

CO-LAB presents:

## Copyright: The basics & beyond

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## Some videos for your consideration...

- [Girlltalk](#) “Shut the Club Down”
  - [Samples](#)
- [Endless Love](#)
- [Avatar: The Linkin Park Edition](#)
- Is the making of any of these videos a felony under current U.S. law?

## Copyright: The basics

- What is copyright?
- What can be copyrighted?
- How do you get it?
- How long does it last?
- What is infringement?
- What is “fair use?”
- What does it mean to say a use is “transformative?”

## IP Overview

- Types of “IP” Protection
  - [Copyright](#): “Writings” broadly defined
  - [Trademark](#): Names, symbols that identify sources of goods and services (“servicemark”)
  - [Patent](#): Discoveries, inventions, processes

## Copyright Protection

- Copyright ©
  - Is a set of **exclusive rights...**
  - granted by **governments...**
  - to regulate the use of a **particular expression** of an idea or information. At its most general, it is literally "the right to copy" an original creation.
  - There is no international copyright.

## What is Copyright ©?

**Copyright** in the United States is a form of protection provided by the laws of the U.S. (Title 17, U.S. Code) to the authors of "original works of authorship," including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works.

## The "Copyright Clause"

- "The Congress shall have the power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries..."

- Article I, Section 8 (Copyright clause)

Why have a copyright clause?

## Copyright

- What did the framers intend?
- A "limited monopoly" for a "limited time" provides incentive to create



## Copyright Protection

- Protection is immediate:
  - A work is copyrighted “at birth,” at the moment of creation. You do not need to register your work to have it protected by copyright law.
- Indicia: copyright © 2009 Derigan A. Silver
- Federal Registration:
  - Registration is **only** required to seek federal remedies for copyright infringement
    - Can collect statutory damages & lawyer’s fees in addition to actual damages
  - Establishes evidence of ownership
  - Not requiring registration can actually cause problems for some kinds of work.

## Copyright Protection

- To be copyrightable, a work must be original **and** creative.
  - Copyright protection subsist in...
    - **Original** works of authorship that are...
    - fixed in a **tangible medium of expression** from which they can be...
    - perceived, **reproduced or otherwise communicated** either directly or with the aid of some device.

## What are copyrightable works?

- Literary Works (broadly defined)
- Musical Works (including words)
- Dramatic Works (including music)
- Pantomimes and choreographic works
- Pictorial, graphic, and sculptural works
- Motion Pictures and Other A/V works
- Sound recordings
- Architectural Works
- Corporate Communications: quarterly and annual reports, website materials, etc.

## What isn't copyrightable?

- Ideas
- Facts (although the broadcast of factual events can be copyrighted)
- Names; titles of movies, books, etc.; mottos, short slogans, phrases; familiar symbols or designs, like a triangle or handicapped access symbol (Some might be protected by trademark law.)
- Useful articles like clothing, furniture, cars, machinery (Some might be patentable.)
- Methods, procedures, systems, mathematical principles, formulas, equations (Might be patentable)
- Works produced by the federal government

## What is the public domain?

The **public domain** comprises the body of knowledge and innovation to which no person or other legal entity can establish or maintain proprietary interests. This body of information and creativity is considered to be part of the common cultural and intellectual heritage of humanity, which in general anyone may use or exploit.

## What Is a “Work for Hire”?

1. A work created by an employee for his or her employer within the scope of employment.
2. A work created by a non-employee (such as a free-lancer) that is specially ordered or commissioned for inclusion in a collective work (such as a newspaper or magazine) **if a work-for-hire agreement is signed.**

**Free-lancers should very carefully read any contact they sign. Why....?**

## Copyright Protection



- Owner’s “Bundle of Rights” from section 106 of the Copyright Act
  - Reproduce the original work
  - Create derivatives of original work
    - Collective works from original works
    - Adaptations of original work
  - Distribute copies of original work
    - Sale, leasing, transfer of ownership
  - Perform or display original work
    - Licensing agreements are often negotiated through compulsory licensing agreements
- **Rights are separate, distinct & divisible**

## Moral Rights

- In addition to these rights, in order to comply with international copyright standards, the U.S. recently began recognizing **moral rights** for some visual works.
- Moral rights: The right to prevent the use of an artist’s name on a work that has been **distorted, mutilated** or otherwise **modified**.

## How long does copyright last?

- The Sonny Bono Copyright Term Extension Act (CTEA)
- Created in 1978 or later:
  - Human owner: Life of the author plus seventy years.
  - Corporate owner: 95 years from publication or 120 years from creation, whichever is shorter.

## How long does copyright last?

- The Sonny Bono Copyright Term Extension Act (CTEA)
- Created prior to 1978:
  - Created, but not published or registered prior to 1978: The longer of life plus 70 years or Dec. 31, 2002
  - Created and published: The longer of life plus 70 years or Dec. 31, 2047
  - Guess when Disney will start lobbying Congress?

## Copyright: Infringement

- What is “Infringement?”
  - Violation of the copyright holder’s exclusive rights
  - Piracy!!! (Arrgh, me mateys!)
  - Monetary damages
    - Actual damages- out-of-pocket losses
    - Statutory damages- willful infringement up to \$150,000 *per infringement*
  - Prison terms: Infringement is a felony that carries a prison term as long as three years

## Copyright: Infringement

- Party claiming infringement must prove
  1. Ownership of copyright on the original work
    - Independently created
    - Minimal amount of creativity
  2. Unauthorized use, must show the actual infringement
    - Evidence of direct infringement OR circumstantial evidence

## Copyright: Infringement

Circumstantial evidence: Seldom is it possible to prove copying directly. Therefore, copying is usually proven through proof of:

1. access to the copyrighted work and
2. substantial similarity between the copyrighted work and the alleged copy.

## Copyright: FAIR USE

- Fair use is a defense against copyright infringement developed in common law and made part of statutory law in 1976.
- Designed to balance the rights of the copyright holder with public interest of dissemination of copyrighted materials
- The **fair use** of a copyrighted work, including reproduction, for purposes such as criticism, comment, news reporting, teaching, scholarship or research is **NOT** an infringement.

## Copyright: FAIR USE

- Factors the court will consider:
  - (1) Purpose and character of use
  - (2) Nature of the original copyrighted work
  - (3) Amount and substantiality of the portion used
  - (4) Effect on the potential market for the original
- Fair use is a flexible and malleable concept.
- All four are explored together, not in isolation.

## Purpose & Character of the Use

- [1] Is the use commercial?
- [2] Does the use serve the public interest by stimulating creativity?
- [3] Does the use do more than paraphrase the original, by adding “value?” Is the new work **transformative?**

## Nature of the Original

- Out-of-print v. currently available
- Fictional v. Factual works
- Published v. Unpublished

## Amount & Substantiality Used

- Both a quantitative and qualitative assessment
- Was it the “heart of the work?”
- Takes into account the other factors
  - In some situations, using the entire material or the heart of a work can be protected.

## Effect on the Potential Market

- The U.S. Supreme Court has indicated that this might be the most important factor to consider.
- However, the more transformative the work, the less this will be a significant factor.
- Consider....

## *Campbell v. Acuff-Rose Music Inc.* (1994)



- Pretty Woman
  - The Court emphasized the “transformative” nature of parody, and implied that the work in that case was sufficiently transformative to meet the test. Parody/satire is highly protected.
  - Court did *not* find that the spoof was a fair use (only that it could be one), instead remanding the case for the lower courts to make their own determination
  - Parties settle: 2 Live Crew paid licensing fee

### *Campbell v. Acuff-Rose Music Inc.* (1994)

- In *Campbell*, the Supreme Court adopted a definition of transformative use from a law review by Judge Pierre Leval.
- To be transformative a work must:
- (1) socially beneficial,
- (2) be used in a different way or purpose from the original, and
- (3) add new value to the original by using it as raw material to create something new.
- However, lower courts have not always followed this analysis.

### Copyright: Beyond the Basics

- Digital media and copyright
- File sharing
- The Google Library Project
- Youtube and copyright
- Creative Commons

### Digital Media and Copyright

- There has always been a tension between technology and the law. Copyright is simply one example.
- However, the unique nature of digital media is changing the way many see copyright.
  - Permanent, perfect copies...
  - that require no sharing...
  - and are easily distributed
  - In addition, copying is *inherent* in the medium.

### Copyright and Web Sites

- Posting digital reproductions of copyrighted material on the Internet is an infringement.
- Copying copyrighted material on the Internet is an infringement.
- If the content is “framed,” in a new way to imply ownership, infringement is possible.
- Search engines and visual search engines that return thumbnail pictures, however, have been considered a fair use by at least two courts.



## Copyright and Sampling

- Bridgeport Music v. Dimension Films (6<sup>th</sup> Cir. 2005)
  - "Get a license or do not sample. We do not see this as stifling creativity in any significant way."
  - This is considered a **bright-line** rule. It leaves no room for interpretation.
- Artists are still left free to argue fair use.

## Digital Media and Copyright

- DVDs, DRM & DMCA
  - Universal City Studios v. Reimerdes (2d Cir. 2001)
  - Encryption-Content Scramble System (CCS) & DeCSS
  - Magazine for hackers posted DeCSS and its source code on Web
  - 2d Cir. upheld a court order to remove and not link to other sites
  - The DMCA has both anti-circumvention and anti-trafficking provisions and makes it **a crime** to create software that breaks commercial encryption codes.

## Digital Media and Copyright

- Video Cassette Recorders (VCRs)
  - Sony Corp. v. Universal City Studios (1984)
  - UCS: The manufacture and sale of VCRs contributes to copyright infringement
  - "**Contributory infringement**," infringement through intentionally inducing or encouraging infringement
  - SCOTUS: "Time shifting" did not harm potential market and was fair use

## Digital Media & Copyright

- Music and Movies on the Internet
  - File Sharing: Centralized servers
    - A&M Records, Inc. v. Napster, Inc. (9th Cir. 2001)
    - Napster was guilty of **contributory** infringement
  - File Sharing: P2P File Sharing Software
    - MGM Studios, Inc., v. Grokster, Lts. (2005)
    - Groksters business plan and advertising proved it was guilty of contributory or **vicarious** infringement; when one profits from direct infringement without attempting to stop it



### MGM Studios Inc., v. Grokster, Ltd. (2005)

- “We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”

◦ Justice Souter

### Pirate Bay, 2009

On April 17, 2009, four individuals associated with Pirate Bay, a bit-torrent tracking Web site based in Sweden, were convicted of “assisting copyright infringement,” sentenced to one year in prison and fined \$3.6 million under a new Swedish law.

### Digital Media and Copyright

Family Entertainment & Copyright Act of 1995 imposes criminal penalties (fines and up to 3 years of jail time) for anyone who possesses or distributes movie, music or software files that have not been released to the public.

### Google and Copyright

In 2007, Viacom filed suit for \$1 billion and an injunction to stop YouTube from distributing copyrighted programming (such as *SpongeBob*, *The Daily Show*, *The Colbert Report* & various MTV shows) without paying royalties.

The owner of a copyrighted work can order removal whenever they see an unauthorized version of their work on the Internet without having to sue and prove a case of infringement

## Google and Copyright

Since Viacom issued its lawsuit, YouTube has introduced a system called Video ID, with the aim of reducing violations.

In addition, at least one court has ruled that copyright owners cannot order the removal of copyrighted material unless they first prove the use is not protected under the fair use doctrine.

## Google and Copyright

Under the Library Project or Google Book, Google is in the process of scanning books from numerous university and public libraries into one searchable database.

The Authors Guild of America and Association of American Publishers separately sued Google, citing "massive copyright infringement."

## Google and Copyright

Google claimed its project represents a fair use, and is the digital age equivalent of a card catalog with every word in the publication indexed.

In addition, Google claimed that because it does not reproduce "random pages" from these texts it is protected under fair use.

## Google and Copyright

In October 2008, Google signed a \$125 million settlement that arranged to pay authors of works. Authors will receive \$60 per full book, or \$5 to \$15 for partial works. Google will be able to index the books, display 20% of each book in "preview mode," show ads and make available for sale digital versions of each book.

## Creative Commons

Creative Commons is a non-profit organization that helps artists and authors share their work under licensing agreements and is working to make it easier to identify copyright owners.

These licenses do not necessarily make a work “free,” although they all require at least noncommercial distribution be allowed free of charge.

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- **[ShareAlike](#) (sa):** Licensees may distribute derivative works only under a license identical to the license that governs the original work.
- The nd and sa clauses are mutually exclusive.

## Copyright Resources

- U.S. Copyright Office:  
<http://www.copyright.gov/>
- Copyright basics:  
<http://www.copyright.gov/circs/circ01.pdf>
- Creative Commons:  
<http://creativecommons.org/>
- Center for Social Media’s best practices:  
[http://www.centerforsocialmedia.org/resources/publications/code\\_for\\_media\\_literacy\\_education/](http://www.centerforsocialmedia.org/resources/publications/code_for_media_literacy_education/)