

Table of Contents

CHAPTER 1. COPYRIGHT BASICS

I. GENERAL CONSIDERATIONS

- § 1:1 Introduction
- § 1:2 Elements needed for copyright
- § 1:3 The needed quantum of originality
- § 1:4 What is copyrightable?
- § 1:5 Copyright's exclusive rights
- § 1:6 Primary purpose of copyright law
- § 1:7 Idea/expression dichotomy
- § 1:8 Merger doctrine

II. WHICH PARTS OF A FILM ARE COPYRIGHTABLE?

- § 1:9 Story line
- § 1:10 Scenes a faire
- § 1:11 The title
- § 1:12 Short phrases, music lyrics and slogans
- § 1:13 Characters
- § 1:14 —Graphically depicted characters v. literary characters
- § 1:15 —Is the character independently copyrightable?

III. COPYRIGHT INFRINGEMENT

- § 1:16 Generally
- § 1:17 Step one: copying
- § 1:18 Access
- § 1:19 Circumstantial evidence of access
- § 1:20 Substantial similarity
- § 1:21 Step two: improper appropriation; the infringement standard
- § 1:22 Tests for substantial similarity
- § 1:23 Substantial similarity decisions
- § 1:24 Who constitutes the “ordinary observer”?

IV. OTHER CONSIDERATIONS

- § 1:25 The need for a synchronization license
- § 1:26 The display of copyrighted works

CHAPTER 2. COPYRIGHT DEFENSES

I. FAIR USE DOCTRINE

- § 2:1 Introduction
- § 2:2 The fair-use doctrine; essentials
- § 2:3 Factor one: the purpose and character of the use
- § 2:4 Factor two: the nature of the copyrighted work
- § 2:5 Factor three: the amount and substantiality of the portion used
- § 2:6 Factor four: the effect of the use upon the potential market
- § 2:7 Examples of fair use decisions
- § 2:8 Fair use and an express denial of permission: what happens if permission is denied?
- § 2:9 More than just an affirmative defense for ISPs?

II. PARODY

- § 2:10 Generally
- § 2:11 Specific examples
- § 2:12 The satire/parody distinction
- § 2:13 Specific examples

III. DE MINIMIS DEFENSE

- § 2:14 Generally
- § 2:15 Specific examples

IV. INDEPENDENT CREATION

- § 2:16 General considerations
- § 2:17 Specific examples

V. INNOCENT INFRINGEMENT

- § 2:18 Innocent infringement; willfulness not required
- § 2:19 Subconscious copying
- § 2:20 Innocent infringement; due to lack of notice

VI. ADDITIONAL DEFENSES

- § 2:21 Generally

TABLE OF CONTENTS

- § 2:22 The Public domain
- § 2:23 Statute of limitations
- § 2:24 Equitable defenses: Laches no longer a defense
- § 2:25 Equitable defenses: Estoppel
- § 2:26 Unclean hands
- § 2:27 Copyright misuse
- § 2:28 Inequitable conduct in registration procurement
- § 2:29 Plaintiff lacks standing to sue

CHAPTER 3. COPYRIGHT AND DIGITAL DISTRIBUTION

- § 3:1 Technology and public interest balance
- § 3:2 Time-shifting and *Sony Corp. of America v. Universal City Studios, Inc.* (the “Betamax” Case)
- § 3:3 Digital audio recording devices
- § 3:4 Digital distribution as transformative use
- § 3:5 Unlicensed digital distribution and peer-to-peer file sharing
- § 3:6 Digital invitation to infringement
- § 3:7 Decentralized peer-to-peer digital distribution (the *Grokster* decision)
- § 3:8 *Post-Grokster* and the lessons learned from *Viacom v. YouTube*
- § 3:9 Television industry’s newest fight with technology
- § 3:10 The literary world’s fight with digitalization
- § 3:11 Infringement implications of embedding a Tweet

CHAPTER 4. TRADEMARK BASICS

I. IN GENERAL

- § 4:1 Introduction
- § 4:2 What is a trademark
- § 4:3 Historical origins
- § 4:4 The purposes of trademark law

II. TYPES OF TRADEMARKS

- § 4:5 Generally
- § 4:6 Generic marks
- § 4:7 Descriptive marks
- § 4:8 Suggestive marks

- § 4:9 Arbitrary marks
- § 4:10 Summing it up

III. MARKS EXCLUDED FROM PROTECTION

- § 4:11 Generally
- § 4:12 Immoral or scandalous matter
- § 4:13 Insignia and particular individuals
- § 4:14 Surname marks
- § 4:15 Deceptively misdescriptive marks
- § 4:16 Primarily geographically deceptively
misdescriptive

IV. TRADEMARK LAW

- § 4:17 Generally
- § 4:18 Goals

V. TRADEMARK INFRINGEMENT

- § 4:19 Generally
- § 4:20 Keystone of infringement: likelihood of confusion
- § 4:21 The factors approach
- § 4:22 The *Polaroid* factors
- § 4:23 *Polaroid* factor #1—Strength of the mark
- § 4:24 *Polaroid* factor #2—Degree of similarity between
the two marks
- § 4:25 *Polaroid* factor #2—Degree of similarity between
the two marks—Similarity in sight, sound, and
meaning
- § 4:26 *Polaroid* factor #3—Proximity of the products
- § 4:27 *Polaroid* factor #4—Likelihood the prior owner
will bridge the gap
- § 4:28 *Polaroid* factor #5—Actual confusion
- § 4:29 *Polaroid* factor #6—Defendant's intent in
selecting the mark
- § 4:30 *Polaroid* factor #7—Quality of defendant's
product
- § 4:31 *Polaroid* factor #8—Sophistication of the
consumer
- § 4:32 *Polaroid* factors—Other factors
- § 4:33 Weighing the factors

VI. RELEVANCY TO FILMMAKING

- § 4:34 In general

TABLE OF CONTENTS

- § 4:35 Naming your movie: The protection of movie titles in general
- § 4:36 Trademark law and movie titles
- § 4:37 Unfair competition law
- § 4:38 Step one: showing secondary meaning
- § 4:39 —Secondary meaning can be lost
- § 4:40 —Prerelease publicity and recognition
- § 4:41 Step two: showing likelihood of confusion
- § 4:42 Summing it up
- § 4:43 Protection of titles from one medium to another
- § 4:44 The use of titles on goods

VII. DILUTION

- § 4:45 Generally
- § 4:46 Dilution by blurring
- § 4:47 Dilution by tarnishment
- § 4:48 “Parody”—A possible defense to claims for dilution and blurring

VIII. TRADEMARKS IN MULTIMEDIA WORKS

- § 4:49 Trademarks & Films
- § 4:50 Location agreements
- § 4:51 Product placement deals

CHAPTER 5. DEFAMATION

I. GENERALLY

- § 5:1 In general
- § 5:2 Types of defamation

II. ELEMENTS

- § 5:3 Generally
- § 5:4 Element one: defamatory language
- § 5:5 The entirety of the work must be viewed in context
- § 5:6 Inducement and innuendo—The defamation need not be apparent
- § 5:7 Defamation by implication
- § 5:8 Statements of opinion
- § 5:9 Fact vs. opinion

- § 5:10 Who may be defamed
- § 5:11 Element two: “of or concerning” the plaintiff
- § 5:12 —Defamation concerns for the filmmaker
- § 5:13 Insulate your work: how to practice “safe” filmmaking
- § 5:14 Element three: publication
- § 5:15 —Only the intent to publish is required
- § 5:16 Element four: damage to the plaintiff
- § 5:17 General damages presumed for libel
- § 5:18 Damage rules for slander

III. STATUS OF THE DEFAMED INDIVIDUAL: CONSTITUTIONAL RESTRICTIONS

- § 5:19 Generally
- § 5:20 Public officials and public figures—Actual malice required
- § 5:21 How to determine whether your subject is a public figure
- § 5:22 Element one: does a public controversy exist?
- § 5:23 Element two: the nature and extent of the individual’s participation
- § 5:24 Element three: were the alleged defamatory statements germane to the plaintiff’s participation in the controversy?
- § 5:25 The public controversy must preexist the defamation
- § 5:26 Judicial guidance: relevant decisions
- § 5:27 Private figures need not prove actual malice; only negligence is required
- § 5:28 Summing it up
- § 5:29 Defamatory blogging
- § 5:30 Editing decisions: proof of actual malice?

IV. DEFENSES & PRIVILEGES

- § 5:31 Consent
- § 5:32 Truth—Not always an absolute defense
- § 5:33 The “Substantial Truth” defense
- § 5:34 Parody
- § 5:35 The plaintiff’s bad reputation: the “libel proof” plaintiff doctrine
- § 5:36 Absolute privilege
- § 5:37 Qualified privilege

TABLE OF CONTENTS

- § 5:38 —Burden of proof
- § 5:39 —Self-defense
- § 5:40 —Fair comment
- § 5:41 —Retraction: a mitigating factor

CHAPTER 6. THE RIGHT OF PRIVACY

I. BASIC PRINCIPLES

- § 6:1 Generally

II. THE LAW OF PRIVACY

- § 6:2 The four torts
- § 6:3 Tort # 1: intrusion into one's private affairs
- § 6:4 Modern twist, "up skirt" videotaping
- § 6:5 Failure to secure a written release
- § 6:6 Tort # 2: public disclosure of embarrassing private facts
- § 6:7 Cases defining newsworthiness
- § 6:8 "Stop story" requests
- § 6:9 Tort # 3: false light
- § 6:10 Embellishment
- § 6:11 Distortion
- § 6:12 Fictionalization

III. APPROPRIATION

- § 6:13 Tort # 4: appropriation
- § 6:14 The newsworthiness and incidental use privileges
- § 6:15 Potential limitation on the newsworthiness exception
- § 6:16 Unauthorized commercial exploitation
- § 6:17 The legality of *Girls Gone Wild* and its ilk

CHAPTER 7. THE RIGHT OF PUBLICITY

I. GENERAL PRINCIPLES

- § 7:1 In general
- § 7:2 Creation of the right: historical development and policy considerations
- § 7:3 Sources of law

II. REQUISITE ELEMENTS AND RIGHTS

- § 7:4 Generally

- § 7:5 The right of publicity is not necessarily limited solely to celebrities
- § 7:6 Rights; generally
- § 7:7 Name protection
- § 7:8 Likeness
- § 7:9 —The “transformative nature” test
- § 7:10 Look-alikes
- § 7:11 The right of publicity versus section 43(a) false endorsement claims
- § 7:12 Voices and sound-alikes
- § 7:13 Associated objects
- § 7:14 Web sites
- § 7:15 Other ways to appropriate identity and the current state of the right of publicity

III. RIGHT OF PUBLICITY: DEFENSES

- § 7:16 The First Amendment
- § 7:17 Acceptable uses of identity
- § 7:18 Relevant considerations
- § 7:19 What constitutes “advertising” or “commercial exploitation”
- § 7:20 Use of a celebrity’s name in film title
- § 7:21 Identity not used
- § 7:22 “Identity” in fictional works
- § 7:23 De minimis use
- § 7:24 Parody
- § 7:25 First-sale doctrine
- § 7:26 Ownership of the right of publicity
- § 7:27 Duration of the right of publicity: post-mortem rights
- § 7:28 Lifetime commercial exploitation requirement

CHAPTER 8 IDEA SUBMISSION

I. GENERAL CONSIDERATIONS

- § 8:1 Generally
- § 8:2 Ideas: “free as the air?”
- § 8:3 Overview: word of caution

II. PROTECTING IDEAS

- § 8:4 Limitations of copyright law

TABLE OF CONTENTS

§ 8:5 The legal framework

A. PROPERTY THEORY

§ 8:6 Generally

§ 8:7 Element one: novelty

§ 8:8 Element two: concreteness

§ 8:9 Element three: unauthorized use

B. EXPRESS CONTRACT

§ 8:10 Generally

§ 8:11 Novelty and concreteness

C. IMPLIED-IN-FACT CONTRACTS

§ 8:12 Elements and factors

§ 8:13 Unsolicited submission involuntarily received

§ 8:14 The role of “industry custom”

§ 8:15 Unsolicited submissions voluntarily received

§ 8:16 Solicited submissions

§ 8:17 Implied-in-fact contract: summing it up

D. UNJUST ENRICHMENT

§ 8:18 Generally

§ 8:19 Application

§ 8:20 —California

E. CONFIDENTIAL RELATIONSHIP

§ 8:21 Generally

§ 8:22 Cause of action

III. COMPARISONS, CRITICISMS, AND CONCLUSIONS

§ 8:23 Generally

§ 8:24 The California approach

§ 8:25 The New York approach

§ 8:26 The final word

CHAPTER 9. OTHER COPYRIGHT CONSIDERATIONS

I. IN GENERAL

§ 9:1 Copyright creation

- § 9:2 Copyright notice
- § 9:3 Location of the notice

II. COPYRIGHT REGISTRATION

- § 9:4 How to register a copyright
- § 9:5 Deposit requirement for motion pictures
- § 9:6 Failure to deposit and effective date
- § 9:7 Which application form?

III. ADVANTAGES TO COPYRIGHT REGISTRATION

- § 9:8 Generally

IV. COPYRIGHT DURATION

- § 9:9 Generally
- § 9:10 Works originally created on or after January 1, 1978
- § 9:11 Works for hire and anonymous or pseudonymous works
- § 9:12 Works originally created before January 1, 1978, but not published or registered by that date
- § 9:13 Works originally created and published or registered before January 1, 1978

V. IDENTIFYING THE AUTHOR

- § 9:14 Generally
- § 9:15 Works for hire
- § 9:16 Other consequences
- § 9:17 Joint authors
- § 9:18 Claims of authorship
- § 9:19 Independently copyrightable
- § 9:20 Intent
- § 9:21 “Authorship” in collection works

VI. TRANSFER OF COPYRIGHT

- § 9:22 Generally
- § 9:23 Who may file an application form?

Table of Laws and Rules

Table of Cases

TABLE OF CONTENTS

Index