Selected Topics in Copyright Law

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Copyright Authorship

• When a work protected by copyright is created, it will either be
  − an individually authored work
  − a “work made for hire,” or
  − a “joint work”
“Work Made for Hire”

- A work made for hire is
  - A work prepared by an employee within the scope of his or her employment; or
  - A work specially ordered or commissioned for use as . . . .
Factors determining employee status

- the hiring party’s right to control the manner and means by which the employee creates work product
- the skill required
- the source of the instrumentalities and tools used in creating the work
- where the work was created
- the duration of the relationship between the parties
- whether the hiring party has the right to assign additional projects to the hired party
- the method of payment
- the extent of the hired party's discretion over when and how long to work
- the hired party's role in hiring and paying assistants
- whether the hiring party is in business and whether the work is part of the regular business of the hiring party
- the provision of employee benefits
- the tax treatment of the hired party
Factors for scope of employment

• Whether the work is of the type that the employee is employed to perform
• Whether the work occurs substantially within the authorized work hours; and
• Whether the employee’s purpose in creating the work, at least in part, was to serve the employer
works made for hire: specially ordered or commissioned

• . . . for use as:
  – a contribution to a collective work
  – a part of a motion picture or other audiovisual work
  – a translation
  – a supplementary work
  – a compilation
  – an instructional text
  – a test
  – as answer material for a test
  – or as an atlas

• if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.
“supplementary work”

• a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work

• Examples: forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, indexes
A sample work for hire clause

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• “Any Work Product that Contractor delivers to UW pursuant to the Services and any copyright rights therein shall be the sole and exclusive property of UW. To the extent applicable, such Work Product will be considered a ‘work for hire’ pursuant to applicable copyright laws. To the extent that any Work Product does not constitute a work for hire, Contractor hereby assigns all right, title, and interest, including all copyrights and any renewals or extensions, in such Work Product to UW.”
“Joint work”

• A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.
Copyright Transactions

• Copyright as intangible property
• Sales
• Assignments
• Licenses
  – Exclusive vs non-exclusive
  – Implied vs express vs in writing
• Permissions
When is a writing required?

• A writing is required when there is a transfer of copyright ownership.

• A “transfer of copyright ownership” includes an exclusive license, but not a non-exclusive license.

• A transfer of copyright ownership, other than by operation of law, must be in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.
Fair Use

• The basic principle: the fair use of a copyrighted work is not an infringement of copyright.

• Favored uses:
  – criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, research
  – Favored uses are not automatically fair uses
Fair Use Factors

• In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—
  – (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  – (2) the nature of the copyrighted work;
  – (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  – (4) the effect of the use upon the potential market for or value of the copyrighted work.
Perfect 10 v. Amazon, 508 F.3d 1146 (9th Cir. 2007)

• Factual Background
• Some of the issues presented
  – Direct infringement:
    • Whether Google infringes by its use of thumbnails (No)
    • Whether Google infringes by in-line linking full-size images (No)
  – Indirect infringement
    • Whether Internet users who browse the images on other websites are infringing, and, if they are, whether Google is contributorily liable for that infringement. (*The users are not infringing; their use is a fair use.*)
    • Whether Google is liable for the undisputed infringement by third-party websites. (*Maybe. The trial court will need to further develop the facts and apply the 9th Circuit’s new test.*)
Thumbnails

• The court held that Google’s use of thumbnails was a fair use
• The Ninth Circuit’s fair use analysis
  – Purpose: favors G: highly transformative; transformative character outweighed commercial character
  – Nature of work: slightly favors p10: creative but previously published
  – Amount and substantiality: neutral; whole works copied but only as thumbnail
  – Economic impact: neutral; harm must be actual b/c use transformative; not shown
the issue of full-sized images

• The “the server test”: a computer owner may be liable for infringement if the owner stores an image electronically and serves that electronic information directly to the user.

• G’s system doesn’t store the full-sized images; it merely in-line links them. I.e., the digital file is not on G’s computers; it’s on the computer of the linked-to website.

• Therefore no direct liability for the linking.
Indirect Copyright Infringement

• Contributory Infringement
  – underlying primary infringement
  – the secondary infringer contributed to that infringement
  – the secondary infringer knew or had reason to know of the infringing activity

• Vicarious Infringement
  – underlying primary infringement
  – the secondary infringer had a financial interest in the infringing actions
  – the secondary infringer had the right and ability to control the infringing activity
  – Does not require that the secondary infringer had knowledge or reason to know of the infringement
Perfect 10 on browsing

• Issue: whether Internet users who browse third party websites displaying infringing copies of P10’s images are infringing, and, if they are infringing, whether Google is contributorily liable for that infringement

• The court held that the browsing is a fair use

• Rationale:
  – Purpose: transformative
  – Nature: neutral
  – Amount: only what is necessary
  – Market impact: none or minimal
• The Ninth Circuit’s (new?) rule:
  • “We hold that a computer system operator can be held contributorily liable if it has actual knowledge that specific infringing material is available using its system, and can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works.”

• Holding. Factual issues exist whether
  – G had knowledge that infringing P10 images were available using G’s search engine,
  – G could take simple measures to prevent further damage to P10’s copyrighted works, and
  – G failed to take such steps.

• Outcome: remanded
Rules of Thumb

• Browsing
  – The mere act of browsing infringing content is probably protected by fair use and not an infringement

• Linking
  – Providing a hyperlink that transports the user directly to the linked-to page is not a direct copyright infringement.
  – But linking can give rise to *indirect* infringement.
    • Contributory infringement (knowledge plus “inducement”)
    • Vicarious infringement (control plus financial interest)
End