

COPYRIGHT LAW

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Office Hours: Tuesday 10-12, Wed. 1-2, or by appointment

Introduction

However one might measure it, the significance of copyright law has increased several thousand-fold over the last decade or two. What was once (not that long ago) something of a legal backwater has moved front and center in a contentious national and international policy debate – not to mention providing a good deal more work for lawyers than ever before.

This course is *not* a survey of copyright law. In a survey class (*e.g.*, Introduction to Intellectual Property), the goal is to construct an organized framework of rules comprising the basic principles of whatever body of law is being surveyed; to that end, we read the statutes and cases and commentary primarily with an eye towards extracting those rules, and to answering some basic questions, such as: “What kinds of works are protected by copyright?” or “When do employers own the copyright in works created by their employees?” or “What does a copyright holder need to prove to show infringement?” and the like.

That’s all absolutely indispensable for understanding copyright law. It is not, however, what lawyers actually spend most of their time doing. Most of the time, lawyers start with facts – usually, facts supplied to them by their client – and their job is to go and read the statutes and the cases and the commentary in order to *frame an argument* as to whether the “law,” applied to *those facts*, comes out one way or the other. Sometimes (often), they know where they’re going, *i.e.*, the conclusions they want to reach (“Client not liable”; “Other guy infringing”); sometimes they don’t. But in either case, that’s a very different task than the “rule-extraction” task you undertook in the Intro class, and it requires a different approach to the raw material of the law; you’re no longer looking for the answers to questions like the ones posed above, but instead for building blocks to use for the construction of arguments pointing in one direction or another.

We will focus on that task – argument construction – in this course. We will not even attempt to cover the entire scope of copyright doctrine, survey-style. Instead, we will take a close look at a small number of concrete problems raising relatively narrow issues, sacrificing breadth of coverage for depth of analysis. We will spend most of our time analyzing and discussing three case studies, one entirely hypothetical (but realistic), the other two drawn from several important actual current copyright disputes, and we will try to craft answers to a number of specific questions about each.

Course Requirements

This class will get administratively very complicated unless we all pay attention to the logistics. Some of you are taking this course as a 3-credit writing seminar for serial writing credit (“Writing Students”); most of you are taking it as a 2-credit exam course (“Exam Students”). The course requirements differ, obviously, depending on which group you’re in.

The Registrar only permits six students to sign up as Writing Students. I am willing to take on another two – i.e., to move two students from the “Exam” category to the “Writing” category. Assuming that there are more than two students who would like to make this shift, I will choose at random, after the first class. These additional students selected will need to *keep* their registration in the 2-credit portion of the course, and *add* a one-credit, serial writing, “guided research/independent study” (with me as the supervising faculty member). From that point on, they’ll be treated as Writing Students (giving us a total of eight).

Writing Students will be responsible for, and graded on, four separate assignments: (a) Writing Assignments 1 and 2 (75% of final grade), and (b) Statutory Reading Assignments 1 and 2 (25%).

Exam Students will be graded based on (a) Statutory Reading Assignments 1 and 2 (25% of final grade) and (b) a **24-hour takehome** exam (75%). [I also take class participation into account, for all students] The exam is going to be based entirely on one (or more) of the case studies, and it will look very much like one or the other of the writing assignments that the Writing Students are working on. This is a clever trick I have devised to get Exam Students to pay attention to the writing assignments (around which we structure much of our discussion in class).

You are all permitted – and strongly encouraged – to work together with others when preparing these assignments (including the takehome). Each assignment must be written, and submitted, individually; but I encourage you to find some of your fellow-students with whom to share the tasks of researching, editing, outlining, etc.. These assignments are not easy, and figuring out a way to parcel out the work, while it won’t make your task any easier, can greatly improve the quality of the final product.

A Note About Handing in Assignments

Please submit all assignments in both hard-copy and electronic form (via email to me at David.Post@temple.edu). Please label the files as follows:

[lastname][date]copyright.doc [or .pdf or .wpd]

So Jane Roe’s assignment for October 15 will have the filename:

Readings and Outline of Classes

Readings consist primarily of **unedited** cases (and accompanying statutory material, primarily from the 1976 Copyright Act, 17 USC §101 *et seq.*), as indicated below. All material is posted on Blackboard; if you prefer, you may download these cases from Lexis or Westlaw instead of using the Blackboard copies.

You **must** obtain a current version of the Copyright Act, and you must bring *your copy of the Act to class*; anyone caught in class without a copy of the Act (in any form, electronic or print) will be stripped naked and whipped mercilessly.¹ There's absolutely no point talking about copyright law without the statute in front of you (unless and until you have it memorized); that is, after all, the source of all of our "law" on the subject. I have posted the statute on Blackboard, if you want to download and print; alternatively, you can pick up any one of a number of "Statutory Supplements" that are available with the same text; [I have ordered some copies of the "Statutory Supplement to Copyright Law" (Yen and Liu) at the Bookstore.]

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I. INTRODUCTION

Class 1- Aug. 29

No reading – copyright review.

We will spend the first class doing a quick, 10,000-foot review of basic copyright law. This material should be at least somewhat familiar to you from the Intro class; if you still have an outline of copyright law from that class, this might be a good time to retrieve it and look it over. I understand that most, if not all, of you have forgotten most, if not all, of the details of copyright law since you last thought about them (presumably, the day of the Intro to IP exam); that's not a problem, but you will need to keep the "big picture" in mind while we go through the narrow issues that we will be covering in this course.

No Class Sept. 5 (Labor Day)

Class 2—Sept 12

Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books,*

¹ The Dean has informed me that I'm not actually permitted to carry this out . . . but you get the idea.

Photocopies, and Computer Programs, 84 Harv. L. Rev. 281 (1970)

Classes 3 - 4 Infringement: Musical Works/Sound Recordings [Sept 19 & 26]

We'll focus our discussion of music copyright during these two classes on Case Study 1: "The Musicians' Dilemma" (attached). You will not be required to hand in any written assignments answering the questions posed there (though we will discuss them in class).

Reading: Class 3

1. Read these critical statutory provisions carefully and closely:

§§ 102 and 106

§§ 114 and 115

§ 1101

(with, of course, the necessary definitions from §101)

You also should skim §§801 – 803

2. Memo: [Sound Recordings and Musical Works](#)
3. Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 Case W. Res. L. Rev. 673 (2003)
4. Copyright Office Circular – Statutory Licenses

For those of you particularly interested in the subject, there is a host of *very* useful information about music copyright at the Copyright Office website: www.copyright.gov. In addition, information about how to "clear rights" and obtain licenses for musical works and sound recordings can be found at:

<http://www.songclearance.com/>

<http://www.harryfox.com>

<http://www.harryfox.com/public/Licensing-GeneralFAQ.jsp>

<http://www.ASCAP.com>

<http://www.BMI.com>

<http://www.sesac.com>

See also: Copyright Office Circular – "How to Investigate Copyright"

Reading – Class 4

1. Infringing the Musical Work Copyright

Three Boys Music v. Bolton, 212 F.3d 477 (9th Cir. 2000)

Optional Additional Reading

Bright Tunes v. Harrisongs, 420 F.Supp 177 (SDNY 1977)

Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946)

Selle v. Gibb, 741 F.2d 894 (CA7 1984)

See Coldplay story:

<http://www.npr.org/templates/story/story.php?storyId=97973449>

2. Infringing the Sound Recording

Bridgeport Music v. Dimension Films, 383 F.3d 390 (6th Cir. 2004)

You may SKIP Section III of the Bridgeport opinion

Newton v. Diamond, 383 F.3d 1189 (9th Cir. 2004)

See http://www.dailymotion.com/video/x7vqs7_james-newton-choir_music

Class 5 – A Statutory Exercise [Oct 3] Termination of Licenses

Reading:

§ 203 (dealing with conditions for termination of “the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author *on or after January 1, 1978 . . .*”) and

§ 304(c) (dealing with conditions for termination of “the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed *before January 1, 1978 . . .*”).

Statutory Reading Assignment 1 (attached) is due at the start of Class 5 (all students). *However, if you would like to revise your memo after our discussion in class, you may do so and hand in the revised version (which I will use as the basis for your grade on this exercise) at the start of Class 6.*

Classes 6, 7, 8, and 9 – Secondary Copyright Liability

Reading – Class 6 [Oct. 10]

Case Study 2: *Viacom v. Youtube* (§512 safe harbors)

1. See Writing Assignment 1. [Due at the start of **Class 9**]

You should begin familiarizing yourself with the *Viacom v. Youtube* case by looking through the following documents. You will need to read them again – possibly, a number of times – in order to understand fully the issues being raised, and they will make considerably more sense *after* we have looked closely at the relevant legal precedent. But for now,

- (a) Complaint for Declaratory and Injunctive Relief & Damages
- (b) Defendant Youtube’s Motion for Summary Judgment
- (c) Plaintiff Viacom’s Motion for Summary Judgment
- (d) Opinion and Order, June 23, 2010

2. Copyright Act §512 [all of it!]

Understanding the structure and content of §512 is indispensable for this assignment (and for practicing copyright law these days). It’s a difficult statutory section; again, you will find that it becomes clearer as we work through the material in this section of the course. For now, you need to get the “big picture”: what, in general terms, is this statutory section trying to do, and how is it structured so as to accomplish that purpose? You might find my “annotated” copy of §512 (posted on Blackboard), in which I simply highlight the statutory terms that I think are particularly critical to understanding the statute’s meaning, and/or the Copyright Office’s “DMCA Summary” (also posted on Blackboard), to be helpful.

Reading – Class 7 [Oct. 17]

1. Contributory Infringement -- Background

Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963)

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (CA2 1971)

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

2. Contributory Infringement on the Internet

Religious Technology Center v Netcom Online Communications Services, Inc., 907 F.Supp 1361 (N.D.Cal. 1995)

A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001)

MGM v. Grokster, 125 S. Ct. 2764 (2005)

Reading – Class 8 [Oct. 24]

Interpreting Section 512

Hendrickson v. eBay, 165 F.Supp.2d 1082 (CD CA 2001)

Perfect 10, Inc. v CCBill LLC, 481 F.3d 751 (CA9 2007)

Columbia Pictures v. Fung, 2009 US Dist Lexis 122661 (CD CA 2009)

UMG Recordings v Veoh, 665 F.Supp.2d 1099 (CD CA 2009)

Statutory Reading Assignment 2 due at the start of class (all students).

Class 9 [Oct 31]

Writing Assignment 1 due at the start of class (Writing Students only)

Classes 10, 11, 12, and 13 – Public Performances

Case Study 3: Amazon Cloud Drive (see **Writing Assignment 2**)

Reading – Classes 10 and 11 [Nov. 7 and 14]

Warner Bros v WTV Systems, Order Granting Preliminary Injunction, Aug 2 2011 (CD CA)

CBS v. Redd Horne, 749 F.2d 154, 159 (3rd Cir.1984)

On Command Video Corporation v. Columbia Pictures Industries, 777 F.Supp. 787 (N.D. Cal. 1991)

The Cartoon Network et al. v CSC Holdings, 536 F3d 121 (2d Cir. 2008)

Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 866 F.2d 278 (9th Cir. 1989)

US v ASCAP, 627 F.2d 64 (2010) [you can **skip** the discussion in part II of the opinion concerning rate calculations]

NFL v. Primetime 24 Joint Venture, 211 F.3d 10 (2d Cir. 2000)

Reading – Class 12 [Nov. 21]

On the basis of your reading of the above cases, and our discussions in class, please find **2 additional cases** that you think could be relevant to the question presented in Writing Assignment 2, read them, and prepare to discuss them in class if called upon to do so.

Class 13 [Nov. 28]

Writing Assignment 2 due (Writing Students Only)

We'll finish our discussion of Case Study 3 (and Writing Assignment 2) in class today. Writing Students should hand in a copy of Writing Assignment 2 at the start of class. At the end of class, I will give each of you a randomly chosen memo (i.e., one that is not your own). You will be responsible for editing this memo for your fellow-student, and returning it to him/her by the end of the week (i.e., Friday, Dec. 2]. **Final versions of the memos must be turned in to me by Monday, December 12.** When you turn in the final version of the memo, include a hard-copy of your first (Nov. 28) version showing the edits made by your fellow-student (along with an indication of which of your fellow-students was responsible for the editing). A (small) portion of your grade on the final memo will include my assessment of how well you edited your colleague's work.

The musicians' dilemma

Jean plays bass in a local band ("The Reinforcements"). The band would like to perform its version of Paul Simon's classic song "Late in the Evening" (originally written in 1980 and released on his album "One Trick Pony" in 1987) at a live show the band is giving at a center city club at the end of May. They also want to record their performance, and to release a CD of the recording.

Can they do this? Whose copyright(s) might they be infringing if they go ahead, *i.e.*, whose permission do they need? [See if you can determine not only whose permission they need as a general matter (*i.e.*, the rules that govern the infringement inquiry in this kind of situation), but whose permission they actually need *here, i.e.*, with respect to *this actual song* – who actually owns the copyright(s) in "Late in the Evening"? And how does one find that out?].

Jean is also the director of programming at Risky Records, a small record label operating out of Philadelphia. Risky is preparing to release a compilation CD containing recordings chosen by prominent Philadelphians as their favorite recordings of all time. Michael Nutter, mayor of Philadelphia, has chosen Paul Simon's original 1987 recording of "Late in the Evening" as his selection for the compilation. Whose permission does Risky need to include this recording on the compilation?

And assuming Jean needs licenses from *somebody*, how does she obtain those? Can she obtain them from the Harry Fox Agency? From ASCAP, or BMI? From the Copyright Office?

Statutory Reading Assignment 1:

Prepare a short memo (no more than five pages) answering the following questions:

Assume the following facts

Joanna created an original musical work (the “Work”) in 1970. It was, and remains, subject to copyright protection. Joanna is the “author” of the Work; it is not a “work for hire.”

In 1977, Joanna orally grants to Nabisco, Inc., a “perpetual, irrevocable, non-exclusive license” to use the Work as background to a Nabisco television commercial. The commercial is released in 1980.

In 1978, Joanna grants Searchlight Pictures, Inc. a “perpetual, irrevocable, non-exclusive license” in writing, allowing Searchlight Pictures to use the Work in their motion picture “A Day in the Country,” in exchange for a flat fee of \$25,000. The motion picture (with the Work included) is released in 1979.

In 1981, Joanna transfers (in writing) her entire copyright interest in the Work, subject to the two outstanding licenses, to Joanna’s Music, Inc.

In 1984, Joanna’s Music, Inc. grants to Madonna a “perpetual, irrevocable, non-exclusive license” to (a) publicly perform the Work, and (b) record a version of the Work and distribute that recording to the public. The License Agreement specifies a royalty payment schedule under which Madonna is to pay Joanna’s Music, Inc. a specified amount for each performance, and each recording sold, of the Work. Madonna’s recording of the Work is included on her “Like A Virgin” album in 1985, and she performs her version of the Work over 250 times, starting in 1985 and continuing to her most recent tour in 2009.

Joanna marries Henry in 1968; they were divorced in 1986. She marries Lee in 1990. Joanna and Henry had two children: Alice (born 1970) and Bob (born 1974). She and Lee have one adopted son – Carl (born 1991).

Joanna dies in 2005. Henry, Lee, Alice, Bob, and Carl are all still living.

QUESTIONS

1. Can any of the above-mentioned licenses (*i.e.*, the license granted to Searchlight Pictures, the license to Nabisco, and the license to Madonna) be terminated under §203?

2. With respect to any of the above licenses that *are* subject to termination:
 - (a) When can termination occur?
 - (b) Who is entitled to terminate the license?
 - (c) What needs to be done in order to terminate the license?

Writing Assignment 1

The law firm at which you are an associate has been asked by Viacom, Inc., to take over the appeal in the litigation against YouTube (see *Viacom v. Youtube*, SDNY June 23, 2010). The partner in charge of the matter has asked you to prepare a memo (8 – 10 pages, maximum) containing the best arguments to be made on Viacom’s behalf that the judgment in the case should be overturned on appeal.

Statutory Reading Assignment 2 (§ 512(e)):

Prepare a *short* memo (no more than 2 pages) answering the following questions:

Assume the following facts:

Temple University is a “nonprofit institution of higher learning”;

Temple U. is also a “service provider”;

Elaine is a “graduate student” who is an “employee” of Temple;

Elaine is infringing some third party’s copyright;

Temple received 4 separate notifications, in 2006, that Elaine’s activities in connection with “the provision of online access to required instructional materials” were infringing;

All notifications were sent anonymously;

Two of the notifications “knowingly materially misrepresented” that Elaine’s activities were infringing.

Question: Under Section 512(e), will Elaine be considered “a person other than” the institution (Temple University) for purposes of Section 512(a) of the Copyright Act?

Writing Assignment 2

The firm at which you are an associate has been retained by Amazon, LLC, in connection with anticipated litigation regarding Amazon's deployment of a "cloud drive" for consumers. The "cloud drive" allocates storage space on Amazon's servers to consumers who can store music (and other) files there, which will be available for playback to the consumer via any device connected to the Internet. (See <https://www.amazon.com/clouddrive/learnmore> for more information about the Amazon cloud drive). The partner in charge of the matter has come to you with the following assignment:

"I heard that a federal court in California has just issued an injunction against the Zediva service (*Warner Bros. v WTW Systems*, Order Granting Motion for Preliminary Injunction, August 1, 2011) on the grounds that the Zediva system was "publicly performing" copyrighted motion pictures without a license. Our client, Amazon, is worried that this might give the owners of copyright in the musical works stored by consumers on the Amazon 'cloud drive' ammunition for an infringement suit against Amazon (on the grounds that it is 'publicly performing' those works). Can you give me a short (7 – 8 pages maximum) memo on that?"