

Class 16: Copying

Administrative

Next Time: 616-32; 639-46

Skip Laureyssens but read Notes following

A little background

Confusing, irrational, contradictory

Most important questions:

- What is the prong getting at?
- How is different from the Copying prong?
- What are the essential differences in the approaches?

New Syllabus with fixed Typos posted online

T's and R's mixed up for Classes 18, 19, and 20

Conference?

News Thursdays

Nine Inch Nails ditched label, now releases new album with Creative Commons license upload part to bittorrent

Starbucks and Wal-Mart

Phun

Last Time

Three Problems on Display

Fan hangs still from Wizard of Oz on apartment wall

...hangs it in a museum

...museum "close-caption" broadcasts opening to a partner museum in another state.

Class 16: Copying

Copying

Connection to Section 106 Materials

Transitioning from enumeration of specific rights and exceptions to question of proof.

Important: These tests are about reproduction.

For distribution, public display, public performance, these tests aren't used.

Note nature of overlapping rights

Every adaptation is a reproduction.
Most distributions involve reproductions
On the Web, most acts are reproductions and distributions rolled into one.

What is an infringing reproduction?

Other steps precede these about Copyrightability, Ownership, etc.

Step 1: Is plaintiff's work within section 102?

If not, still might be infringement (illustrative list).

Step 2: Did defendant "do or authorize" one of the acts listed in 106 or 106A?

Step 3: Can plaintiff make the prima facie case of infringement?

Today plus next two classes.

Step 4: Any defenses provided in 107-122?

107 = Fair Use

What are the elements of the prima facie case?

Why are we undertaking this? Because of NON-LITERAL copying.

1. Did defendant "copy" the work?

Itself with two prongs.

- A. Access
- B. Probative Similarity

2. Did the copying amount to an "improper appropriation"?

Next Class

Basic Idea: Independent creation is a defense. Even if you reproduced the original verbatim, no infringement if you didn't copy.

Direct Proof

Admission
Not worth fighting over, because it's not really in question

Circumstantial Evidence

Test

The "sliding scale" or "inverse ratio"

Proof of two things

- Access
- Probative similarity

Note B7: About probabilities, not absolute proof.

Class 16: Copying

Copying

A. Access

Note B2: Two Tests

- Actually Viewed
- Opportunity to See

Two general classes of cases arise for Opportunity to See

The unsolicited submission

- Bouchat (606 -- Ravens case)
- Sayles (607, Note B5)
- Jorgensen (same)
- Test (Note B5): "mere possibility" not enough; must be "reasonably possible that the paths of the infringer and the infringed work crossed."

"Wide dissemination": The very famous work that someone in Def's position could not have avoided.

- Star Wars or Harry Potter
- Harrisonsongs
- Note B3: Is access always met in such a case?
- And what is "subconscious" access?

Harrisonsongs

B. Probative Similarity

Point: Probative of use of materials to which author had access.

Expert testimony allowed.

"Substantial Similarity" is confusing term.

Probative Similarity - Just "prima facie" case

Ty Note 5 (614)

Copying can be found with

- Some access, a lot of probative similarity
- A lot of access, some probative similarity
- As one goes up, the requirement for the other goes down

The Sliding Scale/ Inverse Ratio

Examples

Bolton (607)

- Reached 110 on the Billboard chart
- 25 Years before Bolton

Other testimony

Radio DJs in Bolton's hometown testified that they played the song the summer it was released
Testimony about private conversations with MB gushing about what a big fan he was and how he had "all his stuff"

The "Selle" problem

Plaintiff had played song at Chicago-area weddings and bar mitzvahs

Striking Similarity