copyright

### Published 1923 – 1977

* 1. Potential 95 years – 28-year initial term, 67-year renewal term (28-year original renewal, 19 years added by 1976 Act, 20 years added by 1998 CTEA)
  2. Renewal
     1. Requirements if published before 1964 – File for renewal in 28th year of initial term
     2. Requirements if published 1964-1977 –renewal automatic
     3. Renewal can only be exercised by: (1) Author if alive; (2) surviving spouse or children; (3) author’s executor; (4) author’s next of kin.
     4. Licenses and Assignments
        1. Assignment of renewal rights enforceable, *Fred Fisher*, unless author died before the time came for filing for renewal. Right to renew would pass to heirs, *Miller Music*.
        2. Right to derivative works for renewal term reverts to author’s heirs when author dies even if renewal rights assigned. ***Stewart v. Abend*** *(author of short story assigned motion picture rights to a production company for initial and renewal term. Author died before renewal)*.

### Fixed/Published 1978 – Present

* 1. Individual works – life of author plus 70 years
     1. Joint author – life of last surviving author
  2. Anonymous works, pseudonym works, works made for hire – 95 years from year of first publication or 120 years from year of creation, whichever expires first

### Restoration – 104A(d)(3)

* 1. Derivative work based on a restored work and is created before country signed on to Uruguay Round
  2. Reliance party may continue to exploit that derivative work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.
  3. (B) If parties can’t agree can take it to court. Compensation should reflect any harm to the actual or potential market for or value of the restored work from the reliance party’s continued exploitation of the work, as well as compensation for the relative contributions of expression of the author of the restored work and the reliance party to the derivative work.

### Legal Limitations

* 1. Constitution
     1. Art. I. Sec. 8, Cl. 8 – “limited time”
     2. Sonny Bono Copyright Term Extension Act constitutional. ***Eldred*** ***(US 2003)*** *(Congress just needs rationale basis to extend and can’t be forever. Copyright has First Amendment safeguards – ideas/facts not protectable and fair use)*.
     3. Uruguay Round Agreements Act constitutional – restored protection to foreign parties whose works had entered the public domain. ***Golan (US 2012)*** *(Congress may grant protection to previously unprotected works)*.
  2. Trademark law cannot effectively extend copyright. ***Dastar (US 2003)*** *(once a work falls into the public domain, the former copyright holder may not use trademark law to sue for failure to attribute authorship)*.

## Transfers

### Licenses and Assignments

* 1. Copyright Transactions – a copyright, and any of the separate rights associated with it, may be transferred
  2. Exclusive License – grants permission and makes that permission exclusive (grantor cannot give the same permission to someone else)
     1. Requirement – Must be in writing and signed. 17 USC 204.
        1. Needs to be clear that transferring copyright and which associated rights.
     2. Effect – Owner of exclusive right can sue for copyright infringement of that particular right. 17 USC 501(b)
  3. Nonexclusive License – grants permission
     1. Requirements – no writing, can be oral and/or implied
  4. Open Source License – makes works available to the public for free subject to the author’s choice of restrictions
     1. Does not put work in public domain
     2. Creative Commons

### Renewal

* 1. See Duration

### Termination

* 1. Cannot be waived. 17 USC 304(c)(5), 203(a)(5)
  2. Criteria
     1. Does not apply to works for hire
     2. If joint authors, majority of grantors must join in the termination
     3. Termination may be made by author if alive, spouse, children, grandchildren, or executor
     4. Must give at least two years prior notice with effective date of termination to grantee or its successors
     5. A copy of the notice must be recorded in the Copyright Office before the effective date.
  3. Section 304(c) and (d) – for pre-1978 grants, gives author right to extra 19 years if copyright protection from 1976 Act and extra 20 years from 1998 CTEA by terminating the grant after original renewal term.
     1. Grant may be terminated within 5 years after the original 56-year total term.
     2. Author has another opportunity to terminate during the 5 years after the 75-year period.
     3. 2-10 years notice
  4. Section 203 – for post-1977 grants, allows author to terminate grants after 35 years.
     1. Grant may be terminated within 5 years after 35 years from the date of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.
     2. 2-5 years notice
  5. Effect
     1. Copyright reverts to author (or renewal beneficiary)
     2. Grantee may continue to utilize derivative works prepared pursuant to the grant, but does not have the right to prepare new derivative works. 17 USC 304(c)(6)(A)

# D has Violated P’s Exclusive Right(s)

## Direct

### Economic Rights – 17 USC 106

#### (1) Reproduction

* + 1. Elements
       1. Copying
          1. Copying includes

Mechanical reproduction

Having the copyrighted work in mind when creating a substantially similar embodiment

Includes subconscious copying (strict liability). ***Bolton***.

Replicating the work in a different medium

* + - * 1. Ways of proving copying

Direct evidence – admission, testimony of witnesses

Access + Similarity

Inverse ratio – lower substantial similarity needed when high degree of access. ***Bolton***.

Access – Reasonable opportunity to view or to copy plaintiff’s work

Proof – (1) a particular chain of events is established between the plaintiff's work and the defendant's access to that work, or (2) the plaintiff's work has been widely disseminated.

Striking Similarity – can be overcome if no access or P and D’s work come from public domain

Common Errors Between Both Works

* + - 1. What D created is a copy
         1. Copy – material object, other than a phonorecord, in which the work is first fixed. 17 USC 101.
         2. Requirements

Tangible

Fixed

Embodiment – placed in a medium such that it can be perceived, reproduced, or otherwise communicated from that medium

Duration – remain embodied for more than a transitory duration

***Cablevision*** *(Cartoon Network sued Cablevision claiming RSDVR violated reproduction rights three times. BMR 1.2 second buffer doesn’t meet duration requirement)*.

Intelligible

* + - 1. Improper Appropriation
         1. Comprehensive copying – verbatim copying of entire work
         2. Fragmented Literal Similarity – copy piece or part of work. Must show two things:

The portion copied consists of protected "expression," not facts or ideas

The portion copied must be a "substantial" part of the plaintiff's work

Quantitative

More than “de minimis.” ***Davis***.

***Iowa State*** *(2.5 minutes from documentary is sufficient)*.

***Castlerock*** *(SAT crossed de minimis threshold (“quantitative test”) and copied creative, protected expressions (“qualitative test”).*

Sound Recordings Exception – right limited to duplicating actual sounds fixed in the recording or preparing derivative work in which actual sounds fixed in the recording are used. You can make sounds that imitate or simulate in the copyrighted sound recording. 17 USC 114(b). Thus, de minimis defense is not available to sample sound recordings given that current protection is so narrow. ***Bridgeport Music (CA6)***; ***But Cf. Newton (CA9)***.

Qualitative – more important that quantity. ***Larrikin*** (Australia 2010).

* + - * 1. Comprehensive Nonliteral Similarity – nothing copied verbatim

The amount that the defendant added to the plaintiff's work is irrelevant. ***Sheldon***.

Methods for separating protected from unprotected material

Totality analysis – most generous to copyright owners

More discerning ordinary observer – look for substantial similarity with only protectable material but don’t separate protectable from unprotectable entirely. ***Boisson*** *(ABC quilts not completely protectable so similarity with some quilts and not others)*.

Filtration

Remove unprotected material from P’s work before comparing it to D’s.

Software – Abstraction-Filtration Comparison Test. ***Altai***.

(1) Abstraction. ***Nichols*** *(Pattern Test)*.

(2) Filtration – remove features that should not be protected: elements dictated by efficiency; elements dictated by external factors (Mechanical specifications of the computer; Compatibility requirements of other programs; Computer manufacturers’ design standards; Demands of the industry being served; Widely accepted programming practices); and elements taken from the public domain.

(3) Comparison – compare features of D’s program to protected parts of P’s program

Formulations of Substantial Similarity

Same aesthetic appeal – according to ordinary observer. ***Boisson***. ***Mannion***.

Apparent appropriation – could be recognized by average lay observer. ***Steinberg*** *(average lay observer would find that Moscow on the Hudson poster was appropriated from The New Yorker cover)*.

Total concept and feel – determined by ordinary lay observer from view of audience to which work was aimed and modified if P’s work contains unprotected material. ***Kroft*** *(McDonald land captured total concept and feel of Fun Stuff show from view of children to whom show is aimed)*; ***Shine*** *(reasonable observer could find that D’s Freedom Tower design was substantially similar to P’s Olympic Tower design)*.

Extrinsic/Intrinsic Test (CA9). ***Swirsky***; ***Bolton***.

Extrinsic – objective comparison; expert witnesses; distinguish between protected and unprotected material.

Intrinsic – total concept and feel to an ordinary observer (jury question).

* + 1. Exceptions
       1. Essential Step *–* Not infringement to copy computer program to make another copy or adaptation of that program provided that it is created as an essential step in the utilization of the computer program in conjunction with a machine or it is for archival purposes. 17 USC 117(a)(1).
       2. Cover License – 17 USC 115
          1. Can distribute a new sound recording of a musical work previously distributed to the public under the authority of the copyright owner.
          2. Does not need to be identical but can’t change basic melody or fundamental character of work.
          3. Must provide notice to the copyright owner or if this can’t be determined, to the Copyright Office.
          4. Must pay a royalty for every phonorecord made and distributed.
          5. Owner of the copyright in the underlying musical composition can still control public performance of the work or transmission over the radio.

#### (2) Modification/Prepare Derivative Works

* + 1. Definition – 17 USC 101
       1. Based on preexisting works
       2. Form in which a work may be recast, transformed, or adapted.
       3. Original work of authorship.
    2. Exception – Cover License (see supra) applies to musical arrangements. 17 USC 115.
    3. Swallowed up by reproduction except in following circumstances
       1. Alteration of a lawfully obtained copy of a copyrighted work
          1. Framing

***Munoz (CA9)*** *(mounting art images on tiles constitutes creation of derivative work)*

***Lee (CA7)*** *(mounting art images on tiles does not constitute creation of derivative work because like framing – work is not recast, transformed, or adapted and not original work of authorship)*

* + - * 1. Expurgation

Technology can edit a DVD movie on the fly and create a censored version of that movie as long as no fixed copy is made. 17 USC 110(11)

* + - 1. Absence of fixation – required for reproduction but modification just requires preparation
         1. Courts hesitant not to require fixation

***Micro Star*** *(CA9 required fixation and found that audiovisual display of downloaded user-created levels that were packaged on CD assume a concrete or permanent form in MAP files)*.

* + - 1. Statutory provisions that treat derivative works more favorably than reproductions
         1. 203 and 304 termination rights
         2. Restoration – 104A(d)(3) (see supra)
    1. Consequence – no copyright protection for infringing derivative works. 17 USC 103(a).
       1. ***Pickett*** *(Pickett’s guitar in shape of Prince symbol not copyrightable because unlawful derivative work)*.

#### (3) Distribution

* + 1. Right to sell, transfer ownership, rent, lease, lend. 17 USC 106(3).
       1. Make available to the public v. Actual dissemination
          1. ***Nimmer*** *(making a copy available for file-sharing constitutes distribution – unclear whether courts will rely on this)*.
          2. ***Diversey*** *(a library adding a work to its collection and making it available to the public constitutes distribution)*.
          3. ***Hotaling*** *(a library illegally distributes a published work when it places an unauthorized copy of the work in its collection and thus makes the copy available to the public)*.
          4. Search Engine – need to store images. ***Perfect 10*** *(Google did not distribute images via links because the third parties transmitted the images, not Google who didn’t have saved copies of such images)*.
       2. Publication – distribution to the public. A public performance or display of a work does not of itself constitute publication. 17 USC 101.
    2. Right to import/export. 17 USC 602(a).
       1. 602(a) exceptions
          1. Imported under authority of government but this does not extend to use in schools or other non-archival uses.
          2. Private use of importer.
          3. Importation by for an organization operated for scholarly, educational, or religious purposes and not for private gain.
       2. Case law –limited by first sale
          1. Round-trip parallel importation – Copyright owner may not prevent reimportation of copies of copyrighted work made in the US. ***Quality King (US 1998)***.
          2. One-way parallel importation

Quality King only applies to copies made in US. ***Omega*** ***(equally divided SCOTUS affirmed)***.

Also applies to case where copies made abroad. ***Kirtsaeng (2013)*** *(Helps US consumers but may hurt poor country consumers by making it harder for sellers to internationally price discriminate so they will raise prices in those countries.)*

* + 1. First Sale – owner of lawful copy/phonorecord can sell or dispose of copy/phonorecord. 17 USC 109.
       1. Elements. ***Nimmer***.
          1. Copy lawfully made with authorization of the copyright owner

***Redigi*** *(customer distributes to Redigi (allowed under First Sale). Redigi copies on cloud (106(1) violation). Redigi resells (distribution and reproduction violation because copy on cloud was unlawful. Note: original customer copy is simultaneously deleted when uploaded on cloud so seems counterintuitive)*.

* + - * 1. Particular copy was transferred under the copyright owner's authority
        2. Defendant qualifies as the lawful owner of that particular copy

Software user is licensee rather than owner copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; (3) imposes notable use restrictions. ***Autodesk (CA9)***

* + - * 1. Defendant thereupon disposed of that particular copy as opposed to just reproducing it
      1. Exception – cannot rent, lease or lend phonorecord or copy of computer program for direct/indirect commercial advantage.
         1. Does not apply to phonorecords when for nonprofit library or educational institution.
         2. Does not apply to computer program when on machine and can’t be copied in ordinary operation.
         3. Does not apply to computer program when for video game system.

#### (4), (5), (6) Performance and Display

* + 1. Rights – to perform and display publicly
       1. Definition – 17 USC 101
          1. (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
          2. (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. (Transmit Clause)

Different times – ***Redhorn*** *(renting VHS tapes to be watched in back room constitutes public performance because the facility is open to the public and the performance was transmitted from the front desk to the room in the back and shown to successive customers)*.

Potential audience

***Cablevision (CA2)*** *(RSDVR not public performance because transmitted only the copy requested and recorded by a particular user to that user on that receiver used to request the copy)*.

***Aereo (US 2014)*** *(transmitting copyrighted TV program to paid subscribers over the internet constitutes public performance. Different from Cablevision. More like CATV where transmitted to large number of unrelated people so more like broadcaster than equipment provider)*.

***Fox v***. ***Dish (CD Cal 2015)*** *(Dish did not infringe Fox’s public performance right because the service only could be used by subscribers to get access to their own recordings.* *The recording and later transmission depended on subscribers engaging in a volitional action)*.

WIPO Copyright Treaty – right to “make available to the public” is arguably broader than to perform and display publicly. US contends it is not.

Search Engine – “Server Test.” ***Perfect 10*** *(thumbnails infringed display rights because Google stored and served images. Third-party links did not directly infringe display rights because Google did not store or serve them but provided html links)*.

* + - 1. Sound Recordings – Perform publicly means by digital audio transmission. 17 USC 106(6)
    1. Limitations
       1. Exceptions – 17 USC 110
          1. Classroom – performance or display of instructor or pupil work during face-to-face teaching activities unless a movie in which copy unlawfully made.
          2. Distance learning
          3. Religion
          4. Nonprofit – non-commercial use, not transmission, no admission charge, proceeds not for private gain but charitable purposes
          5. Homestyle – transmission of performance or display at home onto single apparatus unless charging people or further transmitting to public
          6. FMLA (Fairness in Music Licensing Act) – performance in small bars and restaurants, no direct charge to hear transmissions, not further transmitted, transmission authorized by copyright owner

Successfully challenged by EU as violation of Berne Convention – carves out rights too much. US pays EU $1.4M for compensation to EU copyright owners.

* + - * 1. Real-space displays – no more than one projection at a time
      1. Compulsory licenses – permit people to engage in particular sorts of performances without permission, but require them to pay the copyright owner's fees that are set in some way by the government
         1. Types – Public Broadcasting System, some webcasts, cable retransmissions, satellite retransmissions, jukeboxes.
    1. Three Step Analysis
       1. Identify all performances
          1. Differentiate between musical work and sound recording
       2. Determine which ones are public
       3. Determine if any public performances are exempt from the statute

### Moral Rights

* 1. General – Integrity, Attribution, Disclosure, Withdrawal, Droit de Suite
  2. US
     1. Common-law – defamation, right of privacy, unfair competition, contract interpretation
     2. Lanham Act - ***Dastar (2003)*** *(once a copyrighted work passes into the public domain, anyone in the public may do anything they want with the work, with or without attribution to the author)*.
     3. State Art Preservation Statutes
     4. Visual Artists Rights Act (VARA)
  3. VARA 1990
     1. Rights of Attribution and Integrity – 17 USC 106A.
        1. Attribution
           1. Claim authorship and prevent use of name as author of work she did not create
           2. Prevent use of name for work that has been distorted, mutilated, or otherwise modified which would be prejudicial to her honor or reputation
        2. Integrity
           1. Prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation
           2. Prevent any intentional or grossly negligent destruction of a work of recognized stature

Recognized Stature test – (1) visual art in question has “stature,” i.e. is viewed as meritorious, and (2) that this stature is “recognized” by art experts, other members of the artistic community, or by some cross-section of society. In making this showing, plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact. ***Martin*** *(demolition of sculpture violated VARA rights because newspaper, magazine and letters show that art community and public considered work to be socially valuable and to have artistic merit)*.

* + 1. Who – 17 USC 106B.
       1. Only author of a “work of visual art” whether or not copyright owner
       2. Joint authors are co-owners of moral rights
    2. What – “work of visual art.” 17 USC 101
       1. Includes – painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer; or 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.
       2. Not Included – works not subject to copyright protection; work made for hire; 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; any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container.
    3. Exceptions
       1. 106A(c)
          1. Modification due to passage of time or inherent nature of materials
          2. Modification resulting from conservation, or the public presentation, including lighting and placement, of the work
          3. Integrity rights do not apply to any reproduction, depiction, portrayal, or other use of a work
       2. Buildings – 113(d)
          1. Integrity rights don’t apply when:

Work of visual art has been made a part of a building and can’t be removed without integrity rights being violated; and

Author consented to installation of work before 1991 or via written agreement after 1991 in which author acknowledges that integrity rights might be violated

Otherwise integrity rights apply but still subject to requirements outlined supra.

* + - * 1. Integrity rights don’t apply when:

Work of visual art can be removed without integrity rights being violated; and

Owner has made good faith effort (notice by registered mail) to notify author and author does not remove work or pay for removal.

If removal paid by author, title reverts to author

* + - 1. Fair Use
    1. Duration
       1. Created 1991 to present – life of author; joint authors – life of last surviving author
       2. Created before 1991 and title not transferred – same as economic rights
    2. Transfer and Wavier
       1. Cannot be transferred but can be waived if in writing; joint authors – one waives, waives for everyone
    3. Not subject to first sale doctrine.

## Secondary

### Contributory

* 1. Direct Infringement by someone other than D
  2. Knowledge (actual or constructive)
     1. COSNU (capable of substantial non-infringing uses) – no liability because no constructive knowledge
        1. ***Sony (Betamax)*** *(Sony not liable for selling VCRs because they were COSNU – time shifting, which is covered by fair use and/or by consent)*.
        2. ***Perfect 10*** *(Google’s linking to third-party infringing full-size images is COSNU – linking to non-infringing images)*.
     2. Willful blindness = actual knowledge. ***Aimster***.
  3. Material contribution to infringement
     1. Providing site and facilities. ***Fonovisa (CA9)*** *(flea market operator materially contributed to selling pirated copies of sound recording by providing vendor with site and facilities)*.
     2. ***Perfect 10*** *(Google’s linking to third-party infringing full-size images is material contribution)*.

### Vicarious

* 1. Direct Infringement by someone other than D
  2. Financial interest in the infringement
     1. Infringing conduct acting as a draw
        1. ***Fonovisa (CA9)*** *(flea market operator had financial interest in infringement because pirated music acted as a draw and enhanced attractiveness of venue to potential customers enabling D to earn more money)*.
  3. Right and ability to supervise the direct infringer
     1. Authority to expel. ***Fonovisa (CA9)*** *(flea market operator had right and ability to supervise because could expel vendor selling pirated music)*.
     2. ***Perfect 10*** *(Google likely has the legal right to stop or limit the direct infringement of third-party websites)*.

### Inducement

* 1. Elements – ***Grokster***.
     1. Direct infringement by someone other than D.
     2. Inducing or encouraging direct infringement with object of promoting infringement (mens rea – purpose)
        1. Not pertinent evidence of inducement – knowledge of infringing uses or general product support.
        2. Pertinent evidence of inducement – (1) advertising illegal uses; (2) targeting customers known to engage in illegal uses; (3) failure to adopt infringement-reducing technologies (insufficient on its own); (4) “commercial sense” of the enterprise depends on illegal uses (insufficient on its own).
     3. Declining to exercise right to stop it.
  2. Problem – the inducement rule is likely to catch the unsophisticated creators of start-ups, not sophisticated actors with good lawyers.
  3. ***Grokster*** *(Grokster distributed software with which users could share music without going through Grokster. Grokster said the software had substantial non-infringing uses but court held Sony is not applicable because Grokster did not merely distribute its software, it promoted its use for infringing purposes.)*

### File Sharing Cases

* 1. ***Napster (2001)*** *(Contributory Infringement – COSNU so no constructive knowledge but had actual knowledge because operators can ascertain whether a particular recording is being copied illegally. Vicarious Infringement – For same reason, operators have “supervisory control.”)*.
  2. ***Aimster (2003)*** *(Encryption prevented operators from knowing content of files its subscribers shared but tutorial showed users how to exchange sound recordings which would likely be subject to copyright infringement. Contributory infringement – “willful blindness” = actual knowledge. Material contribution established by D’s active encouragement of infringing uses. Vicarious infringement – unclear whether willful blindness enough to treat D as having supervisory control.*
  3. ***Grokster (US 2005)*** *(Grokster distributed software with which users could share music without going through Grokster. Grokster didn’t learn of specific illegal uses until too late to stop them. Left COSNU intact but added Inducement as a new form of liability.)*

## Para-Copyright

### Overview

* 1. Digital Millennium Copyright Act (DMCA) - 17 USC 1201, 1202
  2. Passed to fulfill WIPO Treaty obligation to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures

### 17 USC 1201

* 1. Two types of protected technology
     1. Anti-access technology
     2. Anti-copying technology (copying is shorthand for all exclusive economic rights)
  2. Two types of prohibitions
     1. Anti-circumvention rules – prohibits the circumvention of anti-access technology
     2. Anti-trafficking rules – prohibits the making and selling of devices or services to circumvent either anti-access technology or anti-copying technology
     3. Note: Circumvention of anti-copying measures does not violate statute because either falls under fair use or copyright infringement.
  3. Anti-Circumvention of Anti-Access Technology – Elements of liability
     1. Work is legally protected by the Copyright Act
     2. Technological measure effectively controls access to the work; and
        1. Effectively controls – Measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work. E.g. encryption, scrambling, and authentication schemes.
        2. Access
           1. Has to be linked with copyrighted work.

***Chamberlain*** *(device that provided rolling code necessary to activate garage door opener did not provide access to copyright protected material (expressive aspects) so code was not protected anti-access technology.)*

***Lexmark*** *(TPM to prevent unauthorized printer cartridges from communicating with its printer does not constitute controlling access because TPM did not prevent reading/copying program at issue*.

* + - * 1. Does not have to be linked to copyrighted work. DMCA created new right to control access.

***MDY*** *(MDY liable for selling Glider, software that allowed players of WoW to use bots to play game, which circumvented certain controls that limited the uses of WoW software. MDY did not infringe copyright but violated separate right to control access to the work)*.

* + 1. Defendant circumvents the measure
       1. Circumvents – to descramble a scrambled work, decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure.
  1. Anti-Trafficking
     1. Prohibits trafficking in devices or services to circumvent either anti-access or anti-copying technology.
     2. Prohibited devices
        1. Primarily designed or produced for the purpose of circumventing, or
           1. ***Streambox*** *(Streambox “VCR” that avoids copy-protection switch violates 1201)*.
        2. Has only limited commercially significant purpose or use other than to circumvent, ***Cf. Sony***, or
        3. Is marketed for use in circumventing. ***Cf. Grokster***.
     3. Prohibited acts
        1. Manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof.
           1. Making available online. ***Corley*** *(DeCSS allowed video recordings on DVDs, once descrambled, to be stored, compressed, reproduced, and redistributed. Court found that Corley putting DeCSS on website constituted trafficking)*.
  2. Exemptions
     1. Libraries to decide whether to buy
     2. Police to conduct investigation
     3. Reverse engineering for interoperability
        1. To successfully prove the interoperability defense under § 1201(f), must show:
           1. Lawfully obtained the right to use a copy of a computer program;
           2. Information gathered as a result of the reverse engineering was not previously readily available to the person engaging in the circumvention;
           3. Sole purpose of the reverse engineering was to identify and analyze those elements of the program that were necessary to achieve interoperability of an independently created computer program with other programs; and
           4. Alleged circumvention did not constitute infringement.
        2. ***Blizzard*** *(D reverse engineered to make CDs that contained Blizzard games and enabled purchasers to access Blizzard network. D did not meet requirement 4 because the circumvention in this instance enabled unauthorized copies of the games to be freely played on server)*.
     4. Encryption research to identify and analyze flaws and vulnerabilities of encryption technologies
     5. Protecting minors from porn
     6. Librarian of Congress can exempt a class of works for a period of 3 years.
        1. 2010 Ruling – educational use of movies, cell phone apps for interoperability, cell phone network access, security testing of video games, obsolete dongles, handicap access to ebooks.
  3. Fair Use and Free Speech
     1. Fair Use
        1. Does not limit 1201. ***Corley (CA2 2002)*** *(Refused to analyze whether the lack of fair use would be an unconstitutional limitation on free speech)*.
        2. But Fair Use then constitutionally required. ***Eldred (US 2003)***.
     2. Free Speech
        1. ***Felten*** *(Felten plans to publish how to strip watermarks out of music without degrading quality. RIAA suggests it will take action. Felten seeks declaratory judgment. RIAA retreats)*.

### 17 USC 1202

* 1. Prohibited to the following with authority of copyright owner:
     1. Intentionally remove or alter any copyright management information (CMI),
     2. Distribute or import for distribution CMI knowing that the CMI has been removed or altered, or
     3. Distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that CMI has been removed or altered, knowing, or ... having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

### Remedies

* 1. Civil – 17 USC 1203
     1. Equitable
     2. Damages
        1. Actual
        2. Statutory – 1201 - $200 - $2,500; 1202 - $2,500 - $25,000
  2. Criminal – 17 USC 1204
     1. Violate 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain—
        1. $500,000 or imprisoned for not more than 5 years, or both, for the first offense; and
        2. $ 1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

### EU Copyright Directive (2001)

* 1. Must provide penalties for circumvention of effective TPMS and trafficking
  2. Mandatory public policy exceptions
  3. Optional private copying exceptions

# General Defenses

## Statutory Safe Harbors

### Overview

* 1. 17 USC 512
  2. Secondary Liability – Contributory and Vicarious Infringement
  3. Limits liability of online service providers for categories of copying frequently made in the operation and use of computer networks.
     1. Copies made in transmission, routing, or providing connections
     2. Passive Caching
     3. Copies made by users
     4. Copies made in information location tools (such as searching and linking)

### Specific Requirements

* 1. Copies made in transmission, routing, or providing connections
     1. Transmission not initiated by service provider
     2. Selection of the material not made by service provider
     3. Service provider does not select recipient
     4. No copy of material is maintained in a manner ordinarily accessible to anyone besides anticipated recipients and not for a period longer than necessary for the transmission, routing, or provision of connection
     5. Material transmitted is not modified.
  2. Passive Caching
     1. Material not made available by service provider
     2. Transmission at the direction of another person
     3. Storage carried out through automatic, technical process and provided only to those who request it.
     4. Material not modified
     5. Service provider abides by refreshing, reloading, or other updating rules
     6. Service provider does not interfere with technology
     7. Provide for certain conditions if poster requires fee or provision of password/other material to access material
     8. Service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement
  3. Copies made by users
     1. Does not need to act if lacks specific knowledge of illegality.
        1. No actual knowledge or willful blindness of infringement. ***Viacom v. YouTube (CA2)***.
        2. No “subjective” knowledge of facts that would make infringement "objectively" obvious to a reasonable person. ***Viacom v. YouTube (CA2)***.
        3. Upon obtaining knowledge (receives proper notice), acts quickly to remove, or disable access to material
     2. No financial benefit directly attributable to the infringing activity when service provider has the right and ability to control such activity
        1. Triggered only by proof of somewhat greater control over the infringing behavior than is required for vicarious infringement. ***Viacom v. YouTube (CA2)*** *(this issue remanded)*.
           1. The ability to block access to material posted on its service is not enough
           2. “[P]urposeful, culpable expression and conduct” of the sort at issue in Grokster might be enough
     3. Upon notification, responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.
     4. Publicly identify an agent the copyright owners can contact to tell them that specific works are being stored on their systems unlawfully.
  4. Search Engines
     1. Abide by detailed set of procedures for removing such material from their systems, or resolving disagreements between the copyright owners and the posters concerning their illegality.

### General Requirements

* 1. Terminate accounts of repeat infringers.
  2. Accommodate technical measures used to protect works
  3. Service provider is not required to monitor its customers’ activity or to actively police for potential copyright infringement. 17 USC 512; Perfect 10.

## Statute of Limitations

### Civil action

* 1. 3 years
     1. Discovery rule applies
     2. Continuing wrong applies

## Fairness

### I. Fair Use

* 1. US, Israel, Singapore
  2. USC 107.
     1. The fair use of a copyrighted work 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 is a fair use the factors to be considered shall include:
        1. The purpose and character of the use
        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.
     2. Covers Economic and Moral Rights
     3. Factors not exhaustive – ultimate test is whether the copyright law's goal of “promot[ing] the Progress of Science and useful Arts," U.S. Const., art. I, § 8, cl. 8, "would be better served by allowing the use than by preventing it.” ***Castlerock***.
  3. Unusual
     1. Congress said not meant to be the last word but meant to ratify process of common law evolution and include judicial adaptation especially in response to new technologies.
     2. Receptivity to defendant’s positions
        1. Commentators argue US fair use doctrine violates three step test in Berne Convention.
           1. Three Step Test – Scope of copyright protections can only be limited when (1) special case; (2) does not conflict with normal exploitations of the work; (3) does not unreasonably prejudice the legitimate interests of the author/right holder.
  4. Problem – no guiding normative criteria
  5. Factors
     1. Purpose and Character of D’s Use
        1. Commercial
           1. Definition

Revenue-generating/profit-making

User profits from it without paying customary price. ***Harper & Row***.

Repeated copying to save expense of purchase even though not making money. ***Napster***.

* + - * 1. Less important than transformative. ***Cariou***.

Was very important. ***Sony (Betamax)*** *(time-shifting was non-commercial activity – private recording for personal use – but were worried about potential of making “libraries”)*.

* + - * 1. Discount if “Intermediate step” toward profit

***Sega*** *(Commercial aspects of Accolade’s use were minimal because purpose in copying Sega’s code was to study functional requirements for Genesis compatibility although ultimate purpose was to sell games)*.

***Texaco*** *(Texaco made copies of journals to meet needs of researchers. Discounted commercial nature of company since immediate objective was scientists’ research)*.

***Sony v***. ***Connectix*** *(Commercial use was indirect since Connectix copied Sony’s code to study functional requirements for PlayStation to make games playable on computer)*.

* + - 1. Transformative
         1. Definition – adds something new with a further purpose or different character altering the first with new expression, meaning, or message. ***Castlerock***.
         2. Most important. ***Campbell***.
         3. Parody

Imitates for comic effect or ridicule or to make appear ridiculous. ***Campbell***.

Okay if copy heart of the original. ***Campbell***.

Does not matter if in good or bad taste. ***See Mattel*** *(Barbie dolls)*; ***Bleistein***.

Must comment on author’s work.

Yes – ***Campbell*** *(Pretty Woman)*; ***Leibovitz*** *(Naked Gun promotional poster)*; ***Green Day*** *(photographer complained that Green Day tainted original message of the image)*.

No – ***Air Pirates*** *(doesn’t comment of Disney characters)*; ***Cat in the Hat*** *(no critical baring on substance of Dr. Seuss’ work)*.

* + - * 1. Critical of P’s work. ***Lennon*** *(use of Imagine transformative because criticizes song’s message)*.
        2. Physical modification

Slight modifications not usually sufficient. ***Castlerock***; ***Blanch v. Koons***; ***Gaylord*** *(stamp added snow and muted color but alterations did not impart a further purpose or different character)*.

* + - * 1. Socially valuable

***Sony (Betamax)*** *(looked at usual factors and that VCR’s TV copying socially valuable)*.

***Perfect 10*** *(Google’s search engine use of thumbnails fair use and considered public benefit)*.

* + - * 1. Different purpose

***Blanch v. Koons*** *(P and D had very different purposes in use of Silk Sandals so transformative)*.

***Authors Guild*** *(Google Books uses snippets of text from books for different purpose – to act as pointers directing users to a broad selection of books)*.

* + - * 1. Creative Use
      1. Shady
         1. Good faith and fair dealing necessary for fair use. ***Harper & Row*** *(D accessed manuscript illicitly)*.
         2. Little impact on fair use analysis, not dispositive. ***NXIVM***.
      2. Customary
         1. Author’s implied consent to reasonable and customary use when releases work. ***Harper & Row***.
         2. Little impact – negated by advancing technology where custom irrelevant. ***Harper & Row***.
    1. Nature of P’s Work
       1. Unpublished gets more protection
       2. Creative gets more protection
          1. Variant – Newsworthy. ***Harper & Row (Brennan)***.
       3. Computer software gets less protection
          1. Need for thinner protection in copying to reveal unprotected functional features.

***Sega*** *(Accolade copied Sega’s code to study functional requirements for Genesis compatibility to sell games for Genesis)*.

***Sony v***. ***Connectix*** *(Connectix copied Sony’s code to study functional requirements for PlayStation to make Virtual Game Station that makes PS games playable on computer)*.

* + - * 1. Availability of patent protection
    1. Amount
       1. Quantitative – denominator is the copyrighted work
       2. Qualitative. ***Harper & Row*** *(didn’t matter that only took 300 words but that took heart of book)*.
       3. Permissible amount of copying depends on purpose and character of the use.
          1. ***Campbell*** *(Parody has to use enough to conjure up original)*.
          2. ***Castelrock***
          3. ***Carious*** *(Prince used key portions of Carious’ photographs but transformed them into something new and different)*.
    2. Impact on Potential Market
       1. Interaction with Purpose and Character of the Use
          1. Less important than Purpose and Character (especially transformative)

Used to be most important. ***Betamax***; ***Harper & Row***

* + - * 1. Commercial use does not necessarily mean it injures market, especially if transformative. ***Campbell***.
        2. Parody – less likely to injure market since serve different market functions. ***Campbell***.
        3. Competition okay if transformative and does not merely supplant copyrighted work, then legitimate competitor. ***Sony v. Connectix*** *(Virtual Game Station substitutes PlayStations by allowing customers to play PS games on computer. Sony will lose sales and profits. But because the Virtual Game Station is transformative and does not merely supplant the PS, the Virtual Game Station is a legitimate competitor)*.
      1. Don’t count as harms
         1. Loss of fee D would have paid P to use. ***Castlerock***.
         2. Injuries resulting from criticism

Borderline cases – tarnishing. ***Cat Not in the Hat***; ***Air Pirates***

More worried about whether substitutes for the market than whether it suppresses or destroys it. ***Castlerock***.

* + - * 1. Impairment of markets for other works owned by P.
        2. Not true substitutes. ***Perfect 10*** *(thumbnails not substitutes for full-sized images)*.
      1. Spectrum of Potential Market
         1. Existing
         2. Traditional, Reasonable, Likely to develop – common in case law
         3. P likely to license. ***Castlerock***
         4. P willing to license
         5. Anyone willing to pay. ***Napster*** (identified alternative market); ***Sony (Betamax)*** (market D created)
         6. Value of the work even if no market

### Hybrid

* 1. UK, Canada, Australia, Taiwan
  2. Defendant's activity must fall within one of the enumerated categories
  3. To determine whether the activity is permissible, consider list of factors

### Enumerated Permissible Uses

* 1. EU Copyright Directive, China

# Remedies

## Civil

### Damages

* 1. Actual – 504(b)
     1. Loss of revenue P suffered as a result of D’s infringement
        1. Fewer sales of P’s work
     2. Value of Use Theory
        1. P may recover from D the amount that a willing licensee would have paid a willing licensor for the right to engage in the conduct at issue.
           1. Industry practice is relevant. ***Bruce v. World Weekly News***.
           2. What P had previously demanded in return for licenses to engage in similar conduct. ***Davis***.
           3. Circumstances that would have made the plaintiff reluctant to license and thus demand a high fee. ***SAP v. Oracle***.
     3. Indirect damages
        1. Cost of modifying product to compete with D's infringing product
        2. Reimbursement for travel costs and costs associated with producing the work
        3. Loss of goodwill, because customers are led to believe that plaintiff's product is not unique
        4. Loss of revenue caused by not being given appropriate credit for one's work
  2. D’s profits – 504(b)
     1. Profits that D made that are not accounted for by actual damages
     2. Gross revenue (burden on P)
        1. Revenues from sales of infringing product
        2. Enhanced sales of related, non-infringing products. ***Frank Music*** *(includes D’s increased hotel and gaming operations profits due to promotional value of play which infringed P’s work)*.
        3. Revenues generated by ads that contain infringing material. ***Reiser*** *(denied because inadequate causal connection – one picture out of many in promotional pamphlet*).
        4. Enhancement of D’s goodwill – hard to prove
     3. Deductions (burden on D)
        1. Costs – overhead (proper allocation demanded if willful infringement) and taxes (unless willful).
        2. Apportionment
           1. D must introduce evidence concerning how much of the revenue is attributable to the infringing and noninfringing parts of D's work. ***Frank Music***.
           2. Factfinder must separate amounts attributable to P's creative contribution from amount attributable to D's contribution

When P's material is "generic" and D's material adds "star power," the portion of the profits given to P shrinks

Where D's revenue derives in part from his position in the art world, they are properly apportioned to D

D’s talent

When in doubt, resolve in favor of P. ***Frank Music***.

* 1. Statutory damages – 504(c)
     1. Alternative to both actual damages and D’s profits but P may ask for greater of the two.
     2. Registration – required at time of infringement or within 3 months of publication for published work
     3. Notice – helps get higher statutory damages
     4. Range
        1. Innocent (good faith): $200 - $30,000
        2. Regular: $750-$30,000
        3. Willful (knowing): $750 - $150,000
        4. Factors – amount court considers just; evidence of actual damage; deterrence; nature of work.
        5. No constitutional ceiling. ***Thomas-Rasset***; ***Tenenbaum***.
     5. Calculation – per work
        1. Songs on CD not separate works. ***MP3.com***.
        2. Episodes in TV series are separate works. ***Columbia Pictures***.
        3. When single copyrightable work, statutory system is unsurprising and does rough justice.
        4. Modern file sharing - tens of thousands copyrightable works at issue. Remedies depends on number of works so statutory damages can grant enormous awards.
           1. Tenenbaum case – can’t escape liability because willful infringement
  2. Punitive damages – with one case exception, not awarded in federal copyright cases
  3. Attorney’s Fees
     1. Prevailing P’s and D’s treated the same. ***Fogerty***.
     2. Primary guideline: would an award of fees promote the purposes of the copyright system?
     3. Noexhaustive list of factors – Frivolousness; Motivation; Objective unreasonableness (both in the factual and in the legal components of the case); Compensation; Deterrence
     4. Smaller damages 🡪 more likely an award of fees, especially if D's conduct was willful. ***Gonzalez***.
     5. Recoverable more often in copyright cases than in most lawsuits
     6. Biggest costs – what defendants fear the most

### Injunctions – 17 USC 502

* 1. Permanent
     1. Plaintiff has suffered an irreparable injury;
     2. Monetary damages are inadequate to compensate for that injury;
     3. Balance of hardships favors the plaintiff; and
     4. Public interest would not be disserved by a permanent injunction
  2. Preliminary. ***Salinger*** *(adopted criteria announced for patent law in eBay case)*.
     1. Criteria – Above plus likelihood of success on the merits
  3. Traditionally, typically granted if P wins
     1. Rare circumstances in which they weren’t. ***Abend*** *(in view of the good faith reliance by the filmmakers on the original license, a reasonable monetary award would be more appropriate than an injunction)*.
  4. Recently, courts favoring damages – creating compulsory licensing regime.

### Impoundment and Destruction

## Criminal

### Statutes

* 1. Music – 18 USC 2319(A)(a)
     1. Knowingly
     2. For commercial advantage or private financial gain
     3. Fix sounds or images of musical performance in a copy or phonorecord, or reproduce copies or phonorecords of performance from unauthorized fixation.
        1. Distribute, sell, rent, traffic, or offer to do any of these things of such copy or phonorecord whether in US or not.
     4. Transmit or otherwise communicate live musical performance sounds/images to public
     5. Penalty
        1. First offense – up to 5 years or fine
        2. Second offense – up to 10 years or fine
  2. General – 17 USC 506(a)
     1. Willful infringement of copyright. ***Moran*** *(subjective not objective measurement of willful)*.
     2. For commercial advantage or private financial gain
     3. Reproduction or distribution of copies or phonorecords within 180 days with a total retail value of more than $1,000 or make available to the public on the internet if knew intended for commercial distribution.
     4. Penalty under 18 USC 2319(a)
        1. Up to 1 year or fine
        2. At least 10 copies and value more than $2,500 – up to 5 years or fine
        3. Second offense as above – up to 10 years or fine

### Other

* 1. Circumvent TPMs/Traffic Circumvention Technology (See Para-Copyright)
  2. False Labels on copyrighted works (See Para-Copyright)
  3. Recording of movies in theaters

### Trend

* 1. Increased reliance on criminal sanctions
  2. Discretion – law gives prosecutors a lot of freedom but cutting back on this.

# Business Strategies

## Offensive Strategies (own IP right)

### Exercise Market Power

* 1. To suppress competition and raise prices

### Sell intellectual property right

* 1. Problem is that market for IP much less fluid because:
     1. Unique Assets
     2. Value of assets if highly context specific
     3. Probabilistic Assets
        1. Validity is often uncertain
        2. Scope of the right is often unclear
     4. Portfolio Effects – Value of a given patent depends heavily on what other patents it is paired with
     5. Due diligence is difficult and expensive
     6. Arrow’s Paradox

### License for someone else to use

### Collaboration

* 1. With competitors
  2. With developers of complements – e.g. open APIs, Apple’s App Store
  3. With customers
     1. user innovation – e.g. fan fiction increases loyalty among potential source of customers
     2. grant-back licenses

### Donate

* 1. Nonstrategic – universities commonly donate to help world at large
  2. Strategic – motivated be desire to increase revenues in some other way
     1. Fuel demand for next wave – e.g. high end fashion

## Defensive Strategies (don’t own IP right but want to enter market)

### Assert a legal privilege

* 1. e.g. 110, 109, fair use

### “Inventing around”

* 1. Develop an alternative that doesn’t encroach on other people’s IP rights.

### Get Permission (get a license)

### Détente – Mutual Assured Destruction

* 1. As a newcomer, acquire your own IP rights not for the purposes of asserting them, but for the purpose of discouraging other people for coming after you because you have stuff against them. People don’t fight, but just threaten each other. Samsung and Apple détente eventually broke down.

### Rapid Dissemination (“shoot the moon”)

* 1. Deploy likely infringing work really fast because by the time litigation ensues, the practice is so culturally embedded that copyright holder feels obliged to give you a license and court favors you. High risk – if lose, lose company. ***See Sony (Betamax); Google; But Cf. Napster.***

# Theories of Intellectual Property

## Fairness

### Classic Form: Locke

* 1. Each person has a natural right to the fruits of his or her (intellectual) labor

### Modified form: equity theory

* 1. Each person deserves a share of the fruits of a collective project proportionate to the magnitude of his or her contribution to the venture

### Applications

* 1. Fair compensation?
     1. Contracts + work-for-hire doctrine
     2. treatment of pre-employment patent assignment agreements
  2. Temper copyrights to reflect contributions of materials from public domain under equity theory?
     1. E.g. Disney animated versions of folk tales.
  3. Temper rights of publicity under equity theory?
     1. Contributions to celebrity status by public
  4. Rights to factual works which may require a lot of labor?
     1. E.g. maps, databases, histories, autobiographies, “hot news”
  5. Ownership (Fairness) v. Rewards (Utilitarian)

## Personality

### Roots: Personhood theory of “real” property

* 1. Human needs served by private property rights – peace of mind; privacy; autonomy; self-realization as a social being; self-realization as an individual; security and leisure; responsibility; Identity; Citizenship; self-expression

### Personhood theory of IP

* 1. Intellectual products are manifestations or extensions of the personalities of their creators
     1. the artist defines herself in and through her art
     2. artists consequently are entitled to considerable continuing control over their products
        1. because injuries to those products injures the creator's self, or
        2. because control over products is part of general project of creating and maintaining an identity
  2. Appreciation of creators' personhood interests provides support for "moral rights"
     1. Right of attribution (given credit for only works you have created)
     2. Right of integrity (right to prevent destruction or mutilation of one’s creations) – E.g. Vangurken (train station design) and Snow (flying bird sculpture)
     3. Right of disclosure (right to determine if and when to make works public)
     4. Right of withdrawal (right to demand that current possessors return work)
     5. Right against excessive criticism (enables artist to recover against critic who abuses him or her)
     6. Droit de suite (right to collect fee when work is resold)
  3. Modern Modifications
     1. all persons must be enabled and encouraged to express themselves artistically
     2. recognize increasing dependence of creativity upon re-use of extant intellectual products

### Applications

* 1. Cast doubt on IP terms that extend beyond (or are shorter than) the life of the author?
  2. Cast doubt on defensibility of work-for-hire doctrine and pre-employment invention assignment agreements?
  3. Need to protect artists more against their own folly or ignorance?
  4. Expanded interpretation of fair use for transformative works?
  5. Does equality of opportunity require an adjustment of moral rights?

## Welfare

### Roots

* 1. Utilitarianism – “greatest happiness of the greatest number” - law should be organized to induce people to behave in ways that redound to the benefit of the public at large.
  2. Economic Analysis of Law
     1. Unless creators can recoup the costs of their creations, they won't produce those creations in the first instance, and the way that the law enables them to recoup their costs of expression is to suppress competition in the creation and distribution of their works. The absence of competition enables creators to price their goods above the costs of making and distributing, which enables the creators to reap monopoly profits.
     2. That still leaves consumers who are able to purchase the goods better off than before, but has the unfortunate side effect of pricing out of the market a significant set of potential consumers.

### Public-Goods Problem

* 1. Conditions that define a public good – Nonrivalrous and Nonexcludable
  2. The Problem: Underproduction
     1. Original creator will not be able to recover costs of creation
     2. Anticipating this effect, creation will not occur in the first instance
  3. Circumstances that exacerbate the problem
     1. High costs of creation – E.g., new pharmaceutical products (cost $800M - $1B)
     2. High uncertainty
     3. Low marginal cost of production
     4. Ease of reverse engineering
     5. Positive externalities from the public good
  4. Circumstances that mitigate the problem and thus reduce the need for governmental intervention
     1. Lead time protects first mover
     2. Custom or extralegal norms protect first mover
     3. Opportunities for increasing excludability through self-help
     4. Alternative motivations for production

### Possible Solutions

* 1. Solution #1: Government Provides the Good
  2. Solution #2: Government Selects and Subsidizes Private Innovators
  3. Solution #3: Government Issues Prizes to Successful Private Producers
  4. Solution #4: Legal Reinforcement of Self-help Strategies
  5. Solution #5: Government protects producers against competition
     1. Intellectual Property
     2. Advantages
        1. Relies upon the market to drive research toward areas of high social value
        2. Relies upon private parties' knowledge of the costs of R&D, marketing, etc.
        3. Imposes costs of innovation upon (initial) users of the innovations
        4. Competition in the quest for the pot of gold fosters fast, focused research
     3. Disadvantages
        1. Deadweight loss
        2. Administrative and Litigation Costs
        3. Impediments to Cumulative Innovation (one innovator builds on work of another)
        4. Patent Thickets
        5. Rent dissipation - unfortunate tendency of intellectual property rights, both patents and copyrights, to draw excessive numbers of people into the competition for generating a socially beneficial innovation
        6. Ineffectiveness in digital environment

### Applications

* 1. IP = "Necessary Evil"
     1. IP protection should not extend to innovations that would be produced in optimal numbers without them
  2. Disaggregation
     1. presumptive argument for tailoring IP rights to particular kinds of innovations
     2. Welfare theory Counterarguments
        1. increased administrative and litigation costs
        2. increased hazard of "industry capture.” - the risk that the lobbying power of companies that stood to gain by tweaking the increasingly specialized sets of rules would grow, which would be good for those companies but bad for the public at large.
  3. Scope of Protection: Incentive/Loss Ratio - the ratio between the incentives generated by each entitlement and the social welfare losses that come with it.
  4. Compulsory Licenses
  5. Bounded Rationality and IP
  6. "Monopolistic Competition"
  7. Justification for Novelty and Nonobviousness Requirements in Patent Law
  8. Criticism of Utility Requirement in Patent Law.
  9. Duration
  10. Price Discrimination
  11. Optimal Levels of Protection

## Culture

### I. Foundations

* 1. Human Nature
     1. People's nature causes them to flourish more under some conditions than others
     2. Social and political institutions should be organized to facilitate that flourishing
  2. Good Life
     1. Conditions necessary for the full realization of personhood – not all eight required
        1. (1) Life; (2) Health; (3) Autonomy; (4) Engagement; (5) Self-expression; (6) Competence; (7) Connection; (8) Privacy
  3. Distributive Justice
  4. Culture – four dimensions of culture that closely connected to realization of aspirations
     1. Diversity – Increases fact and experience of choices, increases autonomy, increases opportunities for expression and engagement.
     2. Art
     3. Education - Autonomy, engagement, self-expression, and competence are all dependent upon the kind of knowledge and skills that only education can provide.
     4. Democracy – participatory not representative democracy

### Applications

* 1. Education
  2. The Idea/Fact/Expression Distinction – no protection for things essential to deliberation and civic engagement
  3. Fair Use
     1. adjust incentive/loss ratios (the numerator of which is the economic benefits that entitlement would provide to creators, and thus the incentive it offered to creativity; and the denominator of which is the social losses that entitlement would cause) associated with potential entitlements to reflect impact on:
     2. increase opportunities for commentary and criticism
     3. increase opportunities for creative reuse of copyrighted works
     4. decrease privileges for consumptive uses –uses for the sole benefit of the owner are not as socially valuable
     5. construe the 4 statutory factors in107 in light of the normative beacon of the good life and good society
  4. Moral Rights
     1. Weaker protections for right of integrity - when copies of a work are not scarce, modification and remixing should be freer.
     2. Strengthened rights of attribution - seems closely tied to the fundamental human need for self-expression, the ability to project one's identity into the world and to be recognized by others.
  5. Libraries
     1. no public lending rights (don’t allow copyright owners to charge fees to libraries)
     2. opt-out rule for digital libraries - Google, or other organizations, should be permitted to digitize books and make the digital versions publicly available, unless and until the copyright owners object.
  6. Formalities
     1. Should require appropriate preconditions for copyright protection because by granting copyrights automatically to creative works, we needlessly limit the scope of the public domain.
     2. registration systems to facilitate location of owners
     3. (qualified) privileges for nonpermissive use of "orphan works"
  7. Compulsory Licensing
     1. increased reliance on liability rules, rather than property rules, particularly with respect to violations of 17 USC 106(2)
     2. lower rates for socially beneficial activities
  8. Differential Pricing
  9. Supplementary Government Funding
  10. Alternative Compensation System for Recorded Entertainment
  11. Traditional Knowledge

### Concerns

* 1. Paternalism – doesn’t entirely defer to people’s own assessment of self-interest (self-determination)
  2. Hazards of Government