LO24-5 COPYRIGHT LAW: PROTECTIONS OF ORIGINAL EXPRESSIONS

Black's Law Dictionary defines a copyright as "the right of literary property as recognized and sanctioned by positive law." More precisely, copyright protection is an intangible right granted by the Copyright Act of 1976[6] (a federal statute) to the author or originator of an *original* literary or artistic production, where the artist is invested, for a specified period (see Table 24.1), with the sole and exclusive privilege of multiplying copies of the work along with the right to profit by publication and sale.

The Copyright Act allows creators to obtain a copyright by having an "original work of authorship fixed in any tangible medium of expression, not known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[7]

Protected works include literary works, musical works, dramatic works, choreographic works, motion pictures, sound recordings, and pictorial or graphical works. Works that *cannot* be protected include ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries, no matter how it is explained, illustrated, or described.[8]

Fundamentally, in order to gain copyright protection, a work must meet a three-part test: (1) **originality,** (2) some degree of **creativity,** and (3) fixed in a **durable medium.**

TABLE 24.1 Copyright Protection Periods

Copyright Owner	Copyright Duration
Sole author or originator	70 years from death of the author or originator.
Publisher or other party (works for hire)	First of (1) 120 years from the date of creation, or (2) 95 years from the date of publication.
More than one author or originator	70 years from the death of the last surviving author or originator.

Originality and Creativity Requirements

The meaning of the word *original* has brought about the most controversy in interpreting the requirements of the Copyright Act. What is to be considered original, and what guidelines should be used to determine originality? The courts have ruled that an original work of authorship is a work that is original to the *author;* meaning, the author must use *her own creative capabilities* to create the work or medium. Does this mean that a compilation of noncopyrightable facts (such as names and telephone numbers) can be copyrighted as long as one author put the collaboration together first or in a creative way? In *Feist Publications, Inc. v. Rural Telephone Service,*[9] the landmark case on copyright originality and creativity,

[6] 17 U.S.C. § 101, et seq.

[7] 17 U.S.C. § 102(a).

[8] Note that ideas, procedures, systems, and the like may be covered by intellectual property protections other than copyright law.

[9] 499 U.S. 340 (1991). This case was the beginning of the phone book battles. Once *Feist* was decided, several different publication companies began to compete with telephone companies for Yellow Pages advertising. This one decision spurred a new niche in the publishing industry.

the U.S. Supreme Court gave some guidance as to what level of creativity was necessary to meet the originality requirements. The Court ruled that, although compilations of facts could be copyrightable, there had to be some *creative* element used that made the compilation an original work. For example, the White Pages of a telephone directory do not meet the creativity requirement because they are simply arranged alphabetically. One federal appellate court has even held that the Yellow Pages listings of a telephone directory do not meet the originality requirement.[10]

Durable Medium

To be protected, a work must be fixed in a *durable medium.* This underscores the copyright law's requirement that the work must be more than just an idea or thought process. In fact, the work must be in a tangible form such as in writing, digital, video, and so forth. Copyright protections extend automatically to a work once created. Although there is no need to register the work with the United States Copyright Office to obtain protection, registration is a prerequisite to actually *enforcing* the holder's rights in court.

COPYRIGHT INFRINGEMENT

LO24-6

When a copyright holder pursues a party that it believes has infringed on its copyright, the aggrieved party will generally pursue one of three *theories of infringement.* These theories have been developed by the federal courts to sort out the various ways by which one could infringe upon a copyright. These theories are *direct, indirect* (also known as *contributory*), or *vicarious* infringement.

Direct Infringement

Direct infringement occurs when the copyright owner can prove legal ownership of the work in question and that the infringer copied the work without permission. While the first element is straightforward, the second element is more complex than appears at first glance. In the context of the copyright protections afforded by law, it is clear that the word *copied* must have an expansive definition rather than a narrow one (i.e., copy means more than an exact replica). At the same time, of course, the definition cannot be so expansive as to foreclose any works of the same category.

Courts have developed the *substantial similarity standard* to guide the definition of copy under copyright laws. Thus, a copyright holder need only prove that the infringer copied plots, structures, and/or organizations that made the infringing work substantially similar to the copyrighted work.

Indirect Infringement

Indirect infringement (also known as *contributory infringement*) involves three parties: the copyright owner, the direct infringer, and the *facilitator* of the infringement. The theory of indirect infringement is one that holds the facilitator liable for damages. Therefore, before pursuing a theory of indirect infringement, the copyright owner must identify the direct infringer. Normally, in order for the facilitator to be liable, the party must have knowledge (direct or imputed) of the infringement and/or contribute to the infringement in some material way. In the famous case of *A&M Records, Inc. v. Napster, Inc.*,[11] a federal appeals court held that Napster's business model of facilitating a peer-to-peer community for sharing of digital music files constituted contributory infringement because Napster had the ability to locate infringing material listed on its search

Legal Speak ›))
Direct and Imputed Knowledge Direct knowledge implies a party has firsthand, actual knowledge of a fact. Imputed knowledge is gained from circumstances or a relationship with a third party where a diligent party "should have known" about the fact at issue.

[10] *BellSouth Advertising v. Donnelley Information Publishing,* 999 F.2d 1436 (11th Cir. 1993).

[11] 239 F.3d 1004 (2001).

engines and the right to terminate users' access to the system. Digital file sharing is discussed more extensively later in this section (see Legal Implications in Cyberspace: Copyrights in the Digital Age).

Vicarious Infringement

The final copyright infringement theory, **vicarious infringement,** is similar to the indirect infringement theory in that they both involve third parties not involved in actual direct infringement. Vicarious liability is based on agency law (see Chapter 10, "Agency and Employment Relationships") and can be used as a theory of liability when the infringing party (the agent) is acting on behalf of or to the benefit of another party (the principal). In that case, the principal party is said to be vicariously liable. The copyright owner will be entitled to remedies against the principal to the same extent as the direct infringer. Vicarious liability most often occurs in an employer–employee circumstance where the employee is acting with authority from the employer and commits an act of infringement that benefits the employer.

The **No Electronic Theft Act**[12] (NET Act) of 1997 gave sharper teeth to the Copyright Act's previous criminal sanctions. The NET Act provides for criminal liability for anyone infringing on a copyright by making a reproduction or distribution, including by electronic means, of one or more copies of a copyrighted work with a total retail value of more $1,000. Penalties include maximum fines of $250,000 and potential incarceration.[13]

Defense to Infringement Claims: Fair Use

Copyright owners do not enjoy unlimited rights to their work. Rather, the law balances public interests with the property rights of copyright owners. The most common and powerful defense is **fair use.** A landmark case on the fair use defense is the U.S. Supreme Court's decision in *Universal Studios v. Sony,*[14] where the Court ruled that Sony's manufacturing and selling of Betamax (the first videocassette tape recording format used in a home videocassette recorder, or VCR, which was the precursor to digital video recording technology) was *not* **per se** infringement. The Court made clear that Congress did not give absolute control over all uses of copyrighted materials. Some uses were *permitted* and because the device could still be used for "substantial non-infringing uses" the Court held that Sony was not liable for contributory infringement. This *fair use exception,* known as the *Sony defense* or the *Betamax doctrine,* was used, unsuccessfully, as the basis for the defense in the *A&M Records v. Napster* case (discussed previously in this chapter) and was reexamined by the U.S. Supreme Court in the *MGM v. Grokster* case (discussed later in the chapter).[15] Fair use has also been extended to the use of a work for parody or satirical purposes.[16]

---

[12] 17 U.S.C. § 506.

[13] A catalyst for this law was a criminal case brought against an MIT student that posted copyrighted software on the Web free of charge for anyone to download. The government could not obtain a conviction in the case because the existing law (prior to the NET Act) only imposed criminal liability when the infringement was undertaken for private *financial* gain. The NET Act eliminated the financial gain requirement for a criminal conviction. See *U.S. v. LaMacchia,* 871 F. Supp. 535 (D. Mass. 1994).

[14] 464 U.S. 417. After Sony had started producing videotape recorders (sold under the brand name Betamax) in a price range that many consumers could afford, Universal saw the mass distribution of this product as a threat to its business and market share. They sued Sony on an infringement theory, claiming that consumers were using the Sony product to copy their copyrighted movies.

[15] See Legal Implications in Cyberspace: Copyrights in the Digital Age.

[16] *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994).

The term *fair use* has now been codified in the Copyright Act with four specific (though nonexclusive) guideposts: the *purpose* and *nature* of the use, the nature of the *work* itself, the *amount* and substantiality of the material used, and the *effect* of the use on the market.

Purpose and Nature of the Use If the use of the work is to further education or scholarship, courts are more likely to be sympathetic to an assertion of fair use. This does not mean, however, that whole sections of textbooks or copied videotapes may be used with impunity. Also, if the use is for some commercially profitable purpose, this will weigh heavily against the infringer. This is not to say that commercial use is a complete bar to assertion of fair use.

Nature of the Work If the copyrighted material has not yet been put into the public domain, fair use is a difficult defense. This is not to say that a complete bar to nonpublic works exists; newsworthy and factual information are still subject to fair use.

Amount and Substantiality Used Courts essentially analyze the totality of the circumstances regarding the amount of copyrighted material used compared to the entire work at issue. Short phrases and limited use of the copyrighted work are often protected by the fair use defense.

Market Effect Courts are reluctant to allow fair use as a defense (even if the use fits the other three categories) if a copyright holder demonstrates that the *value* of a copyrighted work will be diminished by allowing its use. Fair use cannot impair the marketability or economic success of the copyrighted work.

Self-Check Fair Use

Which of these situations would constitute fair use?

1. A manager photocopies an article of interest from *The Wall Street Journal* and distributes it to three co-workers who also may be interested.
2. A company buys one copy of a training manual from a publisher, and then distributes photocopies of entire chapters to its workforce.
3. An executive rents out a DVD on motivation from her local video/DVD store. The next day, she shows the DVD during work hours to her management team in order to inspire them to adopt certain leadership practices.
4. A firm that arranges corporate training sessions buys a DVD that features former General Electric CEO Jack Welch on problem-solving skills for executives. The firm shows 30 minutes of this DVD at the beginning of each of its eight-hour training sessions called "Solutions for Solving," for which they charge $500 per person for the entire session.

Answers to this Self-Check are provided at the end of the chapter.

RIAA Lawsuits

In addition to aggressively pursuing file-sharing services such as Napster and Grokster, the motion picture and music recording industry has filed thousands of infringement lawsuits against individuals engaged in file sharing. The Recording Industry Association of American (RIAA) has invested substantial resources in tracking down and recovering damages from individual infringers. In a 2009 case that garnered substantial media attention, a jury imposed damages of $1.92 million against Jammie Thomas-Rasset in a federal court in Minnesota. The award was the result of a lawsuit filed by RIAA against Thomas-Rasset that alleged she downloaded more than 1,700 copyrighted songs.

Legal Speak >))
Infringement The unlawful use of another's intellectual property.

Legal Implications *in* Cyberspace

Copyrights in the Digital Age

Technology has created new challenges for legislatures and courts struggling with applying copyright law in the digital age.

Computer Software In order to settle uncertainty in the computer science field about the ability to copyright computer software, Congress amended the Copyright Act with the Computer Software Copyright Act.* This law, passed in 1980, specifically defined computer software programs as a literary work and, thus, entitled to protection. However, the nature of computer software brings with it a good deal of uncertainty in terms of copyright protection. In 1986, the landmark case of *Whelan v. Jaslow*† gave the first guidance by an appellate court on the issue of copyright protection for software and indicated that courts were willing to extend broad protection to computer programs, including both the "look and feel" of a program's displays and also the program's structure, sequence, and organization. More recently, courts have been carving back this broad protection and adopting a more sophisticated test. One appellate court also made clear that patents, not copyrights, would be the most suitable form of intellectual property protection to protect the dynamic aspects of writing computer software programs.‡

Evolution of Copyright Law and Technology The revolutionary technological gains and the increasing popularity of the information superhighway has led to significant threats to copyright holders such as record labels and movie studios. In the past, copyright infringement of movies and music was limited because the technology that existed to copy these media was not capable of producing mass copies, except through a sophisticated criminal network. In short, the average consumer was limited in what he could copy and distribute and, thus, copyright holders had little fear that day-to-day consumer infringement would impact their revenue stream from sales of the original. However, when the digital age truly arrived, copyright holders responded by lobbying Congress for additional protections in the area of copyright laws.

*17 U.S.C.A. § 117.
†797 F.2d 1222 (3rd Cir. 1986).
‡*Computer Associates International v. Latai, Inc.*, 982 F.2d 693 (2nd Cir. 1992).

Audio Home Recording Act The Audio Home Recording Act (AHRM), a 1992 amendment to the Copyright Act, was a response to the rapidly advancing technology of digital audio that emerged in the early 1990s. This new digital technology industry threatened the major record labels because it caused enforceability problems for the copyright protection of musical recordings. In the early 1990s, these digitally copied recordings became increasingly common because the recording device, a CD-Writer, became standard equipment with many computer packages. The AHRA forced manufacturers of CD-Writers to pay royalties (2 percent of their sales) to a fund administered by the Copyright Office, and eventually paid to copyright owners. It also required the producers of a digital audio recording device to include a Serial Copy Management System (SCMS) that, through computer software, prevents copies from copies to be made, but does not prevent copies from originals to be created.

Digital Millennium Copyright Act Congress passed the Digital Millennium Copyright Act (DMCA) in 1998 in an attempt to modernize copyright law to deal with the new challenges that had emerged in the digital age. The DMCA was controversial because it added substantial protections to copyright holders of digital products and gave immunity to internet service providers (ISPs) for certain copyright liability. Some of the major provisions of the DMCA are:

- Civil and criminal penalties established for anyone who produces, sells, or distributes any product or service that circumvents antipiracy software or other antipiracy technology.
- Restriction of import or distribution of analog video recorders and camcorders that lack antipiracy features.
- ISPs have no liability for copyright infringement by their users (such as posting copyrighted software on an ISP's electronic bulletin board) so long as the ISP does not have actual knowledge of the infringing material.

File Sharing Technology changed the status quo rapidly. The late 1990s saw the introduction of two very important technological advances: (1) the popular music file format known as MP3 (essentially compressed digital files), and (2) the increasing speed advancements

(continued)

Legal Implications *in* Cyberspace

of the Internet. These two additions changed the once hours-long process of transferring music and movies over the Internet to a process that took just a few minutes or less. The MP3 file popularity grew very quickly. This, in turn, brought about the ability to upload and download music and video files from one private personal computer to another. The ability to upload and download hundreds of files a day led to the establishment of peer-to-peer (P2P) networking and, of course, entrepreneurs who have leveraged this technology into profit. The pioneer of P2P file-sharing communities was Napster. As discussed, the Ninth Circuit Court of Appeals effectively shut down Napster after they ruled that Napster's business model was inherently illegal because Napster had imputed knowledge of copyright infringement. However, other Napster-like services were thriving under a business model whereby the P2P provider could not have any actual knowledge of copyright infringement. The motion picture and recording industries doggedly pursued each of these companies by suing them under a contributory infringement theory. Of course, Napster eventually reemerged as a pay for subscription service. Ultimately, the issue of what level of intent was necessary to constitute infringement was decided by the U.S. Supreme Court in Landmark Case 24.1.

CONCEPT SUMMARY Copyrights

- Copyright protection is an intangible right granted by the Copyright Act to the author or originator of an original literary or artistic production.
- In order to obtain copyright protection, the work must be a result of some creative capability by the author/originator and it must be fixed in a durable medium (such as in writing).
- There are three theories of infringement: direct, indirect (also known as contributory), and vicarious.
- A powerful defense is "fair use" of copyrighted material where a court will examine the purpose and nature of the use, the nature of the work, the amount used, and the market effect of the use.

PATENTS: LEGAL PROTECTION OF INVENTIONS AND PROCESSES

A patent is a government-sanctioned monopoly right that allows an inventor the exclusive entitlement to make, use, license, and sell her invention for a limited period of time. Patent rights are important in the entire businesses community, but are particularly vital to the manufacturing, technology, and pharmaceutical sectors. Patents are often an important part of the planning for these firms because their business model depends on the benefits of obtaining a patent; that is, the full legal protection of their ideas, methods, and inventions. Once a patent is obtained, a competitor is barred from profiting off the patented device or process during the life of the patent. Thus, a patent can be a firm's most important and valuable asset.

Understanding the fundamentals and discarding the myths of patent laws are important for managers. The most common myth is an assumption that nearly any new idea or invention is "patentable" (able to obtain patent law protection). This assumption is *not* true