Intellectual Property Law Review 2010

MSIA Graduate Conference Workshop

M. E. Kabay, PhD, CISSP-ISSMP
Assoc Prof Information Assurance
School of Business & Management
Senior Academic Advisor, MSIA
School of Graduate Studies & Continuing Education
Norwich University

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Topics for Discussion Today

- General IP Overview
- Patents
- Trade Secrets
- Copyright
- Discussion
- The Future of IP

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Why Protect Intellectual Property?*

- Allow creators to benefit
- Promote creativity
- Everyone encouraged to be productive, creative
  - Society progresses
  - Nation progresses
  - Humanity progresses

*With thanks to Karthik Raman, NU 2006

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Intellectual Property Law

- Several issues of interest
  - Copyright
  - Patents
  - Trademarks
  - Trade Secrets
  - Reverse Engineering*
  - EULAs*
  - Trademarks and the DNS*

  *Not discussed in today's brief workshop
- This lecture looks at some interesting cases drawn from IYIR database

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Patents in the USA

- Patents Defined
- US Constitution and Laws
- Utility
- Design
- Plants
- Infringement
- Exemption
- Remedies
- Reform
- International Agreements
- Recent Case Law Involving Patents

THE UNITED STATES OF AMERICA

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Patents Defined

- Word means "open" (14th century Latin)
- Defined: "a property right granted by the Government of the United States of America to an inventor 'to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States' for a limited time in exchange for public disclosure of the invention when the patent is granted." (Source: http://www.uspto.gov)
- Patent Protection = reward for disclosing invention

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US Constitution and Laws

- US Constitution Article 1, §8, clause 8:
  - Progress of science and useful arts
  - Limited time of exclusive right to use
    - ✓Writings
    - ✓Discoveries
- 1st Patent Act: 1790
- Patent Act of 1793
- 35 USC: Patent Act of 1952, amended 1995
  - Utility patents
  - Design patents
  - Plant patents
- Patent Reform Act of 2005
  - Proposes significant changes to patent laws
  - Not yet passed, in bill format
  - See Burgunder p. 79-80, Exhibit 3.1

Most patents last 20 years

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Utility

- US Patent Act - §101
  - Entitled to a patent for an invention if it is *novel, nonobvious, and a proper subject*
- §103 - New, useful and nonobvious
  - ✓Process
  - ✓Machine
  - ✓Manufacture
  - ✓Composition of matter
  - ✓Improvement

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Novel

- US Patent Act §102 *excludes* patents if
  - Previously known or used in US
  - Patented or described in printed publication before filing
  - In public use or for sale in US >1 year before filing
  - Abandoned
  - Someone else previously filed for patent on it
  - Not invented by applicant
  - Also invented by someone else
- §102 encourages rapid filing by inventors
  - 1 year to file

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Useful

- Reject patent filing if
  - Doesn't work
  - Has no defined purpose
- Exceptions
  - Cannot patent natural process or material
  - Abstract mathematical equations or algorithms care not patentable
    - ✓However, *expressing* ideas mathematically or as computer algorithms *does NOT preclude* patent

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Nonobvious

- Exclude patent filing if
  - Obvious to person with
    - ✓Ordinary skill
    - ✓In art (meaning science, technique, technology)
- What defines "ordinary skill?"
  - Awareness of all pertinent prior art
  - Types of problems encountered
  - Prior art solutions
  - Speed of technology change
  - Educational level

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Design

- US Patent Act §171 defines patents for design
  - new, original and ornamental design
  - Any article of manufacture
  - 14 year protection
- Seiko Epson Corp v Nu-Kote Intl (1999)
  - Patent infringement on *shape of ink cartridges*
  - Trial court ruled against plaintiff because cartridges not visible to user, thus not patentable as "design"
  - US Court of Appeals *reversed* lower court
    - ✓Patent was valid even if design not visible or obvious to user

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Patent Duration

- Utility Patents: at least 20 years
  - Changed in 1995 to comply with international agreement obligations
- Legal protection starts when the PTO (Patent Trademark Office) issues the patent and lasts until expiration
  - Note: term begins when filed
    - ✓Invention can be used while PTO processes a patent application, even though patent term has not begun
    - ✓But once patent granted, patent holder can require royalties for previous use
  - Exceptions apply for new pharmaceutical products

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Infringement

- Without permission of patent holder, to
  - Make
  - Use
  - Offer for sale
  - Sell
  - Import

  } the patented invention

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Exemptions

US Patent Act §273

- Good faith
- Used subject of patent at least 1 year before filing date of patent
- Holder of patent abandoned it for ~6 years or more

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Enforcement Issues & Challenges

- Patent issued by PTO assumed valid
  - Challenger of patent must overcome presumption of validity
  - Must show patent invalidly granted by PTO
    - ✓Erred in determination that product or process was *novel* or *nonobvious*

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Remedies

- Injunction to stop infringing
  - Likely most powerful weapon of patent holder
- Damages equivalent to royalty + interest + costs
  - Limited to 6 year period before filing of complaint
  - Examples:
    - ✓Profits from lost sales
- *Treble* damages at discretion of court
  - Awarded if *willful* infringement
- Attorney fees in exceptional cases
  - E.g., where willful infringement found

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Reform

- Patent Reform Act of 2005 in works
- Currently, US stands alone in *first-to-invent* approach
  - Focuses on novelty inquiry on date of invention rather than date of application
  - Likely to join international consensus with Reform Act passage
- Drawback to current approach
  - Increases litigation expenses
    - ✓Determining priority by invention is tough;
    - ✓Simple to determine who is the first to file
- Challenges to change
  - Fairness concerns
  - Produce a race to the patent office
    - ✓Less thoughtful patent applications?

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International Agreements on Patents

- Paris Convention for Protection of Industrial Property (1883)
- TRIPS (1994)
  - Agreement on *Trade-Related Aspects of Intellectual Property Rights*
  - See http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm
- NAFTA (1992)
  - *North American Free Trade Agreement*
  - See http://www.ladas.com/BULLETINS/1994/NAFTAGATT.html
  - See also http://www.customs.ustreas.gov/nafta/docs/us/chap-17.html

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Recent Case Law Involving Patents

- In re Bilski
- Microsoft v Salesforce.com
- i4i v Microsoft
- Kodak v Apple & RIM
- Elan v Apple
- Nokia v Apple v Nokia v…
- Apple v HTC
- New Troll v Expired Patents
- Aussie CSIRO WLAN Patents
- Patents & Open Source Software
- First We Kill All the Patent Lawyers
- Keep Higher Patent Fees?

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In re Bilski (1)

- 1997: Bernard J. Bilski & Rand Warsaw
  - Filed patent application for commodities trading methods
  - USPTO examiner rejected all claims for patent
  - Appealed decision to Board of Patent Appeals and Interferences; rejected
- 2006: Appealed to Court of Appeals for Federal Circuit (CAFC)
- 2008: Decision rendered Oct 30
  - Upheld rejection of Board in 1998
  - 9-3 majority argued that machine-or-transformation test was essential for patent

(cont'd)

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In re Bilski (2)

- Implications of CAFC decision
  - Explicitly rejected precedent set in *State Street Bank* decision of 1998
    - ✓That case involved patent on managing mutual fund accounts
  - Bilski setting stage for landmark showdown
    - ✓Can so-called "business methods" be patented?
      - Processes and procedures
      - Not widgets
    - ✓Affects software, biotech
- SCOTUS agreed in June 2009 to hear appeal
  - Hearing November 2009

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Microsoft v Salesforce.com

- 2010-05: MS accuses CRM vendor of stealing 9 patents
  - Seattle Federal Court
  - Web-based CRM software
- Broad patents; e.g.,
  - Displaying Web page using embedded menu
  - Stacking toolbars in computer display
- Only 4th time MS has sued anyone for patent infringement

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i4i v Microsoft (D v G?)

- 2007: i4i sues MS for patent infringement – use of XML editing tools in OFFICE 2007
- 2009-05: MS loses trial in Texas
  - Fined $300M damages
  - Ordered to revise software within 60 days
    - ✓Or stop selling Office 2007
- 2009-09: MS appeals injunction in Court of Appeals for Federal Circuit
  - Wins extension to 11 Jan 2010
  - But fine stands
- MS complied

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Kodak v Apple & RIM

- 2010-01: Kodak sues Apple & RIM
- After years of negotiation
- Issue: "method for previewing camera phone images that has been patented by Kodak." [Brad Reed, *Network World*]
- Other companies had licensed technology under patent
  - Motorola
  - Nokia
  - Samsung

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Elan v Apple

- 2010-04: Elan Microelectronics of Taiwan
  - Charges Apple with patent infringement
  - Technology for touch-sensitive devices
  - Used in iPad, iPhone, iPod Touch, MacBook, Magic Mouse
- Filed complaint with US International Trade Commission
  - Demanded ban on import of affected goods into US
  - Until licensing issues resolved
- Case scheduled for June 21, 2010 in San Francisco

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Nokia v Apple v Nokia v....

- 2009-10: Nokia sues Apple
  - Infringing 10 of its patents in iPhone concerning wireless networks
- 2009-10: Apple files countersuit
  - Patent infringement by Nokia of 13 Apple patents
- 2009-12: Nokia files complaint with US Intl Trade Commission
  - 7 more patents relating to interface, camera, antenna, power management
- 2010-05: Nokia adds 5 more patents to its charges
  - Signal-to-noise modulation, geo-location, antenna technologies

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Apple v HTC

- 2010-03: Apple files for patent infringement v HTC
  - Taiwan-based mfr
  - Android, Touch Pro, Imagio, Tilt mobile phones
- US District Court in Delaware
- US International Trade Commission

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New Troll v Expired Patents

- 2010-03: Attorney Thomas Simonian
- 10 cases filed against dozens of corporations
- All filed between 25 Feb & 4 Mar
  - Northern IL Fed Circuit Court
- All alleging companies are using expired patents as if valid
- Could be bonanza:
  - $500 per infraction (sale of device)
  - Half profit to attorney, half to govt
  - Plus court costs

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Aussie CSIRO WLAN Patents

- 2010-05: Australian CSIRO* sues 3 US mobile phone operators
  - AT&T
  - Verizon
  - T-Mobile
- Infringing on patents for using Wi-Fi in phones
  - IEEE 802.11 a, b, g, & n
  - Warned companies in 2009 that they were infringing

**Commonwealth Scientific and Industrial Research Organization*

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Patents and Open Source Software

- 2009-02: Microsoft & TomTom enter negotiations
  - TomTom makes GPS navigation devices
  - Use elements of LINUX kernel
  - MS threatened to sue over use of patented MS FAT OS components
- 2009-03: agreeement
  - 2 years to remove offending components
  - No lawsuits during that time

Defensive Patent License (DPL)

- 2010-05: Jason Schultz and Jennifer Urban
  - Law professors
  - Directors, UC Berkeley's Samuelson Law, Technology & Public Policy Clinic
- DPL similar to GPL (GNU General Public License)
  - Open source software protection
- Pool resources to fight patent trolls
- Avoid exploitation by commercial companies who seize open-source materials

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"First We Kill All the Patent Lawyers" – S. J. Vaughan-nichols

- 2010-05: *Computerworld*
  - Assured readers he did not mean literally
- US patent system is dysfunctional
  - Supposed to encourage innovation
  - *In re Bilski* threatens software industry
  - Searching for possible infringement opens inventor to *increased* liability
  - Increasing # companies paying settlements even when infringement claims wrong: cheaper
  - Patent trolls & anti-competitive large companies exploiting system

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Keep Higher Patent Fees?

- 2010-05: House Judiciary Ctee
  - John Conyers (D-MI) & Lamar Smith (R-TX)
  - Patent and Trademark Office Funding Stabilization Act
- Support USPTO
  - Reduce 2-year backlog of unprocessed applications
  - 750,000 patents uncleared
  - 500,000 new applications per year
- Prevent Congress from diverting patent fees into general US govt revenues
- Increase fees for processing
- Hire new staff

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TRADE SECRETS

- Definition of Trade Secrets
- Protection
- Polices & Law
- Damages
- International Issues
- Industrial Espionage

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http://blogs.piercelaw.edu/tradesecrets/tradesecretdiagram.gif
FROM: http://www.jordasecrets.com/2007/10/jorda_on_what_is_and_what_is_n.html

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Definition

- "In most states, a formula, pattern, physical device, idea, process, compilation of information or other information that
  1. provides a business with a competitive advantage, and
  2. is treated in a way that can reasonably be expected to prevent the public or competitors from learning about it, absent improper acquisition or theft."*
- Sometimes referred to as *confidential information* or *proprietary knowledge*
- *See also Burgunder p. 212*

* http://www.nolo.com/dictionary/trade-secret-term.html

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Purpose of Trade Secret Laws

- Protect *valuable creative ideas* at various stages of development
- Patents cover completed inventions & processes
  - Require inventions be
    - ✓novel and
    - ✓Nonobvious
- Trade secrets require only information be *valuable*

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Trade Secret Policies & Law

- Uniform Trade Secrets Act (UTSA)
  - Information → Formula, Pattern, Compilation, Program, Device, Method, Technique, Process
  - Derives independent economic value from secrecy
  - *Subject of reasonable efforts to maintain secrecy*
- Contrast with patent ("patent" means "open")
- Unauthorized use of trade secret can lead to *civil tort* for misappropriation

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Misappropriation Defined

- Trade secret holder entitled to remedies when misappropriation occurs:
- Acquiring trade secret by improper means
- Disclosing or using trade secret reasonably knowing that such conduct violates duty to maintain confidence
- While reasonably knowing of the impropriety, using or disclosing secret received from another who improperly obtained it
- While reasonably knowing about fiduciary breach, using or disclosing secret that was disclosed by another under such a duty to maintain confidence
- (See Burgunder p. 213)

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State Laws on Trade Secrets

- State Level: Most states have separate statutes criminalizing trade secret theft
- American Law Institute (ALI)
  - 1995: Restatement (Third) of Unfair Competition
- National Conference of Commissioners on Uniform State Laws
  - 1979: formulated UTSA
  - Uniform Trade Secrets Act
  - Model for state legislatures to follow to pass statutes that codify policies
  - By 2005, 44 states & District of Columbia had statutes based on UTSA

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Federal Level

- Trade Secrets Act (18 USC §1905)
- Economic Espionage Act (18 USC §1831 et seq.)

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Trade Secrets Act

- 18 USC §1905
- Covers
  - Unauthorized disclosure
  - Of secrets relevant to government work
    - ✓Contracts
    - ✓Investigations
    - ✓Reports
  - By *government employee* or *agent* only
- *Text on next slide*

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Trade Secrets Act (Text)

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311–1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00001905----000-.html

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Economic Espionage Act of 1996 (EEA)

- **18 USC §1831 *et seq.***
- **Criminalizes unauthorized disclosure of government OR commercial secrets by *anyone***
- **Includes penalties for those receiving such information**
- **See text on next slide**

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EEA Text

§ 1831. Economic espionage

(a) In General.— Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly—

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret;

(3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in any of paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy, shall, except as provided in subsection (b), be fined not more than $500,000 or imprisoned not more than 15 years, or both.

(b) Organizations.— Any organization that commits any offense described in subsection (a) shall be fined not more than $10,000,000.

 http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00001831----000-.html

EEA Penalties include

- **Up to 15 years in jail**
- **MAX($500,000 fine or 2x value)**
- **Forfeiture**
- **Import-export restrictions**

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UTSA Remedies for Misappropriation

- **Damages ($)**
  - **Amount needed to compensate the trade secret holder for losses**
  - **Amount of unjust enrichment earned by unlawful use or disclosure**
- **Injunctions**
  - **Preventing use**
    - ✓ **Including "threatened misappropriation"**
  - **To obtain preliminary injunction, must prove:**
    - ✓ **Irreparable harm**
    - ✓ **Strong likelihood of success of winning if case goes to trial**

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First Amendment Issues

- **Opponents of corporate actions have revealed trade secrets to press**
  - **Concerned or disgruntled employees**
  - **Journalists or activists using social engineering (e.g., Ciarelli)**
- **Can corporations impose *prior restraint* to prevent publication?**
  - **Generally, no: 1st Amendment protects such publication absent compelling reasons to interfere**
  - **May still prosecute for industrial espionage after the fact**

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Reverse Engineering

- Defined in *Computer Desktop Encyclopedia*:
  - *To isolate the components of a completed system. When a chip is reverse engineered, all the individual circuits that make up the chip are identified. Source code can be reverse engineered into design models or specifications. Machine language can be reversed into assembly language (see disassembler).*
- Applicability to discussion of trade secrets
- Ethical considerations
  - State trade secret law (misappropriation prohibitions) v. acquisition of info through reverse engineering

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International Trade Secret Protection

- TRIPS agreement
  - *Agreement on Trade-Related Aspects of Intellectual Property Rights*
  - Members of the World Trade Organization (WTO) must protect "undisclosed information"
  - Does not use *trade secret* term
  - WTO members required to enforce their own trade secret laws with remedies
- Issues
  - Enforcing contractual obligations / confidentiality agreements
  - Determining damages
  - Durational periods – variation in time limits for maintaining secrecy of info
  - Need to exercise caution with trade secrets overseas

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Ipreo v Goldman Sachs

- 2010-05: Illegal access to database
- Ipreo Holdings of NY
  - Provides banks & corporations w/ business intelligence & software
  - Bigdough DB (!)
- Sued GS in Southern District of New York
  - Accused GS employees of illegal access
  - GS allegedly downplayed seriousness
  - $2M punitive damages
  - ≥$1M compensatory damages

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Home Depot Steals Invention

- Michael Powell, inventor
  - 20-yr relation with HD
  - 2004: shows HD finger guard prototype
- HD steals design
  - Makes 2,000 copies
  - Executive says, "Fuck Michael Powell. Let him sue us."
- So he did. Decision 2010-05:
  - $3M punitive damages
  - $15M restitution
  - $2.8M legal fees
  - $1M/year interest starting 2006 (year patent granted)

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Copyright

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

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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

Columbian

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LAWS of the UNITED STATES, PUBLISHED By Authority.

CONGRESS of the UNITED STATES AT THE SECOND SESSION, Begun and held at the City of New-York, on Monday the 4th of January, 1790.

An ACT for the ENCOURAGEMENT of LEARNING, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned.

BE it enacted by the SENATE and HOUSE of REPRESENTATIVES of the United States of America, in Congress assembled, That from and after the passing of this act, the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, his or their executors, administrators or assigns, who hath or have not transferred

MISCELLANY.

OBSERVATIONS on the MANUFACTURES and COMMERCE of the United States, By W. BARTON, of Philadelphia.

Thanks to Prof Robert Guess of Tidewater Community College!

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*

What is Protected by Copyright?

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

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Formalities

- Original work is automatically copyrighted in the name of the author / creator
  - Theoretically not *necessary* to indicate "Copyright © 2009 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
  - $500-$20,000 statutory damages
  - Register within 3 months of publication

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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
  - Recent case distinguishes between paper publication and electronic publication

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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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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 XP bought as upgrade from Windows ME, must *keep* Windows ME disk to justify use of XP 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)

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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

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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.*

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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

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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?

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Recent Legal Developments In Copyright

- Capitol v Thomas-Rasset
- RIAA v Tenenbaum
- RIAA wants ISPs to be © Cops
- IFPI v Google v Bloggers
- UK's Ofcom Publishes Draft Antipiracy Regs
- Irish ISP Attacks File Sharers
- Italian ISPs Still Common Carriers
- Novell & Unix Code

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Capitol v Thomas-Rasset (1)

- 2007-04: Jammie Thomas (now Thomas-Rasset)
  - Sued by RIAA for using Kazaa to steal 24 tracks
  - Actually stole 1,702
  - 1st individual in US to be sued
  - Convicted & fined
    - ✓$9,250 per song
    - ✓Total $222,000 penalties
- 2009-06: retrial for procedural errors in 1st trial
  - Convicted again
  - Jury awarded $80,000 per song
  - Total penalty now $1.92M

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Capitol v Thomas Rasset (2)

- 2010-01: Damages reduced
  - U.S. District Court of the District of Minnesota
  - Judge Michael Davis
  - Ruled damages abusive
- RIAA offered settlement: $25,000
  - Thomas-Rasset & attorneys refused
  - Preparing for 3rd trial
- Questioning constitutionality of damages
  - Intended for commercial copyright infringers
  - Not individuals

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RIAA v Tenenbaum

- 2009-07: Joel Tenenbaum convicted
  - Boston University grad student
  - Admitted to downloading songs illegally
    - ✓800 on computer
    - ✓24 specified in trial
  - Convicted and fined
    - ✓$22,500/song
    - ✓$675,000 total penalties
- 2010-01: Hoping for reduction on appeal
  - Citing Thomas-Rasset case (qv)

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RIAA wants ISPs to be © Cops

- 2010-01: Recording Industry Association of America
  - Brief to FCC
  - Net neutrality enquiry
- ISPs should police subscribers' behavior
  - Unique position to spot infringement of copyright
  - Should terminate access when users ignore warnings 3 times

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IFPI v Google v Bloggers

- 2010: International Federation of the Phonographic Industry (IFPI)
  - Sends take-down orders to Google
  - Remove hundreds of songs from music blogs
  - Google *shuts down* 6 popular music blogs
- Errors
  - Many songs were legitimately posted with written permission
  - Google failed to abide by DMCA requirements for 2 week notice
  - Bloggers deprived of legal right to file counternotifications (explanations)

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UK's Ofcom Publishes Draft Antipiracy Regs

- 2010-06: Office of Communications (Ofcom)
  - Draft Code of Practice
  - Largest ISP's response to complaints
    - ✓Illegal file sharing
- Copyright owners complain about alleged illegal file sharers
- ISPs send 3 warning letters to users
- Anonymized details
  - Can be requested by copyright holders
  - Used to start legal action

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Irish ISP Attacks File Sharers

- 2010-05: Pilot program by Eircom
  - 3-month test
- Repeat offenders of copyright
  - Cut Internet service
- Eircom sued by Irish Recorded Music Association (IRMA)
  - Out-of-court settlement 2009-01
  - 3-strike plan
  - Provide IRMA w/ IP addresses of suspected file sharers

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Italian ISPs Still Common Carriers

- 2010-04: Audiovisual Antipiracy Federation (FAPAV)
  - Telecom Italia should identify customers responsible for copyright violations
  - Report them to justice authorities
  - Block access to P2P Web sites
  - Inform them breaking law
- Judge Antonella Izzo rejected request
  - Also rejected €10,000 (US $13,000) fine / day without compliance

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Novell & Unix Code

- 2009-08: 10th Circuit Court of Appeals
  - Reversed 2007 decision by US District Court for Utah
  - Had found that Novell owned Unix and UnixWare copyrights
  - Remanded case for retrial
- Novell bought UNIX System Laboratories
  - 1993 – $300M
  - Sold to SCO 1995
  - Novell claimed Unix ownership
- 2003: SCO sued over its own alleged ownership of Unix copyright
  - Claimed Linux was illegal derivative

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DISCUSSION

The Future of IP ???

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