

LEGAL ISSUES: "FAIR USE" AND COPYRIGHT LAW REGARDING THE INTERNET

Presented by Joel R. Willer
March 23, 2004

- 1) Three major federal statutes in the United States protect intellectual property:
 - a) Copyright statute, which protects original "works of authorship fixed in any tangible medium of expression" [Title 17 of the United States Code];
 - b) Patent statute, which protects new and useful inventions and processes [Title 35 of the U.S.C.]; and
 - c) Trademark statute, which protects words, names, and symbols used by manufacturers and businesses to identify their goods and services [Title 17 of the U.S.C.].
- 2) Matter subject to copyright [17 U.S.C. § 102.(a)]:
 - a) Literary works;
 - b) Musical works, including any accompanying words;
 - c) Dramatic works, including any accompanying music;
 - d) Pantomimes and choreographic works;
 - e) Pictorial, graphic, and sculptural works;
 - f) Motion pictures and other audiovisual works;
 - g) Sound recordings; and
 - h) Architectural works.
- 3) The owner of a copyright has the exclusive rights to do and to authorize any of the following [17 U.S.C. § 106.]:
 - a) To reproduce the copyrighted work in copies or phonorecords;
 - b) To prepare derivative works based upon the copyrighted work;
 - c) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - d) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 - e) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
 - f) In the case of a sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
- 4) Ownership [17 U.S.C. § 201.]:
 - a) The copyright is generally owned by the person who created the work, except
 - b) A "work made for hire" is [17 U.S.C. § 101.]:
 - i) Created by an employee in the course of his/her employment; or
 - ii) Commissioned as a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas, if the parties expressly agree that the work shall be considered a work made for hire.
 - c) The copyright of each contribution to a collective work is separate from the copyright in the collective work.
 - d) Ownership in a work can be assigned to another entity.
- 5) "Public Domain" materials are not protected by the copyright statute. These include:
 - a) Materials for which the copyright has expired, or which was not timely renewed [see below];
 - b) Certain materials published before March 1, 1989, without proper copyright notice on authorized copies (unless the omission was on a small number of copies);
 - c) Materials dedicated to the public domain by the author; or
 - d) Materials that are not copyrightable:

- i) Common idioms/short phrases (However, a phrase used as an advertising slogan might be protected under the trademark statute);
 - ii) Facts and theories;
 - iii) Ideas; or
 - iv) U.S. Government works.
- 6) Remedies for infringement:
- a) A civil court may grant an injunction to prevent or restrain infringement of a copyright [17 U.S.C. § 502.].
 - b) The court may order the impounding and destruction of all copies or phonorecords found to have been in violation of the owner's copyright [17 U.S.C. § 503.].
 - c) An infringer of copyright can be monetarily liable for either [17 U.S.C. § 504.]:
 - i) The copyright owner's actual damages and any additional profits of the infringer, or
 - ii) Statutory damages:
 - (1) The copyright owner may elect to recover, instead of actual damages and profits, an award of statutory damages in a sum of not less than \$750 or more than \$30,000;
 - (2) In a case where the court finds that the infringement was committed willfully, the court may increase the award of statutory damages to a sum of not more than \$150,000; or
 - (3) In a case where the infringer proves that s/he was not aware and had no reason to believe that his/her acts constituted an infringement, the court may reduce the award of statutory damages to a sum of not less than \$200.
 - iii) Three year statutory limitation for filing claim [17 U.S.C. § 507.(b)].
 - d) The court may award reasonable attorney fees to the prevailing party (for the copyright owner to recover attorney's fees, the work must be registered with the Copyright Office before the infringement occurred) [17 U.S.C. § 505.].
 - e) Criminal punishment is possible for willful infringement [17 U.S.C. § 506.]:
 - i) For purposes of commercial advantage or private financial gain, or
 - ii) 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.
 - iii) Maximum imprisonment sentences can range from one to ten years, depending on the circumstances of the offense [18 U.S.C. § 2319.].
 - iv) Five year statutory limitation for filing claim [17 U.S.C. § 507.(a)].
- 7) Notice of copyright [17 U.S.C. §§ 401. and 402.]:
- a) A work publicly distributed after the effective date of the Berne Convention Implementation Act of 1988 (March 1, 1989) does not require a formal copyright notice.
 - b) A notice of copyright may be placed on publicly distributed copies, comprised of three elements:
 - i) The symbol "©", or the word "Copyright", or the abbreviation "Copr." (or, in the case of a sound recording, the symbol "Ⓒ"); and
 - ii) The year of first publication of the work; and
 - iii) The name of the owner of copyright, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.
 - c) If a notice of copyright appears on published copies, then no weight is given to a defense based on innocent infringement in mitigation of actual or statutory damages.
- 8) Duration of copyrights:
- a) Works created on or after January 1, 1978 [17 U.S.C. § 302.]:
 - i) Individual work – Life of the author, plus 70 years;
 - ii) Joint Works – Life of the last surviving author, plus 70 years; or
 - iii) Anonymous Works, Pseudonymous Works, and Works Made for Hire – 95 years from first publication, or 120 years from creation, whichever expires first.
 Note: The above durations are as extended by the Sony Bono Copyright Term Extension Act of 1998.
 - b) Works created before January 1, 1923, have already entered the public domain.

- c) Works from before 1978 entered the public domain immediately upon publication without a formal copyright notice, with limited exceptions (foreign works might enjoy greater protection).
 - d) Works published before 1964 entered the public domain if the copyrights were not renewed under the then-applicable statute (foreign works might enjoy greater protection).
 - e) Aside from the exceptions in the above subparagraphs c) and d), works created after January 1, 1923, and published before January 1, 1978, are protected for a maximum of 95 years, regardless of type of authorship [17 U.S.C. § 304].
 - f) Works created before January 1, 1978, but not published until after that date are protected as listed in above subparagraph a), or until December 31, 2002, whichever is later [17 U.S.C. § 303].
 - g) Works created before January 1, 1978, but published between that date and December 31, 2002, are protected as listed in above subparagraph a), or until December 31, 2047, whichever is later [17 U.S.C. § 303].
 - h) Sound recordings were not given federal protection under U.S. law until Congress passed the Sound Recording Act of 1971, effective February 15, 1972. Pre-1972 recordings might be protected by various state statutes. Pre-1972 recordings will definitively enter the public domain in the year 2067 [17 U.S.C. § 301.(c)].
- 9) Registration:
- a) Registration with the Copyright Office is permissive and is not required to secure copyright protection;
 - b) Except for certain foreign works, registration must be made before an infringement suit is brought;
 - c) Prior timely registration is required for the collection of statutory damages or attorney’s fees;
 - d) Registration provides *prima facie* evidence of the validity of the copyright claim.
 - e) Procedure:
 - i) Completion of the proper form, available at the U.S. Copyright Office Web site;
 - ii) Deposit of a copy of the work to be registered; and
 - iii) \$30 filing fee.
- 10) The “Fair Use” of a copyrighted work includes “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research...” [17 U.S.C. § 107.]. In determining whether a use is “fair,” four factors are considered:
- a) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - b) The nature of the copyrighted work:
 - i) If the work is factual or functional in nature, rather than fictional or artistic, the use is more likely to be “fair,” unless the portion used includes subjective or individualized expression;
 - ii) Use of an unpublished work is more likely to infringe than the use of a published work;
 - c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole:
 - i) The statute and courts have mentioned no specific number of words, amount of time, or percentage of the work that might be safely taken without permission;
 - ii) If the portion used is the heart of the work, that use will likely be deemed to have been “substantial;”
 - iii) The quality of the copy might be a factor in determining fair use (e.g., using a low-resolution thumbnail image as a link to the copyright owner’s site); and
 - d) The effect of the use upon the potential market for or value of the copyrighted work.

Note: The 1998 Conference on Fair Use (“CONFU”) attempted to provide more specific guidelines, mutually agreeable to copyright owners and educational institutions, defining “Fair Use;” however, only the courts can ultimately determine what constitutes “Fair Use.” The CONFU report is limited to uses of digital images (as available only within an institution’s secure electronic network), distance learning, educational multimedia, and various library contexts; the report does not specifically discuss Internet services available to the general public. Compliance with the CONFU standards might prove a good faith effort to respect the fair use of the copyrighted material. A URL to the CONFU report is included at the end of this outline.

- 11) The Online Copyright Infringement Liability Limitation Act of 1998 added specific protections for educational institutions that act as an Internet service provider [17 U.S.C. § 512.(e)]:

- a) The institution is immunized from monetary liability due to certain infringing activities by a faculty member or graduate student (but the faculty member or graduate student is not immunized), if:
 - i) The infringing activity was not part of online instructional materials for a course taught at the institution by the faculty member or graduate student within the preceding three years;
 - ii) During the preceding three years, the institution received no more than two notifications of claimed infringement by the faculty member or graduate student; and
 - iii) The institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the U.S. laws relating to copyright.
 - b) The activities exempted from monetary liability by this provision, under certain conditions, include:
 - i) The transmission of the infringing material [17 U.S.C. § 512.(a)];
 - ii) Temporary storage (system caching) of the infringing material [17 U.S.C. § 512.(b)];
 - iii) Material stored at the direction of the user without the knowledge or awareness of the institution [17 U.S.C. § 512.(c)]; and
 - iv) Referring or linking users to an online location containing infringing materials, as long as the institution has no knowledge that the material is infringing [17 U.S.C. § 512.(d)].
- 12) The Technology, Education, and Copyright Harmonization (TEACH) Act of 2002 added an exemption for “the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session” transmitted via a digital network, under certain conditions [17 U.S.C. § 110.(2)]:
- a) The material cannot be from a work produced or marketed primarily as a part of mediated instruction;
 - b) The copy or phonorecord must be legally acquired;
 - c) The transmission must be made by an instructor as part of a class offered as a part of the mediated instructional activities of a governmental body or an accredited nonprofit educational institution (e.g., a formal distance education course);
 - d) The display or performance must be directly related to the teaching content of the transmission;
 - e) The reception of the transmission is limited to:
 - i) Students officially enrolled in the course; or
 - ii) Officers or employees as a part of their official duties or employment;
 - f) The entity institutes policies regarding copyright, provides informational materials to faculty, students, and staff members that accurately describe, and promote compliance with, the U.S. laws relating to copyright;
 - g) The work is not accessible by recipients for longer than the class session (Note that this provision effectively limits the exemption to live distance learning classes);
 - h) Recipients cannot further disseminate the work to others; and
 - i) The entity does not attempt to circumvent technological security measures.

Online Resources	
ULS Intellectual Property Policy:	http://www.ulm.edu/gradschool/UL_System_Policy.htm
United States Copyright Office:	http://www.copyright.gov
Conference on Fair Use (CONFU) Report:	http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.htm
Stanford University Libraries Fair Use Site:	http://fairuse.stanford.edu
University of Texas Copyright Crash Course:	http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm
Indiana U.-Purdue U. Copyright Mgmt. Center:	http://copyright.iupui.edu
UL-Lafayette Copyright Handbook:	http://www.ull.edu/InfoTech/MediaPrintSvcs/Copyright