

Copyright Law

Summary. This course will provide a detailed assessment of the law of copyright, which concerns itself with the protection of many varieties of creative expression—from the traditional (music, sculpture, literature), through the novel (computer software, databases, video game characters), to the esoteric (floral arrangements, fashion accessories, or the “total concept and feel” of a graphical computer interface).

Although copyright law is nominally a creature of statute, it will quickly be seen that the copyright statutes raise as many questions as they resolve. A major part of our inquiry, accordingly, will be devoted to considering the overarching policies that copyright law is meant to advance, and assessing whether the judicial doctrines that have grown up around the various pieces of copyright legislation work effectively to serve, or to frustrate, those policies. The inquiry is necessarily complicated by the fact that copyright’s core, bedrock principles are themselves (to a far greater extent than in practically any other domain of law) up for grabs—the subject of a robust, longstanding, and ongoing debate.

As the title of your casebook suggests, the authors (and I) are especially interested in the intersection of traditional copyright doctrines with modern information technologies, which are creating a world quite different from the one in which many copyright doctrines evolved. Thus, although we will cover traditional copyright rules in some depth, our focus will be on how well those rules serve the needs of the emergent network economy, in which global information flows and active user involvement have begun to supplant a traditional mass-production model (featuring comparatively passive consumers) as a dominant mechanism for cultural communication.

Introduction to Intellectual Property Law is a recommended, but not required, course prerequisite. In view of the greater depth and focus of this course, however, students who have not taken *Introduction to Intellectual Property Law* should not find themselves disadvantaged in any respect.

Textbook and Course Materials.

- **Required Texts:** Cohen, Loren, Okediji & O’Rourke, *Copyright in a Global Information Economy* (2nd ed. 2006) (“**Casebook**”) together with the 2008 *Case and Statutory Supplement* (“**Supp.**”). The casebook and supplement are available in the law school bookstores or online at <http://lawschool.aspenpublishers.com/>. You should review the notes following each assigned case in addition to the text of the cases themselves. You should also consult the web site the authors have created to accompany their casebook, <http://www.coolcopyright.com/>.
- Additional course materials will be handed out in class or made available for pickup (“**Hand-out**”).

Grading. Your course grade will be based on two components.

- Final Examination: 75%.
- Course Participation: 25%. Your course participation grade includes in-class participation as well as written participation in an online discussion forum for the course that is hosted on the web site of the H2O Project, <http://h2o.law.harvard.edu/>. Registration instructions for the discussion forum will be provided during the first class meeting.

Office Hours. Office hours will be held Wednesdays 9 a.m. to noon, or by appointment. Please contact my assistant, Huda Kebede, at 556-9133, to schedule an appointment.

Scheduling Note. Class will not meet on Tuesday, February 10, 2008.

First Day’s Assignment. For our first class meeting on January 13, please review all the readings under Part I of the course syllabus (“Theory and History”).

Course Syllabus

Part 1: Theory and History

- Introduction and Overview (Casebook, pp. 3–5).
- The Theoretical Underpinnings of Copyright Law (Casebook, pp. 5–19).
- The History of U.S. Copyright Law (Casebook, pp. 19–33).
- The Growing Role of International Treaties and Institutions (Casebook, pp. 33–42).

Part 2: The Requisites of Copyrightability

I. Copyrightable Subject Matter

- *U.S. Constitution*: Article I, § 8, clause 8.
- *Statute*: 17 U.S.C. §§ 101, 102, 103.
- The Elements of Copyrightable Subject Matter (Casebook, pp. 45–47).

A. Fixation

- Discussion (Casebook, pp. 47–48).
- *Williams Electronics, Inc. v. Artic International, Inc.* (Casebook, pp. 48–51).
- *MAI Systems Corp. v. Peak Computer, Inc.* (Casebook, pp. 51–53).
- *The Cartoon Network, LP v. CSC Holdings, Inc.* (Handout, pp. 1–5).
- Discussion (Casebook, pp. 53–57; Supp., pp. 349–50).

B. Originality

- Discussion (Casebook, pp. 57–58).
- *Burrow-Giles Lithographic Co. v. Sarony* (Casebook, pp. 59–61).
- *Bleistein v. Donaldson Lithographing Co.* (Casebook, pp. 62–64).
- *Mannion v. Coors Brewing Co.* (Supp., pp. 350–54).
- Discussion (Casebook, pp. 65–67).
- *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* (Casebook, pp. 67–70).
- *The Bridgeman Art Library, Ltd. v. Corel Corp.* (Casebook, pp. 70–71).

C. Idea and Expression

- Discussion (Casebook, pp. 72–73).
- *Baker v. Selden* (Casebook, pp. 73–78).
- Discussion (Casebook, pp. 78–80).
- *Hoehling v. Universal City Studios, Inc.* (Casebook, pp. 80–86).
- *American Dental Ass'n v. Delta Dental Plans Ass'n* (Casebook, pp. 86–90).

D. Derivative Works and Compilations

- Discussion (Casebook, pp. 90–91).
- *L. Batlin & Son, Inc. v. Snyder* (Casebook, pp. 91–94).
- *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.* (Casebook, pp. 94–97).
- *Pickett v. Prince* (Casebook, pp. 98–100).
- Discussion (Casebook, pp. 100–01).
- *Feist Publications, Inc. v. Rural Telephone Service Co.* (Casebook, pp. 101–06).

- *Roth Greeting Cards v. United Card Co.* (Casebook, pp. 106–08).
- *Mason v. Montgomery Data, Inc.* (Casebook, pp. 108–10).

II. Authorship

- *Statute*: 17 U.S.C. §§ 101, 105, 201.
- Discussion (Casebook, pp. 110–11).
- *Lindsay v. R.M.S. Titanic* (Casebook, pp. 111–13).
- *Erickson v. Trinity Theatre, Inc.* (Casebook, pp. 113–14).
- *Aalmuhammad v. Lee* (Casebook, pp. 114–18).
- *Community for Creative Non-Violence v. Reid* (Casebook, pp. 119–24).
- *Aymes v. Bonelli* (Casebook, pp. 124–25).
- Discussion (Casebook, pp. 125–27).
- *Autec Systems, Inc. v. Peiffer* (Casebook, pp. 127–29).
- Discussion (Casebook, pp. 129–38).
- **Skim**: University of Cincinnati Rule 10-19-02 (Handout, pp. 5–6).

Part 3: Acquiring and Transferring Copyright Rights

I. Copyright Formalities

- Discussion (Casebook, pp. 139–44).
- *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.* (Casebook, pp. 144–47).

II. Duration of Copyright

- *Statute*: 17 U.S.C. §§ 302–305.
- Copyright Duration and Renewal Guide (Handout, p. 7).
- Discussion (Casebook, pp. 153–59).
- *Eldred v. Ashcroft* (Casebook, pp. 159–69).
- Discussion (Supp., pp. 358–59 notes 7 and 9).

III. Renewal and Transfer

- *Statute*: 17 U.S.C. §§ 203, 204, 304(c) & (d).
- Discussion (Casebook, p. 169).
- *Stewart v. Abend* (Casebook, pp. 170–77).
- Discussion (Casebook, pp. 177–83; Supp., pp. 359–60 note 5).
- Problems: Copyright Termination and Renewal (Handout, pp. 8–9).
- *Effects Associates, Inc. v. Cohen* (Casebook, pp. 183–88).
- *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.* (Casebook, pp. 189–92).
- *Random House v. Rosetta Books, LLC* (Casebook, pp. 192–98).
- Discussion (Casebook, pp. 198–200).
- *New York Times Co. v. Tasini* (Casebook, pp. 200–07).

Part 4: Protected Works and Boundary Problems

- *Statute*: 17 U.S.C. §§ 101, 102.
- Discussion (Casebook, pp. 209–11).

I. Useful Articles and “Conceptual Separability”

- *Mazer v. Stein* (Casebook, pp. 212–14).
- Discussion (Casebook, pp. 214–15).
- *Kieselstein-Cord v. Accessories by Pearl, Inc.* (Casebook, pp. 214–18).
- *Carol Barnhart Corp. v. Economy Cover Corp.* (Casebook, pp. 218–21).
- *Brandir International, Inc. v. Cascade Pacific Lumber Co.* (Casebook, pp. 221–26).
- Discussion (Casebook, pp. 226–33).
- Excerpt from Reichman, “Legal Hybrids Between the Patent and Copyright Paradigms” (Casebook, pp. 233–35).

II. Computer Software

- Discussion (Casebook, pp. 235–38).
- *Apple Computer, Inc. v. Franklin Computer Corp.* (Casebook, pp. 238–42).
- *Computer Associates International, Inc. v. Altai, Inc.* (Casebook, pp. 243–51).
- *Softel, Inc. v. Dragon Medical & Scientific Communications, Inc.* (Casebook, pp. 251–55).
- *Lotus Development Corp. v. Borland International, Inc.* (Casebook, pp. 255–64).
- Discussion (Casebook, pp. 264–69).

III. Characters

- *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.* (Casebook, pp. 280–83).
- *Titan Sports, Inc. v. Turner Broadcasting Systems, Inc.* (Casebook, pp. 284–87).
- *Detective Comics, Inc. v. Bruns Publications, Inc.* (Handout, p. 10).

IV. Databases

- Discussion (Casebook, pp. 290–92).
- *Bellsouth Advertising & Publishing corp. v. Donnelley Information Publishing, Inc.* (Casebook, pp. 292–95).
- *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.* (Casebook, pp. 296–99).
- *CDN, Inc. v. Kapes* (Casebook, pp. 300–01).
- *Matthew Bender & Co. v. West Publishing Co.* (Casebook, pp. 301–04).
- Discussion (Casebook, pp. 304–07).
- Excerpt from Ginsburg, “No ‘Sweat’? Copyright and Other Protection of Works of Information After *Feist v. Rural Telephone*” (Casebook, pp. 307–08).
- Excerpt from Reichman & Samuelson, “Intellectual Property Rights in Data?” (Casebook, pp. 308–10).

Part 5: The Exclusive Rights of a Copyright Holder

- *Statute*: 17 U.S.C. §§ 106, 106A.
- Discussion (Casebook, pp. 313–14).

I. The Elements of Infringement

- Discussion (Casebook, pp. 314–15).
- *Three Boys Music Corp. v. Bolton* (Casebook, pp. 315–18).
- *Selle v. Gibb* (Casebook, pp. 318–20).
- *Ty, Inc. v. GMA Accessories, Inc.* (Casebook, pp. 320–23).
- Discussion (Casebook, pp. 323–25).

II. The Reproduction Right

- Discussion (Casebook, pp. 325–26).
- *Nichols v. Universal Pictures Corp.* (Casebook, pp. 326–30).
- *Arnstein v. Porter* (Casebook, pp. 330–33).
- *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.* (Casebook, pp. 333–36).
- *Steinberg v. Columbia Pictures Industries, Inc.* (Casebook, pp. 336–41).
- *Boisson v. Banian, Ltd.* (Casebook, pp. 341–45).
- *Computer Associates International, Inc. v. Altai, Inc.* (Casebook, pp. 345–49).
- *Cavalier v. Random House, Inc.* (Casebook, pp. 349–54).
- *Swirsky v. Carey* (Casebook, pp. 354–59).
- Discussion (Casebook, pp. 359–60).
- *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors* (Casebook, pp. 360–63).
- Discussion (Casebook, pp. 363–64; Supp., pp. 367–68 note 4).

III. The Distribution Right

- Discussion (Casebook, p. 365).
- *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors* (Casebook, p. 365).
- *Hoteling v. Church of Jesus Christ of Latter-Day Saints* (Casebook, pp. 365–69).
- *Bobbs-Merrill Co. v. Straus* (Casebook, pp. 369–71).
- Discussion (Casebook, pp. 371–77).

IV. The Derivative Works Right

- Discussion (Casebook, pp. 385–86).
- Excerpt from Goldstein, “Derivative Rights and Derivative Works in Copyright” (Casebook, pp. 386–87).
- *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.* (Casebook, pp. 387–91).
- *Dam Things from Denmark v. Russ Berrie & Co., Inc.* (Casebook, pp. 391–96).
- *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.* (Casebook, pp. 396–97).
- *Lee v. A.R.T. Co.* (Casebook, pp. 398–400).

- *Lewis Galoob Toys v. Nintendo of America, Inc.* (Casebook, pp. 401–03).
- *Micro Star v. FormGen Inc.* (Casebook, pp. 403–06).
- Discussion (Casebook, pp. 407–08).

V. Moral Rights

- Discussion (Casebook, pp. 408–09).
- *Gilliam v. American Broadcasting Co., Inc.* (Casebook, pp. 409–14).
- *Carter v. Helmsley-Spear, Inc.* (Casebook, pp. 415–17).
- *Martin v. City of Indianapolis* (Casebook, pp. 418–23).
- *Phillips v. Pembroke Real Estate, Inc.* (Handout, pp. 11–15).
- *Dastar Corp. v. Twentieth Century Fox Film Corp.* (Casebook, pp. 423–26).

VI. Public Performance and Display

- Discussion (Casebook, pp. 426–28).
- *Columbia Pictures Indus. v. Redd Horne, Inc.* (Casebook, pp. 428–32).
- *The Cartoon Network, LP v. CSC Holdings, Inc.* (Handout, pp. 16–19).
- Discussion (Casebook, pp. 432–35).
- *Perfect 10, Inc. v. Amazon.com, Inc.* (Supp., pp. 370–74).
- Discussion (Casebook, pp. 436–43).

VII. Copyright and the Music Industry

- Discussion (Casebook, pp. 443–47).
- Excerpt from Fisher, *Promises to Keep* (Handout, p. 19).
- **Skim:** Excerpt from Creative Commons, “Podcasting Legal Guide: Rules for the Revolution” (Handout, pp. 20–25).
- Discussion (Casebook, pp. 447–50).
- *Newton v. Diamond* (Casebook, pp. 450–55).
- *Bridgeport Music, Inc. v. Dimension Films* (Casebook, pp. 455–58).
- Discussion (Casebook, pp. 458–72; Supp., pp. 376–77 note 3).

Part 6: Copyright Infringement

- *Statute:* 17 U.S.C. §§ 501, 505, 512.

I. Direct Liability

- *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* (Casebook, pp. 473–77).
- Discussion (Casebook, pp. 477–79).

II. Secondary Liability

- Discussion (Casebook, pp. 479–80).
- *Fonovisa, Inc. v. Cherry Auction, Inc.* (Casebook, pp. 480–83).

- *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* (Casebook, pp. 483–87).
- Discussion (Supp., pp. 379–81 notes 6 and 7).

III. Secondary Liability for Manufacturers of Copying Technologies

- Discussion (Casebook, pp. 488–90).
- *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* (Casebook, pp. 490–501).
- Discussion (Supp., pp. 381–82 note 10).

IV. Secondary Liability for On-Line Service Providers

- Discussion (Casebook, pp. 501–11; Supp., pp. 385–86).
- *Lenz v. Universal Music Corp.* (Handout, pp. 26–28).

V. Criminal Liability

- Discussion (Casebook, pp. 511–13).
- *United States v. Moran* (Casebook, pp. 513–16).
- *United States v. LaMacchia* (Casebook, pp. 516–20).
- Discussion (Casebook, pp. 520–23).

Part 7: Fair Use

- *Statute*: 17 U.S.C. § 107.

I. Introduction and Comparative Perspective

- Discussion (Casebook, pp. 525–30).

II. Fair Use and Culture

- Discussion (Casebook, p. 530).
- *Harper & Row Publishers v. Nation Enterprises* (Casebook, pp. 531–38).
- *Campell v. Acuff-Rose Music, Inc.* (Casebook, pp. 538–47).
- Discussion (Casebook, pp. 547–48).
- *New Era Publications Int'l v. Carol Publishing Group* (Casebook, pp. 548–51).
- *Castle Rock Entertainment v. Carol Publishing Group, Inc.* (Casebook, pp. 551–53).
- *Nuñez v. Caribbean International News Corp.* (Casebook, pp. 554–559).
- Discussion (Casebook, pp. 560–61).

III. Fair Use and Technology

- Discussion (pp. 561–62).
- *Sega Enterprises Ltd. v. Accolade, Inc.* (Casebook, pp. 562–66).
- *Sony Computer Entertainment, Inc. v. Connectix Corp.* (Casebook, pp. 567–72).
- Discussion (Casebook, pp. 572–75).
- Excerpt from Lessig, *Free Culture* (Handout, pp. 29–32).

IV. Market Failure or Productive Consumption?

- *Sony Corp. of America v. Universal City Studios, Inc.* (Casebook, pp. 576–82).
- Discussion (Casebook, pp. 582–85).
- *American Geophysical Union v. Texaco, Inc.* (Casebook, pp. 585–91).
- *Princeton University Press v. Michigan Document Services, Inc.* (Casebook, pp. 591–97).
- *Bill Graham Archives v. Dorling Kindersley Ltd.* (Handout, pp. 32–37).
- Discussion (Casebook, pp. 597–600).
- *A&M Records, Inc. v. Napster, Inc.* (Casebook, pp. 600–02).
- Excerpt from Fisher, *Promises to Keep* (Handout, pp. 38–39).

Part 8: The Digital Millennium Copyright Act

- *Statute*: 17 U.S.C. §§ 1201–1205.
- Discussion (Casebook, pp. 603–09).
- *Universal City Studios, Inc. v. Reimerdes* (Casebook, pp. 609–20).
- Discussion (Casebook, pp. 620–24).
- Librarian of Congress, *Final Rule: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* (Handout, p. 40).
- Discussion (Casebook, pp. 624–27).
- *Chamberlain Group, Inc. v. Skylink Technologies, Inc.* (Casebook, pp. 627–34).
- *Lexmark International, Inc. v. Static Control Components, Inc.* (Casebook, pp. 634–39).
- Excerpt from Armstrong, *Fair Circumvention* (Handout, pp. 41–42).

Part 9: Federal Preemption of State Law

- *Statute*: 17 U.S.C. § 301.
- Discussion (Casebook, pp. 649–51).
- *Sears, Roebuck & Co. v. Stiffel Co.* (Casebook, pp. 651–53).
- *Goldstein v. California* (Casebook, pp. 653–57).
- *Kewanee Oil Co. v. Bicron Corp.* (Casebook, pp. 657–60).
- *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* (Casebook, pp. 660–62).
- Discussion (Casebook, pp. 662–70).
- *Harper & Row Publishers, Inc. v. Nation Enterprises* (Casebook, pp. 670–71).
- *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.* (Casebook, pp. 671–76).

Part 10: Remedies

- *Statute*: 17 U.S.C. §§ 502–505.

I. Injunctive Relief

- Discussion (Casebook, pp. 768–69).
- *Olan Mills, Inc. v. Linn Photo Co.* (Casebook, pp. 769–71).
- Excerpt from Lemley and Volokh, “Freedom of Speech and Injunctions in Intellectual Property Cases” (Casebook, pp. 771–72).
- *Universal City Studios, Inc. v. Reimerdes* (Casebook, pp. 772–74).
- *Abend v. MCA, Inc.* (Casebook, pp. 774–76).

II. Seizure and Impoundment

- Discussion (Casebook, pp. 776–77).

III. Damages

- *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.* (Casebook, pp. 777–80).
- *Hamil America, Inc. v. GFI* (Casebook, pp. 780–84).

IV. Statutory Damages

- *Storm Impact, Inc. v. Software of the Month Club* (Casebook, pp. 788–91).
- *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.* (Casebook, pp. 791–94).
- *BMG Music v. Gonzalez* (Handout, pp. 42–45).