Computers and the Law

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CLASS 4

Copyright Law pt. 2;
Parody
Copyright Law

• What rights are afforded by Copyright protection?
• What type of reverse engineering is permitted?

EXCLUSIVE RIGHTS

• § 106. Exclusive rights in copyrighted works
  Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
  (1) to reproduce the copyrighted work in copies or phonorecords;
  (2) to prepare derivative works based upon the copyrighted work;
  (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
  (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
  (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
  (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Public Performance

• “[W]e find that the transmit clause directs us to identify the potential audience of a given transmission, i.e., the persons “capable of receiving” it, to determine whether that transmission is made “to the public.” Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances “to the public,” and therefore do not infringe any exclusive right of public performance. We base this decision on the application of undisputed facts; thus, Cablevision is entitled to summary judgment on this point.”
• The Cartoon Network, LLP v. CSC Holdings, Inc., 536 F.3d 121 (2nd Cir. 2008)
Public Performance
Performing a Work Publicly
• to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered, or
• to transmit or otherwise communicate a performance or display of the work to a place previously specified or to the public, by means of any device or process, regardless of the place and time received by the public.

Distribution
• General Rule - Copyright owners are provided with the exclusive right to distribute copies or phonorecords of their works
• Exception - limited to the first transfer of ownership

First Sale Doctrine
• "The whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution."

First Sale Doctrine

• "[The First Sale Doctrine] makes clear that "the copyright owner's rights under § 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it." 17 U.S.C. § 109(a) (emphasis added).

• Also pursuant to § 109(a), "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a) (emphasis added).

• One significant effect of § 109(a) is to limit the exclusive right to distribute copies to their first voluntary disposition, and thus negate copyright owner control over further or "downstream" transfer to a third party. Quality King Distribs. v. L’anza Research Int’l, Inc., 523 U.S. 135 (1988).

• Thus, under the first sale doctrine, "a sale of a lawfully made copy terminates a copyright holder’s authority to interfere with subsequent sales or distribution of that particular copy." Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F.3d 477, 480 (9th Cir. 1994).

• "The copyright owner is entitled to realize no more and no less than full value of each copy or phonorecord upon its disposition." Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc., 832 F. Supp. 1378 (C.D. Cal. 1993).


First Sale/Grey Market Goods

• Does the first sale doctrine extinguish the rights of the copyright holder when the goods are made abroad and sold abroad?

• According to the 9th Circuit, the Act grants U.S. copyright holders control over the resale, redistribution and importation into the United States of any copyrighted works they manufacture abroad, even after the holder sells those works to others.

• Omega v. Costco Wholesale Corp., (9th Cir 2008)

• What did the Supreme Court do?

17 U.S.C. §117

• (a) Making of Additional Copy or Adaptation by Owner of Copy. — Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
  • (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
  • (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.
17 U.S.C. §117

• (c) Machine Maintenance or Repair. — Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if —
  • (1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and
  • (2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

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, art reproduction, 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.

Copyright Infringement

• A person commits copyright infringement when he/she violates any one of the author's exclusive rights.
  • Infringement may be for intentional and unintentional acts
  • Possibility of injunction and actual or statutory damages
  • Statute of limitations for civil action – 3 years
**Test for Infringement**

- A plaintiff bringing a claim for copyright infringement must demonstrate (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.
- Absent evidence of direct copying, proof of infringement involves fact-based showings that the defendant had access to the plaintiff's work and that the two works are substantially similar.

**Registration Precondition**

- “Subject to certain exceptions, the Copyright Act requires copyright holders to register their works before suing for copyright infringement. 17 U.S.C.A. §411(a) (Supp. 2009).”

**Substantially Similar**

- The substantial-similarity test contains an extrinsic and intrinsic component. At summary judgment, courts apply only the extrinsic test; the intrinsic test, which examines an ordinary person's subjective impressions of the similarities between two works, is exclusively the province of the jury.
- Funky Films, Inc. v. Time Warner Entertainment Company, 462 F.3d 1072 (9th Cir. 2006)
Infringement

§ 501(a). Infringement of copyright
• Anyone who violates any of the exclusive rights of the
copyright owner as provided by sections 106 through 122 or
of the author as provided in section 106A(a), or who imports
copies or phonorecords into the United States in violation of
section 602, is an infringer of the copyright or right of the
author, as the case may be. As used in this subsection,
the term "anyone" includes any State, any instrumentality of
a State, and any officer or employee of a State or
instrumentality of a State acting in his or her official capacity.
Any State, and any such instrumentality, officer, or
employee, shall be subject to the provisions of this title in the
same manner and to the same extent as any
nongovernmental entity.

Injunction

§ 502. Remedies for infringement: Injunctions
• (a) Any court having jurisdiction of a civil action arising under
this title may, subject to the provisions of section 1498 of title
28, grant temporary and final injunctions on such terms as it
may deem reasonable to prevent or restrain infringement of
a copyright.
• (b) Any such injunction may be served anywhere in the
United States on the person enjoined; it shall be operative
throughout the United States and shall be enforceable, by
proceedings in contempt or otherwise, by any United States
court having jurisdiction of that person. The clerk of the court
granting the injunction shall, when requested by any other
court in which enforcement of the injunction is sought,
transmit promptly to the other court a certified copy of all the
papers in the case on file in such clerk's office.

Impounding

§ 503. Remedies for infringement: Impounding and disposition
of infringing articles
• (a) At any time while an action under this title is pending, the
court may order the impounding, on such terms as it may
decide reasonable, of all copies or phonorecords claimed to
have been made or used in violation of the copyright owner's
exclusive rights, and of all plates, molds, matrices, masters,
tapes, film negatives, or other articles by means of which
such copies of phonorecords may be reproduced.
• (b) As part of a final judgment or decree, the court may order
the destruction or other reasonable disposition of all copies
or phonorecords found to have been made or used in
violation of the copyright owner's exclusive rights, and of all
plates, molds, matrices, masters, tapes, film negatives, or
other articles by means of which such copies of
phonorecords may be reproduced.
Damages

• § 504. Remedies for infringement: Damages and profits
  • (a) In General. - Except as otherwise provided by this title, an infringer of copyright is liable for either -
    (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
    (2) statutory damages, as provided by subsection (c).

Actual Damages

• (b) Actual Damages and Profits. - The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Statutory Damages

• (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
Statutory Damages

• (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000.

• If the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200. The court shall not remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107 if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

Costs and Attorney’s Fees

• § 505. Remedies for infringement: Costs and attorney's fees

• In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

Fair Use

• § 107. Limitations on exclusive rights: Fair use

• Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 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.

• The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
Lewis Galoob Toys v. Nintendo of America

- Nintendo (P)
  - Creator of Nintendo gaming system.
- Lewis Galoob Toys (D)
  - Creator of Game Genie game altering device.
- Basis of Proceeding
  - Appeal from D.C. decision that Game Genie does not violate any Nintendo copyrights.

Lewis Galoob Toys v. Nintendo of America

- “The doctrine of fair use allows a holder of the privilege to use copyrighted material in a reasonable manner without the consent of the copyright owner.”

Lewis Galoob Toys v. Nintendo of America

- What is the allegation of infringement against Galoob?
  - Contributory Infringement
  - “The district court properly focused on whether consumers who purchase and use the Game Genie would be infringing Nintendo’s copyrights by creating (what are now assumed to be) derivative works.”
Lewis Galoob Toys v. Nintendo of America

• Factor #1 - Purpose and Character of Use
  • “Game Genie users are engaged in a non-profit activity. Their use of the Game Genie to create derivative works therefore is presumptively fair.”

Lewis Galoob Toys v. Nintendo of America

• Factor #2 - Nature of the Copyrighted Work
  • Published nature supports a finding of fair use

Lewis Galoob Toys v. Nintendo of America

• Factor #3 - Amount and Substantiality of Portion of Work Used
  • Cannot overcome a presumption of fair use
  • Consumers view a copyrighted work to which they have already paid for access
Lewis Galoob Toys v. Nintendo of America

- Factor #4 - Effect of the Use upon the Potential Market/Value
- No effect on potential market because Nintendo will not release altered versions of its games

Lewis Galoob Toys v. Nintendo of America

- Conclusion
- “The district court could properly conclude that Game Genie users are making a fair use of Nintendo’s displays…”

Reverse Engineering

- “Reverse engineering encompasses several methods of gaining access to the functional elements of a software program. They include: (1) reading about the program; (2) observing “the program in operation by using it on a computer;” (3) performing a “static examination of the individual computer instructions contained within the program;” and (4) performing a “dynamic examination of the individual computer instructions as the program is being run on a computer.”
- Sony v. Connectix
Sega Enterprises Ltd. v. Accolade, Inc.

- Sega (P)
  - Creator of Genesis gaming system.
- Accolade (D)
  - Developer of software for gaming systems.
- Basis of Proceeding
  - Appeal from D.C. decision

What did Accolade do?
- Reverse engineered Sega’s video games for compatibility with Sega system
- Created games for Sega system

Why didn’t Accolade just obtain a license from Sega?

Accolade’s argument
- "Disassembly of object code to gain an understanding of the ideas and functional concepts embodied in the codes is a fair use …"
Sega Enterprises Ltd. v. Accolade, Inc.

• Issue – Intermediate Copying
• Does intermediate copying infringe the exclusive rights of the copyright owner in section 106?
• CT - Yes, unless fair use applies

Sega Enterprises Ltd. v. Accolade, Inc.

• Factor #1 - Purpose and Character of Use
• Copying for a commercial purpose weighs against a finding of a fair use, but the presumption can be overcome
• Why did the court believe that Accolade had overcome the burden?

Sega Enterprises Ltd. v. Accolade, Inc.

• Factor #2 - Nature of the Copyrighted Work
• “When specific instructions, even though previously copyrighted, are the only and essential means of accomplishing a given task, their later use by another will not amount to infringement”
• Why did the court find this factor in favor of Accolade?
Sega Enterprises Ltd. v. Accolade, Inc.

- Factor #3 - Amount and Substantiality of Portion of Work Used
  - Factor favors Sega because an entire work was disassembled...

Sega Enterprises Ltd. v. Accolade, Inc.

- Factor #4 - Effect of the Use upon the Potential Market/Value
  - For legitimate competition is ok
  - Cannot monopolize market
  - Why?

Sega Enterprises Ltd. v. Accolade, Inc.

- Holding
  - "Because ... disassembly is the only means for gaining access to those unprotected aspects of the program, and ... [w]here there is a good reason for studying or examining the unprotected aspects of a copyrighted computer program, disassembly for purposes of such study or examination constitutes a fair use."
  - What is the public policy arguments behind the court’s decision?
Kelly v. Arriba Soft

The Search Engine

- The search engine at issue in this case is unconventional in that it displays the results of a user's query as 'thumbnail' images. When a user wants to search the internet for information on a certain topic, he or she types a search term into a search engine, which then produces a list of web sites that contain information relating to the search term. Normally, the list of results is in text format. The Arriba search engine, however, produces its list of results as small pictures.
- "To provide this service, Arriba developed a computer program that 'crawls' the web looking for images to index. This crawler downloads full-sized copies of the images onto Arriba's server. The program then uses these copies to generate smaller, lower-resolution thumbnails of the images. Once the thumbnails are created, the program deletes the full-sized originals from the server. Although a user could copy these thumbnails to his computer or disk, he cannot increase the resolution of the thumbnail; any enlargement would result in a loss of clarity of the image."
- What else did the search engine do?

Procedural History

- "We review a grant of summary judgment de novo. ... We also review the court's finding of fair use, which is a mixed question of law and fact, by this same standard. ... In doing so, we must balance the nonexclusive factors set out in 17 U.S.C. §107.
- "The district court's decision in this case involves two distinct actions by Arriba that warrant analysis. The first action consists of the reproduction of Kelly's images to create the thumbnails and the use of those thumbnails in Arriba's search engine. The second action involves the display of Kelly's larger images when the user clicks on the thumbnails. We conclude that, as to the first action, the district court correctly found that Arriba's use was fair. However, as to the second action, we conclude that the district court should not have reached the issue because neither party moved for summary judgment as to the full-size images and Arriba's response to Kelly's summary judgment motion did not concede the prima facie case for infringement as to those images."
Kelly v. Arriba Soft

Exclusive Rights
• "An owner of a copyright has the exclusive right to reproduce, distribute, and publicly display copies of the work. ... To establish a claim of copyright infringement by reproduction, the plaintiff must show ownership of the copyright and copying by the defendant. ... As to the thumbnails, Arriba conceded that Kelly established a prima facie case of infringement of Kelly's reproduction rights."

Kelly v. Arriba Soft

Fair Use Exception
• "A claim of copyright infringement is subject to certain statutory exceptions, including the fair use exception. ... This exception 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.' ... The statute sets out four factors to consider in determining whether the use in a particular case is a fair use. ... We must balance these factors in light of the objectives of copyright law, rather than view them as definitive or determinative tests. ... We now turn to the four fair use factors."

Kelly v. Arriba Soft

1. Purpose and character of the use.
   – The Supreme Court has rejected the proposition that a commercial use of the copyrighted material ends the inquiry under this factor. Instead, "[t]he central purpose of this investigation is to see ... whether the new work merely supersed[e][s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative." The more transformative the new work, the less important the other factors, including commercialism, become. What did the court find with respect to this factor and why?
Kelly v. Arriba Soft

• 2. Nature of the copyrighted work.
  – "Works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works." Photographs that are meant to be viewed by the public for informative and aesthetic purposes, such as Kelly’s, are generally creative in nature. The fact that a work is published or unpublished also is a critical element of its nature. Published works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred. Kelly’s images appeared on the internet before Arriba used them in its search image. When considering both of these elements, we find that this factor weighs only slightly in favor of Kelly."

Kelly v. Arriba Soft

• 3. Amount and substantiality of portion used.
  – "While wholesale copying does not preclude fair use per se, copying an entire work militates against a finding of fair use." ... However, the extent of permissible copying varies with the purpose and character of the use. If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her.
  – "This factor neither weighs for nor against either party because, although Arriba did copy each of Kelly’s images as a whole, it was reasonable to do so in light of Arriba’s use of the images. It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site. If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine."

Kelly v. Arriba Soft

• 4. Effect of the use upon the potential market for or value of the copyrighted work.
  – "This last factor requires courts to consider "not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and wide-spread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original." ... A transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work."
  • What did the court find with respect to this factor and why?
Kelly v. Arriba Soft

Conclusion

• "We hold that Arriba's reproduction of Kelly's images for use as thumbnails in Arriba's search engine is a fair use under the Copyright Act. However, we hold that the district court should not have reached whether Arriba's display of Kelly's full-sized images is a fair use because the parties never moved for summary judgment on this claim and Arriba never conceded the prima facie case as to the full-size images. The district court's opinion is affirmed as to the thumbnails and reversed as to the display of the full-sized images. We remand for further proceedings consistent with this opinion."

Discussion

1. Will watching an uploaded video, that is subject to copyright rights that prohibit its uploading and redistribution, cause the viewer to infringe any copyright rights?

Copyright

• Hot areas & cases
  – Famous Characters: Wizard of Oz
  – Use of a Graphic Element in a Video Montage: Green Day
  – Professor Notes: Faulkner Press v. Class Notes d/b/a Einstein's Notes
  – Fair Use: Family Guy, South Park, Remote DVRs
  – Photos: Balsley v. LFP, Inc.,
Moral Rights

- Protect artist investment in a creative work
  - Ensuring proper attribution of authorship
  - Protecting the work from derogatory treatment
- Rights persist even after work is sold

Parody

- “[L]iterary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule”
- Campbell v. Acuff-Rose Music
- Dr Seuss v. Penguin Books
- Leibovitz v. Paramount Pictures
Campbell v. Acuff-Rose Music

Background
• 1964 – Ray Orbison and William Dees “Oh, Pretty Woman”
• 1989 – 2 Live Crew “Pretty Woman”
• 2 Live Crew offer
  – All credit for authorship to original authors
  – Pay a fee for use of song
  – Provide a copy of lyrics and a recording of the song
• Agent for Copyright Owner
  – Refused to grant permission

Campbell v. Acuff-Rose Music
• Basis of suit – copyright infringement
• D.C. – in favor of 2 Live Crew; ruled that the recording was a fair use of the original work
• Court of Appeals – reversed and remanded; focusing on that commercial use is presumptively an unfair use

Campbell v. Acuff-Rose Music
• Infringement unless fair use found as a parody
• Four factor analysis
Campbell v. Acuff-Rose Music

• First Factor - the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
• “[P]arody has an obvious claim to transformative value…”
• “For the purposes of copyright law, … and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”

Campbell v. Acuff-Rose Music

• “The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use.”

Campbell v. Acuff-Rose Music

• Analysis continues from there…
• Supreme Court ultimately rules in favor of Campbell
Dr Seuss v. Penguin Books

• The Cat NOT in the Hat
• Rhyming summary of highlights from OJ Simpson trial
• Sued for Copyright and Trademark Infringement

Dr Seuss v. Penguin Books

• D.C. – grant of preliminary injunction
• Parody Analysis
• "Parody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment. This court has adopted the "conjure up" test where the parodist is permitted a fair use of a copyrighted work if it takes no more than is necessary to "recall" or "conjure up" the object of his parody."

Dr Seuss v. Penguin Books

• "While Simpson is depicted 13 times in the Cat’s distinctively scrunched and somewhat shabby red and white stove-pipe hat, the substance and content of The Cat in the Hat is not conjured up by the focus on the Brown-Goldman murders or the O.J. Simpson trial. Because there is no effort to create a transformative work with "new expression, meaning, or message," the infringing work’s commercial use further cuts against the fair use defense."
Dr Seuss v. Penguin Books

- Preliminary injunction granted

Leibovitz v. Paramount Pictures

- D.C. – advertisement is a fair use parody
- Court of Appeals – same
- Leibovitz – photographer of 1991 Vanity Fair cover of Demi Moore

- Used Leslie Nielsen’s face on a pregnant actress’s body that was in a similar position to the picture taken of Demi Moore with notice that the film was “Due this March”
Leibovitz v. Paramount Pictures

- “The focus of this inquiry, the Court explained, should be on whether the copying work “merely ‘supersede[s] the objects’ of the original . . . , or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message, …”

Leibovitz v. Paramount Pictures

- “In saying this, however, we have some concern about the ease with which every purported parodist could win on the first factor simply by pointing out some feature that contrasts with the original. Being different from an original does not inevitably “comment” on the original. Nevertheless, the ad is not merely different; it differs in a way that may reasonably be perceived as commenting, through ridicule, on what a viewer might reasonably think is the undue self-importance conveyed by the subject of the Leibovitz photograph. A photographer posing a well known actress in a manner that calls to mind a well known painting must expect, or at least tolerate, a parodist’s deflating ridicule.”

Leibovitz v. Paramount Pictures

- “[N]ot entitled to a licensing fee for a work that otherwise qualifies for the fair use defense as a parody”
Recent Cases

- Suntrust
- J.D. Salinger – book sequel/parody
- Google Book case

Program Completed