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Developments in Copyright Law

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Definition of a Copyright (17 U.S.C. § 102)

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression. Works of authorship include:

- Literary, musical, and dramatic works;
- Pantomimes and choreographic works;
- Pictorial, graphic and sculptural works;
- Motion pictures and other audiovisual works;
- Sound recordings; and
- Architectural works.

Examples of Copyrightable Works

- Books, plays and other literary works
- Films, music recordings
- Pictures, drawings, characters
- Photographs
- Brochures, advertisements
- Website content
- Computer software programs
- Jewelry, furniture, architectural plans

A Trademarked Logo Can Be Copyright Protected

- If a logo meets the originality requirements, it can be protected as a copyright, regardless of any protection it may also enjoy as a trademark.



- Significance of copyright protection of logos:
 - Potential for enhanced brand protection (copyright is not tied to a field of use like trademark); DMCA can provide for better copyright enforcement options online, compared to trademark enforcement options;
 - Registration process is usually much faster and less expensive compared to trademark registration;
 - No renewal or maintenance of copyrights needed.

What is NOT Copyrightable?

- Ideas or concepts
 - Example: idea of using certain images in an advertisement is not copyrightable; actual images and actual advertisement (i.e., expression of the idea) are copyrightable
- Facts
- Data
- Works that lack a “minimal level” of creativity
 - Example: Alphabetical listing of names in a telephone book or directory
- Useful Articles (Utilitarian)

Drawing The Line Between Copyrightable Expression And Non-copyrightable Utilitarian Designs

Star Athletica, LLC v. Varsity Brands, Inc., 136 S. Ct. 1823 (2016), U.S. Supreme Court granted certiorari. Oral argument October 31, 2016.

- Dispute between competing manufacturers of cheerleading uniforms. Varsity brought suit against Star Athletica for copyright infringement.
- Useful article such as a garment design cannot be copyrighted, but features of it may.
- What is correct approach to determine whether a design is a protectable pictorial, graphic or sculptural work separable from the utilitarian aspects of the article? E.g. Ornamental belt buckle (also worn separately as a pin)
- Can Varsity's design features (stripes, chevrons, zigzags, color blocks) be separated from the uniform's utilitarian aspects?
- District Court: Designs not separable from the utility of the cheerleading uniform. Not copyrightable
- 6th Circuit: Varsity's design features could be separated from the utility of the uniforms so they were protected as pictorial, graphic or sculptural works.
- Star Athletica proposes a new 2 part test to determine if an article's design features may be copyrighted: (1) identified separately; (2) independent-existence.
- Varsity argues that applied art, which has both artistic and practical utilitarian elements, is protected.

Idea v. Expression

- Copyright protects expression, not ideas
 - Whether a work, or a part of a work, is defined as an idea or expression depends on level of abstraction
 - More generalized the idea, less likely there is copyrightable expression
- Merger Doctrine
 - Where there are only a limited number of ways to express an idea, the idea merges with the expression and the work is not copyrightable

Requirements of Copyright

- Originality
 - The work must be an independent creation by the author and the work must possess a minimal degree of creativity
 - Copyright protection only extends to the copyrightable elements of a work
- Fixation
 - The work must be sufficiently permanent / stable so that it can be perceived, reproduced, or communicated for a period of more than transitory duration
 - Fixation and creation need not be simultaneous

Ownership of Copyright

- Unless specified otherwise, the creator of the work is presumed to be the author and owner
- If using an independent contractor, must obtain written assignment of copyright
 - Example: photographs taken by a third party
- **Works for hire**
 - The employer or person for whom the work was prepared is considered the author unless the parties expressly agreed otherwise in contract

Ownership of Copyright (cont'd)

- Two types of works for hire:
 1. Work created by employee within scope of employment (Employer is the copyright owner)
 - Copyright Act does not define term “employee” or “in the course of employment;” U.S. Supreme Court has used general common law agency principles
 - An “employee” under agency law depends on factors such as: control of means of production, location of work, source of tools, amount of skill involved, whether creator is receiving employee benefits, duration and relationship between the parties
 - “In the course of employment” under agency law depends on factors such as: type of work employee hired to perform; whether work was created mostly during work hours; whether purpose of the work is to serve the employer

Ownership of Copyright (cont'd)

2. Certain specially ordered or commissioned works for use as:

- a contribution to a collective work;
- a part of a motion picture or other audiovisual work;
- a translation;
- a supplementary work;
- a compilation;
- an instructional text;
- a test;
- answer material for a test;
- an atlas.

For specially ordered or commissioned works, the parties must expressly agree in writing that the work is a work made for hire

Case Study: Software Made for Hire

- *MacLean Associates Inc. v. Wm. M. Mercer-Meidinger-Hansen Inc.*, 21 USPQ2d 1345 (3d Cir. 1991)
 - MacLean is a former employee who became an independent contractor; Develops software as independent contractor
 - MacLean provides his software without restrictions, and features of software were copied into new Mercer systems
 - MacLean sues three years later over new Mercer system
 - Work made for hire?
 - The new Mercer system does not qualify as a specially commissioned work, so question is whether the copied features are “a work prepared by an employee within the scope of his or her employment”
 - Court uses factors from *CCNV v. Reid*
 - When MacLean’s software was developed, he was a contractor, used his own equipment at his own facility, controlled his hours
 - MacLean owns copyright because he was an independent contractor

Practice Tips:

Practice pointer:

- When working with independent contractors, include an assignment of copyright rights.
- Get intellectual property ownership nailed down in an agreement before starting work with an independent contractor
- If IP status not previously agreed upon, get a later agreement, but independent contractor may want more in return

Implied License

- A nonexclusive license may arise by implication where the creator hands the work over, intending that defendant copy and distribute it. *Effects Assocs. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990)
- Three prongs:
 - Request work
 - Deliver the work
 - Intend that it be copied and distributed

Implied License (cont'd)

- *MacLean Associates Inc. v. Wm. M. Mercer-Meidinger-Hansen Inc.*,
 - The nature of Maclean's work suggests implied license to Mercer
 - However, license limited to use of original software
 - License scope exceeded when Mercer integrated MacLean's software into new system

Other Important Considerations

- ASSIGNMENTS & LICENSES
 - Copyright ownership may be divided and freely transferred in parts or in whole
 - A transfer of copyright ownership includes the assignment or exclusive license of any of the exclusive rights comprised in the copyright
 - A Non-exclusive license is not considered a transfer
 - A transfer must be in writing and signed by the copyright owner
 - Exclusive licensees cannot transfer or sublicense their rights without the consent of the licensor
 - For a non-exclusive license no writing is required and the license may be oral / implied from conduct

Ownership of Copyright

- **Derivative Works**

- A work based on one or more preexisting works (e.g. a movie sequel or a translation)
- To be considered a derivative work the new matter must be original
- Copyright protection covering the derivative work only extends to the new, not the preexisting material

- **Practice Tip:** If seeking to enforce copyright protection on derivative works based on expired copyrights, important to separate out the new, additional elements in the derivative works still protected by copyright from the expired elements.

e.g., *Klinger v. Conan Doyle Estate* (7th Cir. June 16, 2014); Sherlock Holmes expired copyrights

- **Compilations**

- A combination of previous works which, as a whole, create a new original work (e.g. original selection or combination of material)

Ownership of Copyright (cont'd)

- **Collective Works**

- A work in which a number of contributions that are separate and independent works in themselves are assembled into a collective whole
- Each author maintains ownership to the individual work within the collection and the owner of the collective work only has the right to copy and distribute the collective work in its entirety

- **Joint Works**

- A work prepared by more than one author with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole
- In absence of agreement to the contrary, all joint authors share equally in the ownership of the joint work; even where their respective contributions are not equal

Ownership of Copyright (cont'd)

- To qualify as a joint work the authors must have:
 - An objective primary intent to be co-authors from the moment of creation (courts look to factor such as decision-making authority and compensation to both parties as co-authors), and
 - Each author must meet the authorship requirements (e.g. more than de minimis contribution is required)
- An express collaboration agreement is not required
- One joint owner cannot bring an infringement action against another joint owner; a joint owner can license without the permission of the other joint owner but there is an obligation to contribute.

Copyright Notice

- Not technically required currently, but strongly recommended
- Should be used on product packages, websites, DVDs, literary works, etc.
- Typical copyright notice format:
 - © DATE/YEAR OWNER

Example:

© 2017 XYZ, Inc.

What Are Copyright Rights?

- Under §106 of the Copyright Act, the copyright owner has the exclusive rights to do and authorize any of the following:
 - (1) reproduce the copyrighted work in copies or phonorecords (reproduction);
 - (2) prepare derivative works based upon the copyrighted work (derivative);
 - (3) distribute copies or phonorecords of the copyrighted work to the public by sale, rental, lease, etc. (distribution);
 - (4) for literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, to perform the copyrighted work publicly (public performance);
 - (5) display the work publicly (public display);
 - (6) in the case of sound recordings, to perform the work publicly by means of a digital audio transmission (sound recording public performance by digital transmission).

Violation of Public Performance Constitutes Copyright Infringement

- *ABC et. al. v. Aereo, Inc.* US Supreme Court
June, 2014
 - Whether unauthorized retransmission constitutes a public performance under Copyright Act.
 - Aereo provided streaming service to 12 cities; relied on thousands of mini-antennas to capture programs and then stream them on a user-to-antenna basis.
 - Supreme Court ruled that Aereo operates much like a cable company, which cannot transmit shows without paying fees.

Why Register a Copyright?

- Works are copyright-protected as soon as created and fixed
- Registration of copyrights is not mandatory but recommended
- Benefits of registration:
 - Copyright registration establishes a public record of the copyright claim;
 - Copyright application or registration generally required to bring lawsuit;

Benefits of Registration

- If registered within five years of publication, registration is prima facie evidence of the validity of the copyright;
- Copyright registration can be recorded with the U.S. Custom Service for protection against importation of infringing products.
- **With a few exceptions, registration prior to infringement is a prerequisite for collecting statutory damages, costs and attorney fees (17 USC § 412).**
 - Grace period for published works: even if the infringement occurred prior to registration, there is no limitation on remedies as long as registration occurs within **three months after first publication of the work.**

Copyrights in the Digital Age: Registration of Online Works

- Each individual work (audio recording, video, image) can be registered as a copyright;
- The overall look of websites can be registered as well;
- For websites with frequently updated content, separate registration must be obtained for each version of the site. (See: Copyright Office's Circular 66); registration of revised version covers only the new or revised material added.
- A group of updates to a database, covering up to a 3-month period within the same year, may be combined in a single registration. (See: Copyright Office's Circular 65).
- Group registration (single registration covering multiple issues published on different dates) available for serials (if collective work) and daily newsletters, including those published online.

What Is Protected on the Internet?

- Original video, audio, text and other copyrightable material;
- HTML and other formatting code;
- Automated databases;
- The unique design of a Web page and its contents:
 - Original text
 - Graphics
 - Audios
 - Videos
 - Links
 - Custom unique lists of web sites

Best Practices for Copyright Protection in the Digital Age

- Always use the copyright notice to give proper notice
- Register copyrights with the U.S. Copyright Office
- Police your copyrights
 - Monitoring the Internet (via Google, search on online auctions, P2P networks, etc.)
 - Utilize technology to protect copyrights
 - Technological Protection Measures (TPMs)
 - Digital Rights Management (DRM)
 - Deep Packet Inspection (DPI) solutions
 - Automated crawlers and software to identify infringing video, audio or images

Enforcement Options

- Cease and desist letter to infringer;
- Complaint Under the Digital Millennium Copyright Act of 1998 (“DMCA Complaint”);
- Civil litigation (17 USC §§ 501-505);
- Criminal action (17 USC §506);
- No immediate action, but continue to monitor

Copyright Infringement: Substantial Similarity

- The burden is on plaintiff to prove:
 - Ownership of a valid copyright (a Certificate of Registration provides *prima facie* evidence of validity)
 - Copying: may be shown by direct or circumstantial evidence
 - Direct Evidence – rare
 - Circumstantial evidence requires showing:
 - The defendant had **access** to the work (e.g. if the plaintiff's work was widely disseminated or if there was a relationship between the parties which provided the defendant with access)

Copyright Infringement (cont'd)

- The Ninth Circuit uses the extrinsic/intrinsic test defined in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977)
 - The extrinsic test looks to whether the ideas are the same and is determined as a matter of law
 - The intrinsic test looks to whether the ordinary reasonable person would consider the expression to be the same and is determined by the trier of fact
- Fair Use: No Infringement
- Defenses to Copyright Infringement: Independent Creation of Work, First Sale Doctrine, *De Minimis* Use, Contract or License; Inequitable Conduct; Statute of Limitations; Misuse of Copyright (Antitrust Defense)

Copyright Infringement (cont'd)

- The Second Circuit uses the abstraction/ filtration/comparison test defined in *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992)
 - Ideas, which are not protected under copyright, are first extracted (“filtered”)
 - Remaining components (copyrightable subject matter) are then compared to determine whether they are substantially similar

17 U.S.C. § 107 Limitations on Exclusive Rights: Fair Use

- 17 U.S.C. § 107 provides that “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright.”

17 U.S.C. § 107

- Continuing, Section 107 lists four fair use factors:
“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
 - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such is made upon consideration of all the above factors.”

The Importance of Fair Use

Blanch v. Koons, 467 F.3d 244, 250 (2d Cir. 2006)

“There is an inevitable tension between the property rights [that copyright law] establishes in creative works, which must be protected, and the ability of artists, and the rest of us to express them—or ourselves by reference to the works of others, which must be protected up to a point. The fair-use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control.”

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

Fair use is “necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and the useful Arts.’”

The Incoherence of Fair Use

- At the same time, no single area of copyright law has been more roundly subject to debate and criticism than the doctrine of fair use.
 - *Professor David Nimmer*: “Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would have been the same”
 - *Professor James Gibson*: “Fair use . . . is too indeterminate a doctrine to provide a reliable touchstone for future conduct.”
 - *Professor Jessica Littman*: “billowing white goo.”
- *Professor Paul Goldstein*:
 - “Fair use is the great white whale of American copyright law. Enthralling, enigmatic, protean, it endlessly fascinates us even as it defeats our every attempt to subdue it.”

Understanding Fair Use: A Tale of Two Models

- The evolution of the fair use doctrine reflects a fundamental change in the way courts view the purpose of the fair use.
 - **Market-Centered Model** dominated how federal courts approached fair use questions following passage of the 1976 Copyright Act through the remainder of the **20th Century**. This approach focuses on whether the secondary use is for “commercial” or “educational” purposes.
 - **Transformative Model** has dominated how federal courts approach fair use questions in the **21st Century**. This model focuses on whether the secondary use is one that adds something new, with a further purpose or different character that alters the original work with new expression, meaning or message.

Market-Centered Model

- Derives from the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) (“time shifting”)
 - “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege.”

Market-Centered Model

- This view was reinforced by Supreme Court's decision in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985)
 - “The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use” and that § 107's fourth factor concerning harm to the plaintiff's potential market, is ‘undoubtedly the single most important’ factor”.

Elements of Market-Centered Model

- Focus on first factor is whether defendant's use was "commercial" or nonprofit;
- Focus on fourth factor is whether defendant's use would harm potential market for plaintiff's copyrighted work;
- Other factors considered but play less decisive role in fair use analysis.

Rise of “Transformative” Model

- Supreme Court’s decision in *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).
 - Inspired by Judge Pierre Leval’s 1990 Harvard Law Review Article, *Toward a Fair Use Standard*,” which argued that fair use inquiry should focus on whether work is “transformative.”
- Though purporting to apply *Sony* and *Harper & Row*, the *Campbell* opinion really articulated entirely new fair use analysis that has now thoroughly replaced the market-oriented model.
- Today, federal courts almost universally apply the Transformative Model.

Elements of Transformative Model

- Reframes Role of Fair Use
 - Fair use furthers the “goal of copyright” by allowing for “the creation of transformative works.”
- Reframes first factor inquiry regarding the purpose and character of the use from whether challenged work is commercial to whether it is “**transformative.**”
- Emphasizes importance of **first** fair use factor over other factors.

Elements of Transformative Model

- De-emphasis on fourth fair use factor.
 - “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”
 - “No ‘presumption’ or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes.”

What Is A “Transformative” Use?

- In *Campbell*, the Supreme Court stated a **“transformative”** use is one that **“adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.”**
- Language susceptible to a variety of interpretations.

Distinguishing Between “Transformative” Works And “Derivative” Works

- Distinguishing between a “transformative” work and a derivative work is not easy based on language of Copyright Act.
 - Exclusive rights of copyright owner extend beyond original copyrighted work and includes the right to “prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2)
 - Copyright Act defines a “derivative work” as “a work based upon one or more preexisting works” and includes “any . . . form in which a work may be recast, *transformed*, or adapted. 17 U.S.C. § 101.

Distinguishing Between “Transformative” Works And “Derivative” Works

- As Professor Goldstein has noted, a fair use analysis based solely on “transformativeness” “threatens to undermine the balance that Congress struck in section 106(2)’s derivative rights provision to give copyright owners exclusive control over transformative works to the extent that these works borrow copyrightable expression from the copyrighted work.”
- Expanding definition of what qualifies as a “transformative” work impacts a copyright owner’s ability to control “derivative” works.
 - If work is found to be “**transformative**,” courts may permit use of the entire copyrighted work as a fair use.
 - If work is found to be “**transformative**,” then “**such uses, by definition do not serve as substitutes for the original work**” and therefore do not cause cognizable harm to copyright owner.

Not all Uses Are “Transformative”

- Transforming character or purpose of copyrighted work versus transforming message.
- A transformative use is one that uses preexisting work to create a new work having a **different expressive purpose** than the preexisting work.
- A transformative use involves a “creativity shift,” such as using a creative work for informational purposes or vice versa.

Not all Uses Are “Transformative”

- As one commentator has noted:
“If the defendant has a transformative purpose, the court has generally found transformativeness, even if she has not altered the work’s content in any way, while if the defendant has no transformative purpose, the court has generally found no transformativeness, even if she has transformed the content of the work sufficiently to create a derivative work.”

Transforming Purpose versus Transforming Message

Transforming Purpose or Character of Work

- *Cariou v. Prince*, 714 F.3d 694 (2013) (well-known appropriation artist's use of copyrighted photographs in paintings sold at gallery is transformative)
- *Authors Guild, Inc. v. Google Inc.*, 954 F.Supp.2d 282 (2013) (digital copying of thousands of copyrighted books for purpose of creating searchable word index is transformative).
- *Adjmi v. DLT Entm't Ltd.*, 97 F.Supp.3d 512 (2015) (play based on 1970's TV series *Three's Company* was transformative because it presented "an upside-down, dark version" of the television series.)

Transforming Content of Work

- *Video Pipeline v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191 (2003) (plaintiff's video clips created from defendant's motion pictures "lack any significant transformative quality")
- *Warner Bros. Entertainment v. RDR Books*, 575 F.Supp.2d 513 (S.D.N.Y. 2008) (defendant's Harry Potter Lexicon not transformative because used too much original expression);
- *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (insufficient "transformative purpose" in defendant's unauthorized use of main character from "The Catcher In the Rye" for new novel).

Transformative Fair Use And The Need For Continuing Judicial Oversight

- *Fox News v. TV Eyes*, 124 F. Supp.3d 325 (2015)
 - TV Eyes records all content of more than 1,400 television and radio shows and creates searchable database using programs' closed-caption technology.
 - TV Eyes offers service to businesses and government agencies.
 - Although finding that TV Eyes' basic service is fair use, Court imposes variety of limits on certain features offered:
 - Only allows users to download clips to subscriber's "media center" but not subscriber's personal computer;
 - Subscribers may only email results of searches to no more than five (5) persons outside of subscriber's organization who can be emailed with results of searches;
 - Prohibits subscribers from emailing video clips until TV Eyes develops adequate protective measures;
 - Court has continuing jurisdiction to enforce compliance or consider new developments.

Transformative Fair Use And Jury Trials

- *Oracle v. Google* (2016)
 - San Francisco jury found that Google’s unauthorized use of some 11,000 lines of Oracle’s copyrighted Java open-source code in Google’s Android mobile phone operating system was fair use.
 - Jury instructions ran some 22 pages—of which there were 9 pages of instructions about how to decide the fair use question.
 - Instructions first recite the four fair use factors from Copyright Act
 - Jury then told it must decide if use was “transformative”
 - Jury told that if it found the use to be “transformative” then needed to reconsider import of four factors
 - Jury then told that after considering four factors, jury was free to “consider any additional circumstances and evidence, pro or con, that, in your judgment, bear upon the ultimate purpose of the Copyright Act, including protection of authors and the right of fair use, namely, to promote the progress of science and useful arts.”

Fair Use Not Found—Not Transformative—Did Not Add Anything and Use Was For Original Purpose

- *Disney Enterprises, Inc. v. VidAngel, Inc., C.D. Cal. Dec. 12, 2016*
 - Disney and 3 other film studios own copyrights to movies and TV shows, which they license to services that sell access to consumers via streaming or downloading. VidAngel runs a for-profit service which allowed customers to stream “filtered” versions of movies and episodes with content removed. Customers can “sellback” DVD to VidAngel the next day for \$1 less than purchase price from VidAngel.
 - Is a service’s unauthorized reproduction and streaming of movies and TV shows—after removing certain segments at the request of individual customers that own a physical copy of the content—fair use?
 - Court found that VidAngel’s for-profit “filtering” service was not transformative and weighed “heavily” against fair use because “it did not add anything” to the works and used them for their original “intrinsic entertainment” purpose. Court found that all four fair use factors weighed against fair use.

Fair Use Not Found—Not Transformative; No Parody; Free Distribution Found to be Commercial

- *Paramount Pictures Corp. v. Axanar Productions, Inc.*, (C.D. Cal. Jan. 3, 2017)
 - Paramount Pictures and CBS Studios own copyrights to the Star Trek movies and TV shows, which they also license to third parties to create derivative works. Plaintiffs own copyrighted works about former starship captain named Garth, “famous for his exploits in the Battle of Axanar.” Defendant produced an unauthorized 21 minute film, *Star Trek: Prelude to Axanar* and a script for a full-length film about “the Battle of Axanar and the exploits of Garth.” Prelude was made available free online to raise money through crowdsource funding to produce the full length film.
 - Defendant asserts fair use.
 - Court finds all factors favor plaintiffs, most notably:
 1. **Purpose and character of the use:** not transformative; no “further purpose or different character, altering...with new expression, meaning, or message.” Not parodies: no criticism of substance or style of the prior Star Trek works. Free distribution found to be commercial because it profited from exploitation of plaintiffs’ copyrighted material “without paying the customary price for a license” and because used to raise money for future projects.
 2. **Nature of the work:** “fictional stories and motion pictures tend to be creative works” that are given “broad copyright protections.”

Digital Millennium Copyright Act (DMCA)

- Made illegal the manufacture, sale, or distribution of devices to break software code and make illegal copies of software. (Exception: devices to conduct encryption research, assess product inoperability, and test computer security systems);
- Criminalized attempts to circumvent anti-piracy measures built into software (certain exemptions for libraries, educational organizations and certain other nonprofits);

Digital Millennium Copyright Act (DMCA) (cont'd)

- Created a safe harbor for online service providers against copyright liability if they promptly remove infringing content upon copyright owner's request and if the following conditions apply (17 USC § 512):
 - the transmission of the material was initiated by or at the direction of a person other than the service provider;
 - the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
 - the service provider does not select the recipients of the material except as an automatic response to the request of another person;
 - the service provider makes no copies of the material; and
 - the material is transmitted through the system or network without modification of its content.

Viacom International, Inc. v. YouTube, Inc. (Google): Test of DMCA; Settled March 2014 ending 7 years of litigation

- Viacom had filed a \$1 billion lawsuit against YouTube and others in 2007 and accused the Google unit of illegally broadcasting 79,000 copyrighted videos on its website between 2005 and 2008. Google paid about \$1.65 billion for YouTube in 2006.
- YouTube (Google) Motion for summary judgment granted on grounds that DMCA's "safe harbor" provisions shielded YouTube from Viacom's copyright infringement claims but was later overturned in part and case was still pending.

DMCA Tips – Staying Out of Trouble

- Clear posting of policies.
- Process for quickly removing infringing content.
- Procedure for users to file counter notices.
- Creating and enforcement of a repeat infringer policy that tracks and bans proven multi time offenders.
- Establishing a designated agent for receiving take-down notices and registering that person with the copyright office.
- Don't be an editor of content if you are a hosting site.
- When in doubt, remove content.
- Internal education – make sure everyone in company understands.

Copyright Issues on Social Networks and File Sharing (P2P) Networks



The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue rectangular background.

The Match.com logo, with "match.com" in blue lowercase letters and a registered trademark symbol.

As a rule, a reputable social network or P2P website has a copyright policy in place which provides a mechanism for taking down infringing content.

The Flickr logo, with "flickr" in blue lowercase letters and a trademark symbol.



The Files Tube logo, with "Files" in black and "Tube" in white on a blue square, with the tagline "Download everything!" below.

The Twitter logo, with "twitter" in a light blue, rounded, lowercase font with a white outline.

The LinkedIn logo, with "Linked" in black and "in" in white on a blue square, with a registered trademark symbol.

The YouTube logo, with "You" in black and "Tube" in white on a red rounded rectangle, with the tagline "Broadcast Yourself" below.



Facebook's Copyright Policy

- “To report a copyright infringement by a Facebook user, all you need to do is fill out our automated DMCA form. This form is the fastest way to report a copyright infringement. Although we will review reports in all languages, it will speed our review if you can submit your report in English.”
- DMCA Form can be filled out and submitted to Facebook online:
 - http://www.facebook.com/legal/copyright.php?copyright_notice=1



Twitter's Copyright Policy

- “We respond to valid claims of alleged copyright infringement such as the unauthorized use of a copyrighted image as an account background or account avatar, or Tweets containing a link to allegedly infringing materials.”
- “You can report alleged copyright infringement by visiting Twitter’s Help Center and filing a copyright report.”
- Copyright Report:
<http://support.twitter.com/forms/dmca>

Twitter Complaint Form

© Dear Twitter, I am reporting copyright infringement.

Please fill out **all the fields below** so we can review your report.

Tell us about yourself

- I am the copyright owner.
- I am an authorized representative of the copyright owner.
- None of the above.

Not what you need help with? [Choose another topic.](#)

Civil Remedies For Infringement

- Injunction (17 USC § 502)
- Impounding and disposition of infringing articles (17 USC § 503)
- Damages and profits (17 USC § 504)
 - Actual damages or
 - Statutory damages (\$750 - \$30,000 per work infringed; up to \$150,000 for willful infringement)
- § 1202, as part of DMCA, statutory damages up to \$25,000 per act of circumvention, alteration or removal of copyright management information or metadata
- Costs and attorney's fees (17 USC § 505)

Criminal Infringement

(17 USC § 506; 18 USC § 2319)

- Criminal infringement is defined as willful infringement of a copyright, if the infringement was committed
 - for purposes of commercial advantage or private financial gain (punishable by up to 10 years in prison, or fine, or both);
 - by the reproduction or distribution, including by electronic means, during any 180–day period, of one or more copies or phonorecords of one or more copyrighted works, which have a total retail value of more than \$1,000 (punishable by up to 6 years in prison, or fine, or both); or
 - by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution (punishable by up to 10 years in prison, or fine, or both).

Other Criminal Offenses

(17 USC § 506)

- 17 USC § 506(c): Fraudulent Copyright Notice.
 - Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than \$2,500.
- 17 USC § 506(d): Fraudulent Removal of Copyright Notice.
 - Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than \$2,500.
- 17 USC § 506(e): False Representation.
 - Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

U.S. Copyrights Are Protected Through Treaty in Many Countries

- “Berne Convention For the Protection of Literary and Artistic Works”
- 171 signatory countries
- Main principles:
 - “National Treatment.” A country member must grant the same level of protection to works originating in other country members as it provides to works of its own nationals;
 - “Automatic Protection.” No registration or other formalities must be required for protection.
 - “Independence of Protection.” Protection independent of whether protection exists in the country of origin (exceptions apply).
www.wipo.int/treaties/en/ip/berne/summary_berne.html)

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