

Intellectual Freedom

Session 8 - LIS 493 Summer 2009

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RIPPED . . .

. . .from the
headlines

2.0 Privacy: Reflection pieces

- general observations
 - data security: authenticity => security; information security vs. national security. biometrics?
 - accountability: anonymity can prevent accountability; e. g., damaged or vandalized book
 - minors' rights to privacy
 - RFID - practice vs. potential; relationship to data mining more generally
 - the need to understand how information travels online & is stored to protect patron privacy
 - public awareness & education opportunities; "Reas. Exp"
- any last thoughts?

Part I: Introduction

Access to Information

3.0 Access to information:

what are the issues of concern?

why do we care? what is the relationship of intellectual property to intellectual freedom, and to libraries? is it a primarily economic concern and if so is it something libraries should be involved in at all?

what is copyright & fair use?

3.0 Access to information:

what are the issues of concern?

- digital divide
- access to government information (think FIPPs; also think "Right to Know")
- intellectual property
- legal & technical enforcement of contracts / IP rights
- licensing
- open access movement
- A2K

3.0 Access to information:

why do we care? what is the relationship of intellectual property to intellectual freedom, and to libraries? is it a primarily economic concern and if so is it something libraries should be involved in at all?

3.0 Access to information:

what is copyright & fair use?

Part II: Copyright & Fair Use

Copyright

- what is copyright? (IP? plagiarism?)
- how does it affect int. freedom & libraries
 - First Amendment
 - archives, access (DRM/DMCA)
 - issues: ereserves, licensing, access/preservation
- copyright basics
 - 6 exclusive rights to authorize ("license")
 - for duration of copyright (life+70)
 - original works of authorship, fixed ...
 - no facts ... idea/expression dichotomy
 - with exceptions, limitations, defenses
 - public domain
 - 107 fair use / 109 first sale / 108 lib / 110 TEACH Act & classroom copies

"Rights" Over Information

- what rights? generally to control and authorize access to and *reproduction of* and *use of* some piece of information
 - e.g., copyright -- the right to *reproduce* (copy), *distribute*, *perform*, *display*, and *make derivative works of* a work
 - e.g., patent -- the right to exclude others from making, using or selling the invention
- how does this square with the First Amendment? "Congress [and the States] shall make no law ... abridging the freedom of speech, or of the press"
- Constitutional reconciliation, exceptions, defenses, "breathing space" ("fair use")

"Intellectual Property" Terminology

- ongoing argument about proper terminology, and proper model:
 - "property" -- exclusive + limitations; drawn from *land*
 - others: rights, authorization, part of personality (Gordon)
 - utilitarian incentives / limited monopoly
 - "intellectual **property**" vs. copyright, patent, trademark
 - "stealing" and "theft" vs. copyright or trademark infringement
 - "piracy" vs. systematic or commercial copyright infringement
 - "owner" vs. "rightsholder"
-
- **copyright ≠ plagiarism**

Areas of Law

- copyright
 - neighboring rights ("related rights")
 - moral rights / droit d'auteur
 - para-copyright (DMCA)
- patent
 - utility model
- trademark (service mark)
 - right of publicity (privacy: appropriation of name / likeness)
 - geographic indicators (champagne; vidalia onions)
- trade secret
- *sui generis* statutes:
 - database rights
 - industrial design rights, boat hulls, mask works, *fashion designs?* (*proposed*)
 - plant variety rights
 - indigenous culture / knowledge

Copyright, Trademark, and All That Jazz

Copyright

- Constitutional & federal only
- protects "original works of authorship" "fixed in any tangible medium of expression"
- protection for new works lasts **author's life + 70 yrs** [old works vary; <1923 is public domain]
- protection benefits the copyright-holder *for the purpose of the public good*
- rationale is incentivizing creation of works of science & useful art
- infringement if "substantial similarity" & access to work

Trademark

- common & statutory, state & fed.
- protects *anything* : logo, slogan, color, scent ...
- protection lasts forever, so long as mark in use
- protection benefits *consumer* & is enforced by the trademark holder
- rationale is a functioning marketplace & happy consumers
- infringement: "likelihood of **consumer confusion**"

Copyright, Trademark, and All That Jazz

Copyright

- expansions over time:
 - subject matter
 - length of term
 - rights: esp. "derivative works"
 - types of infringement:
"secondary" liability
(contributory infringement, vicarious liability, inducement)
 - damages
 - "Copyright Czar"
- related expanded doctrines:
 - DMCA
 - sui generis (e.g., boat hulls; semiconductor chip masks)
 - "moral rights"

Trademark

- expansions over time:
 - went federal (Commerce Cl.)
- related expanded doctrines:
 - trademark dilution

Copyright, Trademark, and All That Jazz

Copyright

- intellectual freedom concerns:
 - access to information
 - creating / using knowledge
- intellectual freedom protections:
 - Sections 107 *et seq*
 - 107 "fair use"
 - reverse engineering
 - parody
 - educational
 - 109 "first sale"
 - idea-expression dichotomy
 - copyrightable subject matter
 - public domain

Trademark

- intellectual freedom concerns:
 - fencing off language, hampering criticism
- intellectual freedom protections:
 - geographic & trade limitations ("United Air / Vanlines / etc.")
 - "trademark fair use" - e.g., news reporting, criticism, comparative ads, parody
 - nominative use
 - "genericide"

Copyright

US Constitution, Article I, Section 8, clause 8:

Article I (Congress), Section 8 (lists of powers)

"The Congress shall have power ..."

Clause 8:

" ... **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"

Very little discussion or debate; basically added in by Madison;
briefly discussed in *The Federalist Papers*; described as a "limited
monopoly".

"Science", "Authors", "Writings" ==> Copyright

"useful Arts", "Inventors", "Discoveries" ==> Patent

Copyright

what kinds of works get copyright? original works of authorship fixed in any tangible medium of expression (17 USC 102)

- "original works of authorship": not a compilation of facts, not an invention but an *authored* work
 - subject matter: 17 USC 102 - literary, musical, dramatic, choreography, pictorial/graphic/sculptural, motion pictures & AV, sound recordings, architecture.
 - 17 USC 102(b) - "*In no case ... idea, procedure, process, system, method of operation, concept or discovery...*"
- "fixed in any tangible medium of expression" - writings, not talks
- no formalities: no (c) notice, no registration ... [1976 Copyright Act / Berne harmonization] : "fixed in any tangible medium..."
- 17 USC 105 - no US government works

Copyright : Ownership

who owns copyright?

author (or author's heirs)

unless work-for-hire

or

unless assigned by contract

20th century growth of *work-for-hire* and *assignment clauses*

Termination rights apply to owner, not to transferee.

Copyright

- rights of copyright (17 USC 106; last significant rev. 1976)
 - statutory copyright rights in the US
 - copy ("reproduce")
 - distribute copies (BUT ONLY for the first sale)
 - prepare derivative works (translations, adaptations, etc.)
 - perform, display, digital audio performance
 - 106A : Visual Artists' Rights Act (VARA) - attribution & integrity

 - many non-US countries
 - moral rights / droit d'auteur
 - neighboring rights ("related rights")
 - database rights

 - para-copyright (US & elsewhere)
 - anti-circumvention (DMCA)

Copyright : Rights & Infringement

- rights of copyright (17 USC 106; last significant rev. 1976)
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infringement = (a) ownership of a protected work; and (b) copying [or other exclusive right] of protected elements of the work

copying = substantial similarity + access to the work

- subconscious copying: George Harrison's "My Sweet Lord" from The Charelles' "He's So Fine"
 - substantial similarity? - 3-note progression
- secondary liability....

Copyright : Rights & Infringement

- secondary liability....
 - contributory infringement (e.g., you helped someone), vicarious liability (e.g., your employees), inducing (e.g., Grokster -- you pitched it to them)

Sony v. Universal, 464 US 417 (1984) - "Betamax" (VCR) case

M: Stevens (Burger, Brennan, White, O'Connor)

d: Blackmun (Marshall, Powell, Rehnquist)

- R: contributory infringement? no -- substantial noninfringing uses
 - rejected "quantity of use" to determine infringement
 - technology companies love this decision, for SNIUs rule
- R: time shifting = fair use
 - r: personal uses infringing? *not decided*
- Mr. Rogers

Copyright : Rights & Infringement

- secondary liability....
 - contributory infringement (e.g., you helped someone), vicarious liability (e.g., your employees), inducing (e.g., Grokster -- you pitched it to them)
- *Sony v. Universal* , 464 US 417 (1984) - "Betamax" (VCR) case [+]
- *Napster* (9th Cir.) - Napster must police
- *Aimster* (7th Cir.) - quantity of use determines infringement
- *MGM v. Grokster* , 545 U.S. 913 (2005) - "inducing" infringement

Copyright : Rights & Infringement

damages:

- innocent infringement - "shall remit" (libraries, etc.); as low as \$200
- infringement: \$750 - \$30,000
- willful infringement: > \$150,000

Copyright : Defenses & Limitations

- Sections 107 - 122
 - 107 fair use
 - 109 first sale (aka exhaustion)
 - 108 library exemptions
 - 110 classroom copies + TEACH Act
- idea-expression dichotomy
- copyrightable subject matter
- copyright term expiration (CTEA / Sonny Bono; *Eldred*)

Copyright : First Sale (§.109)

- Section 109 - first sale / exhaustion
- 17 USC 109(a) .. the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.
- 17 USC 109(b) ... no rental or loans of software or music, *except* by nonprofit libraries and nonprofit educational institutions (including ILL); software must have copyright notices attached

... so *reselling is okay* ==> secondary / aftermarkets (e.g., used bookstores)

... and *lending is okay* ==> libraries

Copyright : Idea-Expression Dichotomy

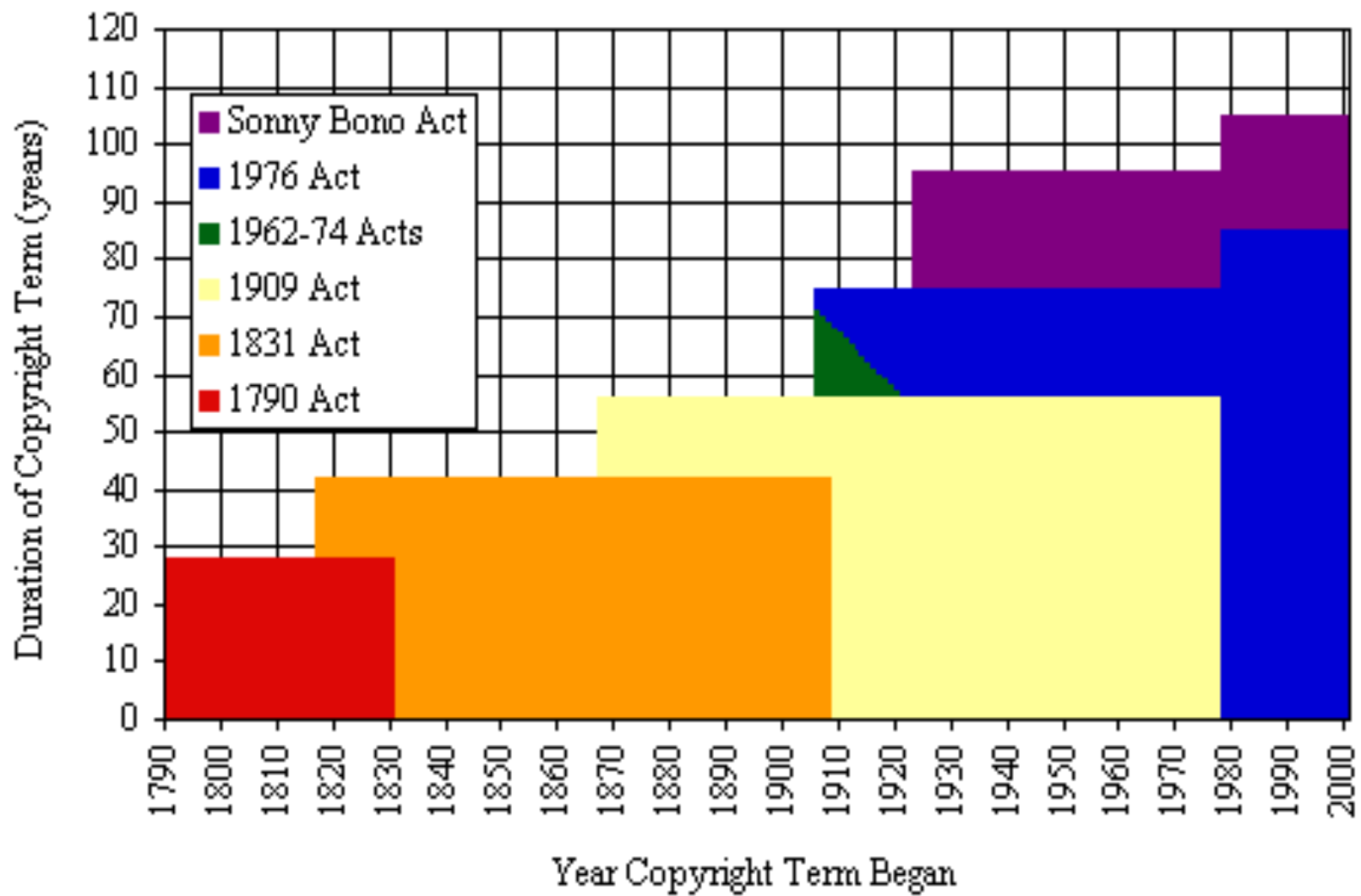
- continuum of fact / idea to expression
 - expression is "original" to the author
- defined in *Baker v. Selden* , 101 US 99 (1879)
- strikes a balance b/w (c) and 1A by permitting "free communication of facts" while still protecting an author's specific expression
- scenes à faire
- merger doctrine
- functionality
- *Feist v. Rural Telephone Services* , 499 US 340 (1991) (J. O'Connor)
 - "the sine qua non of copyright is originality" - even a mere "spark" is copyrightable, but ...
 - telephone listings, arranged alphabetically, are not
 - "sweat of the brow" doctrine dead in the US
 - "database protection legislation" (EU)

Copyright : Limited Times

- original term: 14 years + 14 year renewal period
- extended ... times
- 1976 Copyright Act
 - life of author + 50 years (Berne harmonization)
 - took effect 1978
- 1998 Sonny Bono Copyright Term Extension Act ("Mickey Mouse Protection Act") [+]
 - life of author + 70 yrs; corporate: creation +120, pub +95
 - "forever less one day"
- Public domain post-CTEA:
 - anything pre-1923
 - public domain frozen at 1923; clock starts again in 2019
 - some things from 1923 - 1978, depending
 - unpublished pre-1978: 2002-2047

Copyright : Limited Times

- 1998 Sonny Bono Copyright Term Extension Act ("Mickey Mouse Protection Act") [–]
 - *Eldred v. Ashcroft*, 537 US 186 (2003) (J. Ginsburg)
 - Jane Ginsburg
 - dissents by Stevens (hurts later works) & Breyer (no incentive; harms public interest)
 - First Amendment is a viable restriction
- Public domain post-CTEA [+]
- Orphan Works Act



Copyright : Fair Use (s.107)

"the fair use of a copyrighted work ... is not an infringement of copyright"

- defense vs. right vs. not an infringement

"for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research"

factors to be considered shall include :

....

Copyright : Fair Use (s.107)

factors to be considered shall include :

- (1) "purpose and character of the use"
 - including "of a commercial nature or is for nonprofit educational purposes"
 - transformative?
- (2) "nature of the copyrighted work"
 - fact or fiction?
 - published or unpublished?
- (3) "amount and substantiality of the portion used in relation to the copyrighted work as a whole"
 - amount: how much?
 - substantiality: how important?
- (4) "effect of the use upon the potential market for or value of the copyrighted work"

Copyright : Fair Use (s.107)

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- (1) "purpose and character of the use"
 - including "of a commercial nature or is for nonprofit educational purposes"
 - transformative?

commerciality: non-dispositive.

- *Campbell v. Acuff-Rose Music* , 510 US 569 (1994);
- *Harper & Row v. Nation* , 471 US 539 (1985);
- *Amer. Geographical Union v. Texaco* (2d Cir.; SDNY J. Leval; ** licensing **)

transformativeness: increasingly important. [+]

Copyright : Fair Use (s.107)

factors to be considered shall include :

(1) "purpose and character of the use"

commerciality: non-dispositive. [+]

transformativeness: increasingly important.

- Pierre Leval
- parody - *Campbell ; Dr. Seuss* (9th Cir.); *Suntrust Bank* (11th Cir.)
- reverse engineering
- type of use: *Kelly v. ArribaSoft* (9th Cir. thumbnails); *Google v. Perfect 10* (9th Cir.; thumbnails); *Dorling-Kindersley* (2d Cir.; Grateful Dead posters)

Copyright : Fair Use (s.107)

factors to be considered shall include :

(2) "nature of the copyrighted work"

- fact or fiction?

- reverse engineering: getting at underlying ideas

- published or unpublished?

- *Harper & Row v. Nation* , 471 US 539 (1985);

- *out-of-print*?

- *Worldwide Church of God* (9th Cir.)

Copyright : Fair Use (s.107)

factors to be considered shall include :

(3) "amount and substantiality of the portion used in relation to the copyrighted work as a whole"

- amount: how much?
- substantiality: how important?

Harper & Row v. Nation Enterp. , 471 US 539 (1985)

- Pres. Ford memoirs; pardon of Nixon
- *Time* contract
- scooped
- public interest? factual nature? critical commentary? amount of the work? ~300 words
 - market effects and "heart of the work" (& "bad actor" -- purpose scooping)
 - Brennan dissent (White & Marshall)

Copyright : Fair Use (s.107)

factors to be considered shall include :

(4) "effect of the use upon the potential market for or value of the copyrighted work"

- historically considered "the most important"
- impact on value through *replacement* , not through *criticism* -- satire & critical diminution in value is *irrelevant*
- licensing markets:
 - *American Geophysical Union v. Texaco* - circularity of analysis
 - *Perfect 10 v. Google* - cell phone thumbnails
 - existing or reasonable
- *Harper & Row v. Nation* , 471 US 539 (1985)

Copyright : Fair Use (s.107)

factors to be considered shall include :

the "Fifth" factor:

- good actor / bad actor? (Napster / Grokster / etc.)
- public interest? (Zapruder film / JFK)
- personal use?

Workshop: Electronic Reserves

A publisher has written your library to complain that your library places copies of chapters of its books on "e-reserve", a password-protected online system accessible to the students. The publisher claims its copyright is being infringed.

Draw up an action plan, including:

- (a) list of questions of concern for the library;
- (b) list of points in the library's favor.

Post your lists on the class wiki, and review other lists; prepare to discuss next class.

Last 3 Sessions

Fri 7/24: copyright review, licensing, DRM/DMCA
workshop: Google Book Search
DUE: materials challenge

Wed 7/29: open access movement, access to govt info
workshop: open access & public education strategy
DUE: materials challenge response

Fri 7/31
exam
evaluation
DUE: final reflection piece