

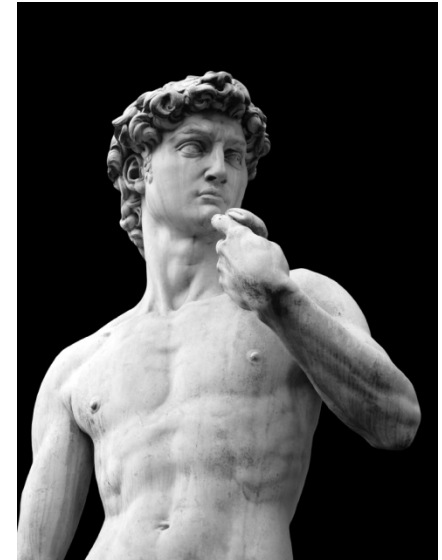
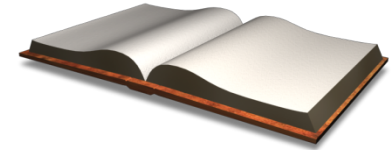
Copyright – Federal law

- **Original works of expression**
- **Fixed** in a tangible medium



What things fall within the copyright realm?

- Books and other writings
- Music
- Film
- Photographs
- Artwork
- Software source codes
- Architecture
- Clothing designs
- Pantomimes/choreographers



Originality

- Original to source.
- Courts do not want to get embroiled in the merits of artistic quality disputes.
- Low threshold
 - “minimal degree of creativity...extremely low”
Feist v. Rural Tel Co., 499 U.S. 340, 345 (1991)

Justice Holmes

“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation... At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.”

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)

Fixation

- Fixed in a tangible medium.
- Permanent recordation or reduction to form.
 - Pen to paper, types, source code, drawing, sculpture.
- Not skywriting!

Kepner v. Leadership Software, 12 F. 3d 527, 531 (5th Cir. 1994)

- Idea-expression dichotomy.
 - Expression is protected, not mere ideas
- Software expression of specific business model – leadership questions/problem attributes to improve management and decision-making.
- While the questions/processes conveyed unprotectable ideas, the specific wording employed was protectable expression.

When does copyright exist?

- Moment expression is fixed in a tangible medium.
- No formal registration requirements to secure a copyright.
- But registering has HUGE benefits:
 - Statutory damages potential

Who is the owner?

- Author is owner and ownership vests in the author.
- Work for hire doctrine: works created by employees within course and scope of employment are works for hire so author is employer.

Factors

1. Employer right to control work and hours?
2. Skill level?
3. Source of tools used?
4. Whether hiring party can assign tasks/duties?
5. Duration of relationship?
6. Employee benefits?
7. Tax treatment – W2 vs 1099?

The exclusive rights under federal law

1. Reproduction → make copies
2. Transformation/Adaptation → create derivative works (i.e., screenplay to movie)
3. Public distribution
4. Public performance right
5. Public display right
6. Limited “moral rights”-type protection in specific art context under Visual Artists Rights Act.

Infringement Cause of Action

1. Actual copying (true independent creation is ok) is shown by (a) access and (b) probative similarity.
2. Substantial similarity as tested by slightly different tests across the Circuits.

Fair Use Factors

1. Purpose and character of the use, including whether the use is of commercial nature or is for nonprofit, educational purposes.
2. Nature of the copyrighted work.
3. The amount/substantiality of the portion used in relation to the copyrighted work as a whole.
4. The effect of the use upon the potential market for, or value of, the copyrighted work.

Uses that are generally fair ones

- Criticism -- quoting a work in a review for purposes of illustration or comment.
- News -- summarizing news stories/articles and limited quotations in news reports.
- Research -- quoting in scholarly, scientific, or technical works.
- Nonprofit educational uses -- some photocopying for classroom use.
- Parody -- a work that humorously mocks the original work.
 - NOTE: Satire-parody line very important.

Issue Spotting

1. Any created content/expression?
2. Borrowing from internet – NO!
3. Any software/code created?
4. Any time content/expression has value in a competitive space – some website look and feel, manuals, database structures/hierarchies, other creative works?
5. Employee agreements → must be clear.

What is a trademark?

- Common synonym is “brand name.”
- **Coke, 7up, Chevy, Google.**
- Words-sounds-numbers-shapes-smells even.
- Must connote a given company’s goods or services.
- When applicable to goods, trademark.
- When services, service mark → Saks, Citibank.

Trademark law focus?

1. Identify origin of article.
2. Quality assurance.
3. Symbol of good will → “commercial magnetism”

4 types of marks

1. Generic
2. Descriptive
3. Suggestive
4. Arbitrary

Generic

1. The common term for product used by many.
2. No trademark protection for generic marks.
3. Examples:

Consumer Electronics for magazine

National Bank for bank

Lite for low calorie

Safari for hunting gear

Descriptive

1. A mark is descriptive if it conveys an immediate idea of the qualities, characteristics, ingredients of the goods.
2. Can secure protection upon showing of secondary meaning.
3. Examples:

Baby Brie for cheese

Honey-baked for ham

Vision Center for optics clinics

Suggestive

1. A suggestive term echoes some aspect of the product/service but the connection is not immediate and requires some imagination/perception to connect it to the product.
2. Have immediate trademark rights.
3. Examples:

Contact for adhesive paper

Playboy for men's magazine

Q-tips for cotton swabs

Arbitrary

1. An arbitrary term is one use din an unfamiliar, arbitrary way.
2. Have immediate trademark rights. Strongest form of mark.
3. Examples:
Camels for cigarettes
Ivory for soap
Kodak, Exxon, Rolex, Google → made-up words
4. Encourage client adoption of a unique one here!

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Trademark infringement

1. Central focus is *likelihood of consumer confusion*.
2. Relevant factors:
 - a. Strength of the mark
 - b. Degree of similarity
 - c. Defendant's good faith
 - d. Evidence of actual confusion
 - e. Sophistication of market
 - f. Quality differential

Trademark Fair Use

1. Similar First Amendment underpinnings to copyright.
2. A competitor can use another's mark in a non-trademark sense generally to mention or discuss product or in comparative advertising.
3. "The fair use defense forbids a trademark registrant to appropriate a descriptive term for his exclusive use and so prevent others from accurately describing a characteristic of their good."
4. "The fair use defense allows a junior user to use a descriptive term in good faith in its primary, descriptive sense other than as a trademark."

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Issue Spotting

1. Use caution in selecting a proper name for business on day one
 - a. Avoid others, go for arbitrary/suggestive.
2. Creating new product/service lines, watch for trademark issues in slogans.
3. Secure registration for all the discussed benefits (national footprint, evidentiary value, constructive notice to others, relatively cheap to secure)
4. Deeper protection creates more business value.

Patents

1. For new inventions or ways of doing certain things.
2. New, Useful, Nonobvious → the trifecta!
3. What kinds of things:
 - a. inventions, products, devices;
 - b. Methods, business methods or processes;
 - c. Designs, a subset of patent law is the Design Patent

Patent Cause of Action

1. Must get a patent from PTO (lives 20 years).
2. Conduct analysis of what exactly the “claims” of the patent cover.
3. Analysis of how those claims read on the defendant’s product.
4. If all claim elements are present, then infringement.
5. But even if one or more are missing, if the differences are sufficiently insubstantial, then can still claim infringement under the Doctrine of Equivalents.

Other IP Issues

1. Trade secrets are critical to analyze and be aware of.
 - a. Offensive value, and great risk to business if not careful in hiring employees from competitors.
2. Right of publicity laws

