Computers and the Law

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CLASS 2

Internet Jurisdiction;
Email and Spam Laws;
Copyright pt. 1
Internet Jurisdiction

• Issue(s)
  – Where is an operator of a website, computer program, or app subject to suit?
  – It is possible to limit the places where someone can be subject to a lawsuit?

What is Jurisdiction?

• the power of a court to decide a matter in controversy (i.e., a case)
Establishing Jurisdiction

- Authority of the court to hear the case (e.g., original or appellate jurisdiction)
- Authority of the court over the subject matter (subject matter jurisdiction)
- Jurisdiction over the parties (personal jurisdiction) or property (in rem jurisdiction) of the suit
- Proper notice

Subject Matter Jurisdiction

Diversity Jurisdiction
28 U.S.C. §1332(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the State;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Federal Question Jurisdiction
Cases arising under the Constitution, Acts of Congress or treaties, and involving their interpretation and application

Power over Person or Property

- Jurisdiction in personam – power which a court has over the defendant’s person and which is required before a court can enter a personal or in personam judgment.
- Jurisdiction in rem – power of a court over a thing so that its judgment is valid as against the rights of every person in the thing

Black’s Law Dictionary
Personal Jurisdiction

- How can personal jurisdiction be established?
  - **General jurisdiction** — “substantial” or “continuous and systematic” contacts with the forum state
  - **Specific jurisdiction** — specific acts within or directed to the forum state

Due Process Considerations

- When the defendant is out-of-state, a court can exercise personal jurisdiction over the defendant pursuant to the state’s long arm statute (and due process).
- The defendant must have minimum or sufficient contacts to be subject to jurisdiction in the state.
- What if the defendant is in the same state as the court?

Establishing Personal Jurisdiction over the Internet

- Generally, courts view a defendant’s web site to determine whether jurisdiction based on sufficient contacts has been established.
- Courts addressing web site passivity have found that creating a web site without more is not an act “purposefully directed at a forum state” sufficient to warrant the exercise of jurisdiction.
- Courts look to the level of interactivity and commercial nature of the exchange of information that occurs on the website to determine if sufficient contacts exist to warrant the exercise of jurisdiction.
Factual Background

• Cybersell AZ
  – It was incorporated in May 1994 to provide Internet and web advertising and marketing services, including consulting.
  – "On August 8, 1994, Cybersell AZ filed an application to register the name "Cybersell" as a service mark. The application was approved and the grant was published on October 30, 1995. Cybersell AZ operated a web site using the mark from August 1994 through February 1995. The site was then taken down for reconstruction."

• Cybersell FL
  – "In the summer of 1995 … [Cybersell FL was formed] to provide business consulting services for strategic management and marketing on the web."

Arizona Long Arm Statute

• "The Arizona Supreme Court has stated that under Rule 4.2(a), 'Arizona will exert personal jurisdiction over a nonresident litigant to the maximum extent allowed by the federal constitution.' … Thus, Cybersell FL may be subject to personal jurisdiction in Arizona so long as doing so comports with due process."

Specific Jurisdiction

• "We use a three-part test to determine whether a district court may exercise specific jurisdiction over a nonresident defendant:
  (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections[.]
  (2) [the claim must be one which arises out of or results from the defendant's forum-related activities]; and
  (3) [e]xercise of jurisdiction must be reasonable."
Cybersell v. Cybersell

- "Interactive" web sites present somewhat different issues. Unlike passive sites such as the defendant’s in Bensusan, users can exchange information with the host computer when the site is interactive. Courts that have addressed interactive sites have looked to the "level of interactivity and commercial nature of the exchange of information that occurs on the Web site" to determine if sufficient contacts exist to warrant the exercise of jurisdiction. See, e.g., Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124 (W.D.Pa. 1997) (finding purposeful availment based on Dot Com’s interactive web site and contracts with 3000 individuals and seven Internet access providers in Pennsylvania allowing them to download the electronic messages that form the basis of the suit); Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328, 1333-33 (E.D.Mo.) (browsers were encouraged to add their address to a mailing list that basically subscribed the user to the service), reconsideration denied, 947 F.Supp. 1338 (1996).

Cybersell v. Cybersell

- "Cybersell AZ points to several district court decisions which it contends have held that the mere advertisement or solicitation for sale of goods and services on the Internet gives rise to specific jurisdiction in the plaintiff's forum. However, so far as we are aware, no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state."

- "Here, Cybersell FL has conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the web, using the name "Cybersell" which Cybersell AZ was in the process of registering as a federal service mark. While there is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents."

Holding

- "We conclude that the essentially passive nature of Cybersell FL’s activity in posting a home page on the World Wide Web that allegedly used the service mark of Cybersell AZ does not qualify as purposeful activity invoking the benefits and protections of Arizona. As it engaged in no commercial activity and had no other contacts via the Internet or otherwise in Arizona, Cybersell FL lacks sufficient minimum contacts with Arizona for personal jurisdiction to be asserted over it there. Accordingly, its motion to dismiss for lack of personal jurisdiction was properly granted."
**Factual Background**
- Zippo Manufacturing (based in PA) – Lighters
- Zippo Dot Com (based in CA) – Usenet Postings
- Basis of Proceeding – Trademark infringement, trademark dilution, false designation of origin

**How broad is PA’s long arm statute?**
- Fullest extent permitted under the Constitution

**Types of personal jurisdiction**
- General jurisdiction – “systematic and continuous activities” in the forum state
- Specific jurisdiction – “relationship between the D and the forum falls within the ‘minimum contacts’ framework …”

**Sliding scale**
- D clearly does business with the website
- D has a passive website
- Middle ground
  - Some information exchanged
  - Court looks to “the level of interactivity and commercial nature of the exchange of information that occurs on the website”
Zippo Manufacturing v. Zippo Dot Com

• Why does the court find personal jurisdiction in this case?
  – The court held that the sales of user subscriptions and the contract with Internet service providers were sufficient to conclude that defendant had purposely availed itself for purposes of personal jurisdiction in Pennsylvania.

Missouri's Long Arm Statute

• Mo.Rev.Stat. §506.500, provides, in relevant part as follows:
  1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:
     (1) The transaction of any business within this state;
     (2) The making of any contract within this state;
     (3) The commission of a tortious act within this state;


• Case History
• W.DC of WA
  – Dismissed copyright action for lack of jurisdiction
• 9th Circuit
  – Reversed dismissal

- Technology at issue
  - Boots and boot design
- Parties
  - Washington Shoe – manufacturer of foot apparel
  - AZ Sporting Goods – operator of a retail store in Alma, Arkansas


- Background
  - A-Z purchased items from WS
  - WS Salesman identified infringing boot copies available at AZ store
  - WS counsel sends C&D letter
  - A-Z removed boots from store and sold of remaining inventory
  - WS sued A-Z


- Applied three part jurisdiction test
  - "purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
  - the claim must be one which arises out of or relates to the defendant's forum-related activities; and
  - the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

- “In tort cases, we typically inquire whether a defendant ‘purposefully direct[s] his activities’ at the forum state, applying an ‘effects’ test that focuses on the forum in which the defendant’s actions were felt, whether or not the actions themselves occurred within the forum.”


- “The ‘purposeful direction’ or ‘effects’ test … ‘requires that the defendant . . . have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.’”


- “Thus, courts may exercise personal jurisdiction over a defendant who engages in an intentional act that causes harm in the forum state, even if that act takes place outside of the forum state.”

- "A-Z purchased the boots at issue from China and the infringing boots were sold in the same Arkansas store as Washington Shoe’s footwear. Subsequently, after receiving notice of the alleged copyright infringement through cease-and-desist letters, A-Z sold the infringing boots to a thrift store. We have little difficulty finding that by intentionally engaging in the actual, physical acts of purchasing and selling the allegedly infringing boots, A-Z has clearly committed an ‘intentional act’…"


- "We have repeatedly stated that the ‘express aiming’ requirement is satisfied, and specific jurisdiction exists, ‘when “the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.”’"
- A-Z’s activities could rise to willful copyright infringement because of notice of rights before and after selling and tort is an intentional tort


- "Because the harm caused by an infringement of the copyright laws must be felt at least at the place where the copyright is held, we think that the impact of a willful infringement is necessarily directed there as well."
Enterprise Rent-A-Car Co. v. Stowell

- “In the instant case, Defendant published and maintained a website with the domain name "VIRTUALCAR.COM" that was accessible to Missouri users of the Internet. The website included photographs of classic cars, but the user could not purchase such cars via the site or exchange information with Defendant via the site. No Missouri users contacted Defendant about buying cars and the site led to no business with a Missouri user. Exercising personal jurisdiction in this case is inconsistent with due process.”

Discussion

- Would a user’s Facebook page cause the user to be liable for personal jurisdiction anywhere in the country?

Email and Spam Laws
Spam

• How does the CAN-SPAM Act work?
• FTC Summary

CAN SPAM Act

• Prohibits sending deceptive or misleading information and using deceptive subject headings
• Requires inclusion of return addresses in email messages, and
• Prohibits sending emails to a recipient after that recipient has indicated he or she does not wish to receive email messages from the sender

CAN SPAM Act

• Who is subject to the law?
  – Mail service senders
  – Persons provided content to be sent to mail service providers
  – Persons performing their own mailings
  – More than one person can be subject to the law for the sending of a particular email
Commercial Mail Messages

• Is the message a commercial electronic mail message?
  – A "commercial electronic mail message" is any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).
  – Does not include transactional or relationship messages

Transactional/Relationship Qualifications

• Is the message a transactional or relationship message?
  – The primary purpose of the e-mail must meet a defined category
  – Effectuate a transaction, product/service related information for the already purchased product/service, notification of changes, account information (on a regular basis), employment relationship/benefit information, or deliver agreed upon goods/services

(i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
(ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;
Transactional/Relationship Qualifications

(iii) to provide—
   (I) notification concerning a change in the terms or
       features of;
   (II) notification of a change in the recipient’s standing
       or status with respect to; or
   (III) at regular periodic intervals, account balance
       information or other type of account statement with
       respect to,
       a subscription, membership, account, loan, or
       comparable ongoing commercial relationship
       involving the ongoing purchase or use by the
       recipient of products or services offered by the
       sender;

(iv) to provide information directly related to
    an employment relationship or related
    benefit plan in which the recipient is
    currently involved, participating, or enrolled; or
    (v) to deliver goods or services, including
        product updates or upgrades, that the
        recipient is entitled to receive under the
        terms of a transaction that the recipient has
        previously agreed to enter into with the
        sender.

Transactional or Relationship?

• If you don’t fit in the bucket of being a
  transactional or relationship message,
  – Either your message is a commercial
electronic mail message and you have
    the associated enhanced obligations, or
  – Your message does not fall within the
    purview of the CAN SPAM Act.
False or misleading header information

- For commercial electronic mail, transactional, and relationship mail messages
- When email address or domain name is obtained under false pretenses
- When origin of message is disguised due to relay
- Not when from line accurately identifies who initiated the message

Deceptive Subject Heading

- Applies only to commercial electronic mail messages
- Cannot have a subject line that would be likely to mislead the recipient about a material fact about the contents or subject matter of the message

Return Email Address

- Applies only to commercial electronic mail messages
- Must have a functioning return email address that works for 30 days after transmission
- Alternatively, the message can provide another Internet mechanism to enable opt-out
  – Can provide a menu of options, so long as menu enables opt out of all commercial electronic mail messages from the sender
- Must remove person within 10 business days
Opt Out and Physical Address

- Applies only to commercial electronic mail messages
- Message must have
  (i) clear and conspicuous identification that the message is an advertisement or solicitation;
  (ii) clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender; and
  (iii) a valid physical postal address of the sender.

CAN SPAM Rule

- The rule "defines the relevant criteria to determine the primary purpose of an electronic mail message. [The] provisions [of this rule] describe types of electronic mail messages that contain commercial content or what the Act terms 'transactional or relationship' content, and establish different criteria for each type."

Primary Purpose

- Commercial when
  - Content is exclusively commercial
  - If content is both commercial and transactional/relational, then when:
    • Subject line reflects that the message is commercial, or
    • Transactional or relationship content (or other content) does not substantially appear at the beginning of the message
Gordon v. Virtumundo

• What is spam?
  – Unsolicited commercial email
• What are the problems associated with spam?
• Where did the term spam come from?

Gordon v. Virtumundo

• Who is Gordon, the plaintiff, and what has he done?
  – Doing research on spam that comes through
  – What kind of automated response did he provide?

Gordon v. Virtumundo

• What happened at district court?
  – Dismissal
  – Why?
• What is Gordon appealing?
Gordon v. Virtumundo

• What does the CAN-SPAM Act do?
  - Provides a code of conduct to regulate commercial e-mail messaging practices
  - Prohibits transmitting messages with "deceptive subject headings" or "header information that is materially false or materially misleading."
  - Imposes requirements regarding content, format, and labeling
  - Each message must have either a functioning return e-mail address or a comparable mechanism that allows a recipient to "opt out" of future mailings.

Gordon v. Virtumundo

• Who can enforce the CAN-SPAM Act?
  - Federal Trade Commission
  - State attorneys general
  - Other state and federal agencies
• Limited private right of action for Internet access providers

Gordon v. Virtumundo

• "A 'provider of Internet access service adversely affected by a violation … of the Act ’may bring a civil action in any district court' to enjoin further violation by a defendant or to recover either actual or statutory damages, whichever is greater. … Statutory damages under the CAN-SPAM Act are substantial and can equal as much as $ 300 per unlawful e-mail. … The Act also authorizes an award of attorneys’ fees and costs against any party at the district court’s discretion. …"
Gordon v. Virtumundo

- Initial standing inquiry
  1) whether the plaintiff is an "Internet access service" provider ("IAS provider"), and
  2) whether the plaintiff was "adversely affected by" statutory violations.

Gordon v. Virtumundo

- Who is a provider of Internet access service?
  - "The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services."
  - Limited to a traditional ISP or more than an ISP?

Gordon v. Virtumundo

- Why does the court conclude that Gordon is not a provider of Internet access service?
- Is there anything that Gordon could have done to become such a provider with the type of "service" that he provides?
Gordon v. Virtumundo

- What type of harm is required for "adversely affected by" language?
  - Not ordinary inconvenience
  - Must be "real" and of the type experienced by ISPs
  - Operational or technical impairments & associated financial costs
- Why do IAS providers and not consumers have standing rights?

Gordon v. Virtumundo

- Was the contemplated harm attributable to the type of practices circumscribed by the Act?

Gordon v. Virtumundo

- What about the state cause of action?
  - "[W]e … interpret the CAN-SPAM Act's express preemption clause in a manner that preserves Congress's intended purpose—i.e., to regulate commercial e-mail 'on a nationwide basis,' 15 U.S.C. § 7701(b)(1), and to save from preemption only 'statutes, regulations, or rules that target fraud or deception…"
  - "Nothing contained in this claim rises to the level of 'falsity or deception' within the meaning of the CAN-SPAM Act's preemption clause."
Gordon v. Virtumundo

• End result – all of Gordon's claims are dismissed
• Does this mean that Virtumundo is free to send spam to everyone in whatever amount it pleases?

Copyright pt. 1

Copyright Law

• What is the scope of protection afforded to a copyright embodied in computer software?
Requirements for Copyright

FEDERAL CONSTITUTIONAL POWER

• "The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."
• U.S. CONST. Art. I, §8, cl.8.

Copyright Requirements

• For an author to have a valid copyright in a particular work, the work must (i) be original, (ii) remain fixed in a tangible medium of expression, and (iii) have involved a minimum degree of creativity.
**Originality**

- **Must:**
  - be an original work of the author
  - "a work independently created by its author, one not copied from pre-existing works, and a work that comes from the exercise of the creative powers of the author’s mind, in other words, ‘the fruits of [the author’s] intellectual labor.’"
- Artistic merits are irrelevant,
- The underlying idea of a work is not subject to copyright protection.

**Fixation**

- Works must be fixed in a tangible medium of expression to be protected under the Copyright Act.
- Works must be embodied in a tangible form that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."
- The requirement for fixation is met when the work can either be directly perceived or perceived with the aid of a machine or other device.

"Artic contends that the audiovisual displays of Midway's games do not meet that requirement. Artic's argument is based on the specific technology by which the images that appear on the game screens are generated. ....

"While Artic's argument has a certain facial validity, it nonetheless fails. The fixation requirement, as is clear from the statute, does not require that the work be written down or recorded somewhere exactly as it is perceived by the human eye. Rather, all that is necessary for the requirement to be satisfied is that the work is capable of being "reproduced ... with the aid of a machine or device." 17 U.S.C. § 102(a)."
Not Protected by Copyright

- Ideas, concepts, facts, historic events
- Plot concepts & outlines (only plot details)
- Stock plots & scenes
- Stereotype characters
- Material copied from public domain

OTHER UNCOPYRIGHTABLE MATERIAL

- Words & short phrases; familiar symbols or designs; variations of typographical ornamentation, lettering or coloring; lists of ingredients or contents
- Works consisting entirely of public domain information: e.g., standard calendars, height & weight charts, tape measures & rulers, schedules, lists or tables taken from public documents or other common sources

Discussion

Could a furniture design be subject to copyright protection?
Fictional Characters

Protection of Fictional Characters

• Is a fictional character an idea (rather than an expression of an idea) and therefore not protectable by copyright?

Protection of Fictional Characters

• “It is clear that when cartoons or movies are copyrighted, a component of that copyright protection extends to the characters themselves, to the extent that such characters are sufficiently distinctive.”

• See Warner Bros. Entertainment, Inc. v. X One X Productions (8th Cir. 2011)
Klinger v. Conan Doyle Estate

• 7th Circuit 2014
• Case history
  – D.C. granted Klinger’s motion for summary judgment and issued a declaratory judgment for Klinger that provided Klinger could use the material

Klinger v. Conan Doyle Estate

• Sherlock Holmes created by Doyle
  – Copyright on original stories have expired
  – Copyright on final 10 stories don’t expire until 2018-2022
• “Once the copyright on a work expires, the work becomes a part of the public domain and can be copied and sold without need to obtain a license from the holder of the expired copyright.”

Klinger v. Conan Doyle Estate

• Klinger prepared an anthology containing stories written by modern authors on Sherlock Holmes
• Klinger did not obtain a license from the Doyle estate, but Random House did
• Klinger was preparing a sequel
• Doyle estate made threats regarding the book absent an additional license being taken from the Doyle estate for the new work
• Klinger sued for declaratory judgment
Klinger v. Conan Doyle Estate

- Doyle’s contention
  - Copyright in a character extends beyond the original work because the character is further developed in subsequent works

Klinger v. Conan Doyle Estate

- “When a story falls into the public domain, story elements—including characters covered by the expired copyright—become fair game for follow-on authors”
- Additional works are derivative works, and copyright only extends to additions of originality

Klinger v. Conan Doyle Estate

- “The ten Holmes-Watson stories in which copyright persists are derivative from the earlier stories, so only original elements added in the later stories remain protected. … The ‘freedom to make new works based on public domain materials ends where the resulting derivative work comes into conflict with a valid copyright[]’”
Klinger v. Conan Doyle Estate

- "An author 'could not copyright a character described merely as an unexpectedly knowledgeable old wino,' but could copyright 'a character that has a specific name and a specific appearance.'"

Protection Schemes

- Some works are protectable by amendments or extensions to the copyright law, or by other laws that have similar rights to copyright law.
List of Protection Schemes

• Architecture
• Hot News
• Rights in Ideas
• DMCA/Access to Works (future class)

Architecture

• “An original design of a building created in any tangible medium of expression, including a constructed building or architectural plans, models, or drawings, is subject to copyright protection as an ‘architectural work’ under section 102 of the Copyright Act (title 17 of the United States Code), as amended on December 1, 1990.
• “Protection extends to the overall form as well as the arrangement and composition of spaces and elements in the design but does not include individual standard features or design elements that are functionally required.”

National Basketball Assoc. v. Motorola, Inc.

How news elements [from INS]
(i) the plaintiff generates or collects information at some cost or expense
(ii) the value of the information is highly time-sensitive,
(iii) the defendant’s use of the information constitutes free-riding on the plaintiff’s costly efforts to generate or collect it
(iv) the defendant’s use of the information is in direct competition with a product or service offered by the plaintiff
(v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened
Rights in Ideas

• Some ideas may be protectable by an implied contract
  – Implied contract when creator of an idea submits the idea to another party for purposes of selling it, and the parties come to a mutual understanding that the recipient will pay for any use of the idea
  – Issue - State law "implied in fact" contracts are not preempted by the Copyright Act.
• Why no copyright protection/action?
  – Possibly because of no work

Other Areas

• Common Law Copyright
• Registration and Deposit
• Term
• Notice Requirement
Common Law Copyright
Prior to 1976 Act
- Prior to 1976 Act, state law covered unpublished works under common law copyright.
- Common law copyright was terminated upon publication.

Common Law Copyright
Today
- Works in "fixed medium of expression" are protected exclusively by Copyright Act [§ 101]
  - Published works, unpublished works, sound recordings, broadcasts
- Works not fixed in a tangible medium of express are protected by common law copyright
  - Extemporaneous utterances, unchoreographed dance performances, unwritten jazz & musical performances
  - Unpublished works created before January 1, 1978 (even if in a "fixed medium")

Registration and Deposit
- **Registration**: [§ 408]
  - Work can be registered at any time [§ 408(a)]
  - Not a prerequisite to copyright protection [§ 408]
  - U.S. authors must register before bringing infringement suit [§ 411(a)]
  - Creates prima facie presumption of validity [§ 410(c)]
- **Deposit**: [§ 407]
  - 2 complete copies of best edition must be deposited in Library of Congress within 3 months of first publication
  - Not a prerequisite to copyright protection [§ 407(a)]
- **Penalty**: $250 + retail price of undeposited work
  - Sega's certificates of registration establish a prima facie valid copyright in its video game programs. Sega Enterprises Ltd. v. MAPHIA, 857 F Supp. 679, (N.D. Cal. 1994); Apple Computer, Inc. v. Formula Int'l Inc., 725 F.2d 521, 523 (9th Cir. 1984); Apple Computer, Inc. v. Formula Int'l Inc., 725 F.2d 521, 523 (9th Cir. 1984); Sega Enterprises Ltd. v. MAPHIA, 857 F Supp. 679, (N.D. Cal. 1994)
Term

- What is the term of a copyright registration?
  - Life of the Author + 70 years
  - For anonymous works, pseudonymous works, and works made for hire - 95 years from publication or 120 years from creation, whichever expires first

Current Notice Requirements

- Copyright notice no longer required...
- Proper copyright notice:
  - (i) the symbol © (the letter C in a circle), or the word “Copyright”, or the abbreviation “Copr.”,
  - (ii) the year of first publication of the work, and
  - (iii) the name of the owner of the copyright in the work.
- Why still include the notice?

Copyright Registration

- The Copyright Office’s copyright registration system is available online at http://www.copyright.gov/eco/
- You can print paper forms from the same link, but paper submissions for registration are more expensive.
Copyright Registration

• Computer Software
  – Form TX
  – Different Fees for online v. paper
  – No trade secrets
    • first 25 and last 25 pages of source code
  – With trade secrets
    • First 25 and last 25 pages of source code with portions containing trade secrets blocked out; or
    • First 10 and last 10 pages of source code alone, with no blocked out portions; or
    • First 25 and last 25 pages of object code plus any 10 or more consecutive pages of source code, with no blocked out portions; or
    • For programs 50 pages or less in length, entire source code with trade secret portions blocked out.

Copyright Registration

• Registration of a single work as a literary work should cover visual display as well
• However, many video games are covered as audio visual works instead of literary work
• See Circular 61 for more information on registering a copyright in software
• http://www.copyright.gov/circs/circ61.pdf

Foreign Protection

• U.S. authors are entitled to protection in foreign jurisdictions under the Berne Convention
• No requirement to register the work in the foreign country or comply with other formalities in foreign jurisdiction
• However, infringement action must be brought in foreign jurisdiction under foreign law
Copyright Ownership

Ownership

- **General Rule** – Copyright ownership vests with the author(s) of the work
  - Copyright ownership of a work can be assigned to another
  - **Important exception** – work made for hire

Work Made For Hire

Employees

- **Within the Scope of Employment**
  - the work is deemed authored by the employer and the employer will have all exclusive rights associated with the work.

- **Outside the Scope of Employment**
  - the work is deemed authored by the employee and the employer will simply have a license to use the particular embodiment of the work without the exclusive rights associated with the work.
Work Made For Hire

Non-Employees

- The work must be:
  1. specially ordered or commissioned,
  2. for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, and
  3. in a written instrument signed by the parties that states the work shall be considered a work made for hire.

Community for Creative Non-Violence et al. v. Reid

- Supreme Court 1989
- Case history
  - DC - work is a “work made for hire” of which Synder is the owner
  - Ct of Appeals - work is not a “work made for hire” and Reid is the owner

- Synder wanted a sculpture to be created for CCNV featuring modern nativity scene with homeless people
- Synder finds Reid
- “The parties agreed that the project would cost no more than $15,000, not including Reid's services, which he offered to donate. The parties did not sign a written agreement. Neither party mentioned copyright.”
Community for Creative Non-Violence et al. v. Reid

• Things go down hill…
  – Sculpture is repaired; Synder wants to take it on tour and Reid refuses; Reid obtains a copyright registration for the work; Synder wants the sculpture back and Reid refuses; Synder seeks a competing registration for the work

“...The Copyright Act of 1976 provides that copyright ownership ‘vests initially in the author or authors of the work.’ ... As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”
Community for Creative Non-Violence et al. v. Reid

• Work made for hire is an exception
  • “Classifying a work as ‘made for hire’ determines not only the initial ownership of its copyright, but also the copyright's duration, § 302(c), and the owners' renewal rights, §304(a), termination rights, § 203(a), and right to import certain goods bearing the copyright, §601(b)(1).”

Community for Creative Non-Violence et al. v. Reid

• Different views
  – whenever the hiring party retains the right to control the product
  – when the hiring party has actually wielded control with respect to the creation of a particular work
  – common-law agency
  – “formal, salaried” employees

Community for Creative Non-Violence et al. v. Reid

• “[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”
Community for Creative Non-Violence et al. v. Reid

• “In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.”

Community for Creative Non-Violence et al. v. Reid

• Factors – (i) the skill required; (ii) the source of the instrumentalities and tools; (iii) the location of the work; the duration of the relationship between the parties; (iv) whether the hiring party has the right to assign additional projects to the hired party; (v) the extent of the hired party's discretion over when and how long to work; (vi) the method of payment; (vii) the hired party's role in hiring and paying assistants; (viii) whether the work is part of the regular business of the hiring party; (ix) whether the hiring party is in business; (x) the provision of employee benefits; and (xi) the tax treatment of the hired party.

Community for Creative Non-Violence et al. v. Reid

• “Examining the circumstances of this case in light of these factors, we agree with the Court of Appeals that Reid was not an employee of CCNV but an independent contractor.”
Types of Copyrightable Works

Types of Works

- Derivative Work
- Joint Work
- Composite Work
- Compilation

Derivative Work

- "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a 'derivative work'."
- A derivative work is a work based upon one or more preexisting works where the original work is recast, transformed, or adapted.
- The derivative work copyright protects only new materials contributed by the author, and does not affect or enlarge the scope, duration, ownership, or subsistence of any copyright protection in the preexisting material.
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."
- The joint owners can independently exploit the work without consent of the other joint owners, but must account to the other joint owners for such exploitation.
- Term – life of last surviving author + 70 years

Composite Work

- A composite work is a work prepared by two or more authors without the intent to merge their contributions into a unitary whole.
- The work is treated as multiple works for licensing and duration each of the component parts.

Compilations

- "A compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works."
Compilations

- What did the Federal Notice say about dance moves?
  - "A claim in a choreographic work must contain at least a minimum amount of original choreographic authorship. Choreographic authorship is considered, for copyright purposes, to be the composition and arrangement of a related series of dance movements and patterns organized into an integrated, coherent, and expressive whole. Simple dance routines do not represent enough original choreographic authorship to be copyrightable."

Compilations

- What did the Federal Notice say about exercise movements?
  - "Exercise is not a category of authorship in section 102 and thus a compilation of exercises would not be copyrightable subject matter. The Copyright Office would entertain a claim in the selection, coordination or arrangement of, for instance, photographs or drawings of exercises, but such compilation authorship would not extend to the selection, coordination or arrangement of the exercises themselves that are depicted in the photographs or drawings."

Program Completed