

# Copyright Basics

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Internet Law

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Class 20



# Where we are

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- Part I: Public Law
- Part II: Private Law
  - Control over Computers
  - Domain Names
  - Copyright
  - Innovation
  - Case Studies



# In today's class

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- Some cleanup from last time
- Doctrinal elements of copyright law
- “Substantial noninfringing uses”
- What is a copy?



# ACPA and UDRP summary

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- Both are focused on cybersquatting
- Both allow *in rem* actions (UDRP is exclusively *in rem*)
- ACPA is a U.S. law; UDRP is ICANN-mandated arbitration
  - The loser in a UDRP arbitration can always file suit to contest the result
- You can read



# The sex.com litigation

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- For the full story, *see* KIEREN MCCARTHY, SEX.COM (2007)
- A domain name worth truckloads of \$,
- Two colorful litigants,
- A registrar asleep at the switch,
- And astonishingly unethical lawyering



# Copyright

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# The relevant bits of copyright

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- Copyright protection covers original works of authorship
- The author has six exclusive rights:
  - Making copies
  - And some other stuff
- Secondary liability is possible
- Fair use provides a complete defense



# Secondary liability

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- A contributory infringer is “one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.”
- A vicarious infringer is one who “enjoys a direct financial benefit from another’s infringing act and has the right and ability to supervise the infringing activity.”
- More on these tests next week



*Sony v. Universal*

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# The factual background

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- Sony sells VCRs
- Consumers sometimes use their VCRs to record programs from their TVs
  - Why do they do it?
  - Why might it be infringement?
  - Why do the movie studios care?
  - And why might Sony be liable?



# Part II: Copyright policy

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- “intended to motivate the creative activity . . . and to allow the public access”
  - “a difficult balance”
- “wholly statutory”
- “never accorded the copyright owner complete control”
- “do not seek relief against the Betamax users . . . nor is this a class action”



# Part III: Secondary liability

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- “It seems extraordinary to suggest that the Copyright Act confers . . . the exclusive right to distribute VTRs . . . .”
- “critical importance of not allowing the patentee to extend his monopoly”
- “staple article of commerce doctrine”
- “Indeed, it need merely be capable of substantial noninfringing uses.”



# Part IV.A: Authorized time-shifting

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- “‘sports, religious, educational, and other programing’ . . . whose copying is now authorized.”
- “Third party conduct [is] irrelevant in an action for direct infringement.”
- “[T]he copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders . . . .”



# Part IV.B: Unauthorized time-shifting

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- “Even unauthorized uses of a copyrighted work are not necessarily infringing.”
- “a noncommercial, nonprofit activity”
- “invited to witness . . . free of charge”
- “[E]very commercial use . . . is presumptively an unfair exploitation . . . .”
- “stolen jewels”



# The four fair-use factors

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- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational uses
- (2) The nature of the copyrighted work
- (3) The amount and substantiality of the portion used in relation to the copyright work as a whole
- (4) The effect of the use upon the potential market for or value of the copyright work



# Part IV.B continued

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- “A challenge to a noncommercial use . . . requires proof either that the particular use is harmful”
- “a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists”
- “But if it is for a noncommercial purpose, the likelihood must be demonstrated.”



# The dissent

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- “[W]hen the proposed use is an unproductive one, a copyright owner need prove only a potential for harm”
- “a reasonable possibility that harm will result from the proposed use”
- “delete commercials”
- “may well replace rental usage”
- “deprived of the ability to exploit”



# *Sony* black letter

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- Time-shifting is a fair use
- Device manufacturers can defeat contributory infringement liability by showing their product
  - capable of
  - substantial
  - noninfringing uses



# What is a copy?

(Deferred until Tuesday)



# Next time

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What did you do in the file-sharing wars?