

Copyright & Fair Use

CJ341 – Cyberlaw & Cybercrime
Lecture #12

M. E. Kabay, PhD, CISSP-ISSMP
D. J. Blythe, JD
School of Business & Management

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Topics

- Copyright purpose & history
- Legal formalities
- Felony Violations
- Misdemeanor Violations
- 1st Amendment Issues
- Defenses to Infringement
- Fair Use



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"Copyright on Campus Video"
<http://tinyurl.com/3ovxxtg>

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Purpose

- Stimulate creativity
- Protect creative investments of authors & artists

Mechanisms:

- Protect intellectual property
 - Prevent loss of control or possession
- Gainful return on investment



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History (1)

- Copyright Act of 1790 -- based on Statute of Anne (1710) in England

<http://tinyurl.com/kb295>



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Thanks to Prof Robert Guess of Tidewater Community College!

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History (2)

- Early 1900s: Federal copyright laws improved
 - Despite technological advances, fundamental objective remains constant
 - Multiple amendments of federal copyright statute to accommodate advances
 - ✓ Question: Can the law evolve fast enough to accommodate change?
- 1995: Digital Performance Right in Sound Recordings Act (DPRA)
 - Passed before pervasiveness of Webcasting
- 1998: Digital Millennium Copyright Act (DMCA)
 - Among other requirements, created new statutory license fee requirement for Webcasting services

Prof Guess also contributed this link: Copyright Office maintains a useful timeline of United States Copyright Laws:
<http://www.copyright.gov/circs/circ1a.html>

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What is Protected by Copyright?

- Reproduction
- Preparation of derivative works
- Distribution
- Performance
- Display in public




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CJ341 Class Notes

Formalities


- Original work is automatically copyrighted in the name of the author / creator
 - ❑ Theoretically not *necessary* to indicate "Copyright © 2011 name-of-author. All rights reserved."
 - ❑ *But highly advisable* to do so to strengthen legal position in case of claimed doubt.
 - ❑ Written assertion of copyright eliminates defense of *innocent infringement* of copyright
- May register US works with US Copyright Office
 - ❑ Offers increased protection
 - ❑ Register within 3 months of publication
 - ❑ \$500-\$20,000 statutory damages for infringement



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Works Made for Hire


- Full-time employees generally forfeit claim to work created expressly for purpose of their job
 - ❑ Copyright belongs to the employer
- Employers' rights do not apply to creative work *outside* employment
 - ✓ Not created with employer facilities, tools
 - ✓ Not interfering with regular work
 - ✓ Created outside normal working hours
- Problems can occur when creative outside work is directly related to job function



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Contractual Sale

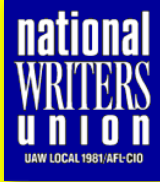
- Copyright ownership may be traded or sold
- Employers often include clause claiming copyright over *all* creations by employee
 - ❑ Sometimes specify work created for any purpose and at any time
 - ✓ E.g., children's story book
 - ❑ No obligation to agree to such clause
 - ❑ But no obligation to hire employee without such agreement
- Publishers almost always try to get *all* rights
 - ❑ Noteworthy case distinguishes between *paper* publication and *electronic* publication (see next slide)



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Writers Win a Court Battle for Control 1999-09


- New York state court ruled in favor of National Writers Union
- Against New York Times
 - ❑ & other major publishers
- Affirmed right of writers to control publication if their materials in new media
- Publishers wanted to use submissions for CD-ROMs or Web without paying additional royalties



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Infringement


- Any use without express permission of copyright holder
 - ❑ Printing
 - ❑ Posting on Web
 - ❑ Using in derivative work
- Direct infringement
 - ❑ Monetary profit is not an issue
 - ❑ Distributing someone else's work for *free* is not a mitigating factor
- Contributory infringement: ISPs?
 - ❑ Requires substantial or pervasive involvement



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Facts?

- Factual information cannot be copyrighted in itself; e.g.,
 - ❑ 2+2 = 4
 - ❑ Distance between Norwich and Montpelier
- The *representation* of factual information *can* be copyrighted; e.g.,
 - ❑ A times-table designed for children with pictures of friendly animals romping around edge of the table
 - ❑ A map of Vermont with particular fonts, colors, and symbols



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Hot News Misappropriation

- June 2001 – AP claimed copyright protection for *facts* reported in newswire feeds
 - ❑ Would prevent even summarizing or abstracting articles
 - ❑ Serious doubts about the viability of this claim
- Sep 2011 – Second Circuit Court of Appeals
 - ❑ Ruled that aggregating *facts* from other sources does not violate copyright law
 - ❑ To see how legal scholars analyze issue, see Calman, C. & R. D. Balin (2011). “The Future of the Hot News Misappropriation Tort After Barclays Capital Inc. v. TheFlyontheWall.com.” Medialawmonitor (2011-09-16). < <http://tinyurl.com/3s4hmwd> >


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Burden of Proof for Felony

1. Copyright existed
2. Defendant infringed the copyright by reproduction or distribution of the work
3. Defendant acted willfully (intent – *mens rea*)
4. Defendant reproduced or distributed
 - ≥10 copies of
 - ≥1 copyrighted works with a total value of ≥\$2,500
 - within a 180-day period

Punishment: ≤5 years and/or fine;

- ❑ If no reproduction or distribution, fine & imprisonment ≤1 year;
- ❑ Harsher penalties for subsequent offenses




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Burden of Proof For Misdemeanor

1. Copyright existed
2. Defendant infringed copyright by reproduction and/or distribution
3. Defendant acted willfully
4. Defendant either reproduced or distributed the copyrighted material for the purposes of commercial advantage or private financial gain or distributed or copies ≥ 1 copyrighted works with a total retail value of more than \$1,000 within a 180-day period

➤ Showing of commercial advantage or private financial gain = penalty enhancer




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1st Amendment?

- Does the 1st Amendment protect unauthorized copying of copyrighted works?
 - ❑ Some defendants have claimed 1st Amendment protections when publishing work of public officials
- But SCOTUS* ruled that even a public official's own copyrighted materials cannot be infringed
- No ban on publishing the *substance* of such documents; only on publishing exact *form*

*SCOTUS: Supreme Court of the United States



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Defenses to Copyright Infringement: First Sale


- Allows someone who buys a copyrighted work to freely distribute copy bought
- But *only* copy actually bought,
- NOT copies of the item bought
- Typically doesn't apply when someone is charged with software piracy (Clifford)
- Warning: upgrades to software
 - ❑ Upgrades typically purchased with reduced cost when earlier version available
 - ❑ Earlier version *cannot legally be sold or given away* if upgrade is in use
 - ❑ E.g., if Windows 8 bought as upgrade from Windows 7 must *keep* Windows 7 disk to justify use of 8 upgrade



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Defenses to Copyright Infringement: Lack of Intent

- Did not act *willfully*
 - ❑ “No Electronic Theft Act” – amended 17 USC § 506(a) states that “evidence of reproduction or distribution of a copyright work, by itself, shall not be sufficient to show willful intent”
 - ❑ Courts disagree whether *willful* refers to intent to *copy* the material or intention to *infringe* the owner's copyright
 - ✓ Most interpret willfulness as specific intent to violate copyright laws
- Other defenses:
 - ❑ Statute of limitations (government has 5 years to bring charges)
 - ❑ Fair Use (see following slides)



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Fair Use Exception

- Copyright Act (Sections 107-122) lists a number of exceptions to set of protected rights, including fair use
- Fuzzy exceptions, although some specifics
 - ❑ E.g., Section 109: provides that one who owns a copy of a protected work may distribute the copy without getting permission from the copyright owner (First-sale doctrine)
- "The notion of fair use acknowledges that copyrights provide substantially broad rights, and that there may be occasions when strict application of those privileges interferes with the public interest." (Burgunder p. 278)

Fair Use Doctrine: 17 USC § 107

- Equitable defense to copyright infringement
- Excepts otherwise infringing use of a work for certain purposes
 - ❑ Criticism
 - ❑ Comment
 - ❑ News reporting
 - ❑ Teaching (including copies for classroom use – with some limitations)
 - ❑ Scholarship
 - ❑ Research
- Fair Use issues are usually litigated as *civil* infringement cases

Fair Use

- Codified in part in 17 USC §107-118 (Copyright Act)
- Fuzzy doctrine: no specific # words, lines
- See <http://www.copyright.gov/fls/fl102.html>
- Key issues (quoting from above ref):
 1. *the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;*
 2. *the nature of the copyrighted work;*
 3. *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.*

Fair Use Guidelines

Guidelines for determining if your use of copyrighted materials qualifies as fair use:*

1. Is your use noncommercial?
2. Is your use for purposes of criticism, comment, parody, news reporting, teaching, scholarship, or research?
3. Is the original work mostly fact (as opposed to mostly fiction or opinion)?
4. Has the original work been published (as opposed to sent out only to one or a few people)?
5. Are you copying only a small part of the original work?

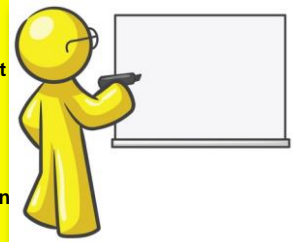
* Larry Lessig, David Post and Eugene Volokh in *Cyberspace Law for Non-Lawyers* (1996): http://w2.eff.org/legal/CyberLaw_Course/index.html

Fair Use – cont'd


6. Are you copying only a relatively insignificant part of the original work (as opposed to the most important part)?
 7. Are you adding a lot new to the work (as opposed to just quoting parts of the original)?
 8. Does your conduct leave unaffected any profits that the copyright owner can make (as opposed to displacing some potential sales OR potential licenses of reprint rights)?
- *The more YES answers there are to the above questions, the more likely it is that your use is legal.*
 - *The more NO answers there are, the more likely it is that your use is illegal.*
- So is this use of the Fair Use text a fair use?*

Teachers Try to Extend Fair Use 1999-02

- Hearing at US Copyright Office
- Educators lobbied for right to use copyrighted works
 - ❑ In distance-education programs
 - ❑ Offered via Internet
 - ❑ Without having to obtain explicit permission
 - ❑ From copyright owners
- Position vigorously opposed
 - ❑ Publishers
 - ❑ Speakers for entertainment industry



Teachers Get Support for Fair Use 1999-05




- US Copyright Office
- Supported requests from public schools, universities
- Should be granted exemptions under Fair Use doctrine
 - ❑ Educational
 - ❑ Non-commercial use of copyright materials



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Georgia State University (2008)




- Consortium of publishers accused GSU of violating fair use
 - ❑ Putting class readings on “electronic reserve”
 - ❑ Also opposed putting publishers’ © materials on faculty Web sites without permission
- See “What’s at Stake in the Georgia State Copyright Case.” *The Chronicle Review* (2011-05-30) in *The Chronicle of Higher Education*. < <http://tinyurl.com/3pj86fb> >
- Ruling (2012) found only 5 of 99 alleged violations were infringements < <http://chronicle.com/article/Long-Awaited-Ruling-in/131859/> >

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Helpful Guides to Fair Use



- Howard, J. (2011). “What You Don’t Know About Copyright, but Should.” *The Chronicle of Higher Education* (2011-05-29) < <http://tinyurl.com/43nskq6> >
- Includes list of URLs for additional readings compiled by Ben Wieder



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Restrictions on Showing Movies (1)




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<http://mpaa.org/contentprotection/public-performance-law>

PUBLIC PERFORMANCE LAW

Copyright Information >

Camcorder Laws >

Public Performance Law >

Types of Content Theft >

Public Awareness Campaigns >

Higher Education >


It's Easy To Do It Right. Here's How.

What is a Public Performance?
 Suppose you invite a few friends over to watch a movie or a TV show that's no longer available on TV. You buy or rent a DVD or Blu-ray disc from the corner store or a digital video file from an online store and show the film or TV episode in your home that night. Have you violated copyright law by legally "publicly performing" the movie or show? Of course not.

But suppose you took the same movie or TV episode and showed it to patrons at a club or bar that you happen to manage. In that case, you have infringed the copyright in the video work. Simply put, movies or TV shows obtained through a brick-and-mortar or online store are licensed for your private use; they are not licensed for exhibition to the public.

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Restrictions on Showing Movies (2)



Get Movies & TV Shows >

Report Piracy >

Rogue Websites >

FAQ >

Why is the Creative Community Concerned About Such Performances?
 The concept of “public performance” is central to copyright. If translators, authors, playwrights, musicians and game designers do not retain ownership of their works, then there is little incentive for them to continue creating high-quality works in the future and there is little incentive for others to finance the creation of those works.

The Law
 The Federal Copyright Act (Title 17 of the U.S. Code) governs how copyrighted materials, such as movies, may be used. Neither the rental nor the purchase of a copy of a copyrighted work carries with it the right to publicly exhibit the work. No additional license is required to privately view a movie or other copyrighted work with a few friends and family or at certain narrowly defined face-to-face teaching activities. However, bars, restaurants, private clubs, prisons, lodges, factories, summer camps, public libraries, day-care facilities, parks and recreation departments, churches and non-classroom use at schools and universities are all examples of situations where a public performance license must be obtained. This legal requirement applies regardless of whether an admission fee is charged, whether the institution or organization is commercial or non-profit, or whether a federal or state agency is involved.

Legal Sanctions
 “Willful” infringement of these rules concerning public performances for commercial or financial gain is a federal crime carrying a maximum sentence of up to five years in jail and/or a \$250,000 fine. Even inadvertent infringement is subject to substantial civil damages.


It's Easy to Obtain a Public Performance License
 Obtaining a public performance license is easy and usually requires no more than a phone call. Fees are determined by such factors as the number of times a particular movie is going to be shown, how large the audience will be and so forth. While fees vary, they are generally inexpensive for smaller audiences. Most licensing fees are based on a particular performance or set of performances for specified times. The major firms that handle these licenses include:

Criterion Pictures
www.criterionpicusa.com
 (800) 990-9494

Motion Picture Licensing Corp
www.mplc.com
 (800) 462-8555

Swank Motion Pictures, Inc.
www.swank.com
 (800) 976-5577

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Now go and study

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