

COPYRIGHT AND NEW TECHNOLOGIES
(formerly Comparative Copyright in the 21st Century)
Fall 2008

Overview, basic information, and syllabus

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BASIC INFORMATION

Class hours: Mondays and Wednesdays. 11:00-11:54am

Classroom: 304

Email and Internet policy:

Please send any emails on weekdays. If you don't receive a response within 5 days (or sooner), I recommend sending the message again. **INTERNET USE DURING CLASS IS STRICTLY FORBIDDEN.**

Course Materials:

Materials are available on-line **through the Angel system** in two forms: as .pdf files which reflect the course packets and as individual .doc or .pdf files. **Course packs will also be available for purchase at the fifth floor faculty services window** (approximately seven cents per page, printed front & back). If you want to regularly buy paper course packs, be sure that Symona Boyd knows (sboyd@yu.edu).

Evaluation:

1. Grading in the course will be based on an open book, 24 hour take-home examination.
2. In addition, class participation will be used to adjust 10+% of the class upward. Professor Hughes reserves the right to adjust *downward* for lack of class participation.
3. As part of class participation, absolutely NO internet use is permitted in the class. *Students found to be using the internet during class will be referred to the Academic Standing Committee for discipline, including, but not limited to, substantial lowering of the final grade in this class.*

SYLLABUS

META-SYLLABUS

* Prelude [how far can copyright go?]

1. Translating 19th Century Copyright Law into 21st Century Problems –

2. **The Initial Treaty Framework**
3. **WIPO Copyright Treaties and comparative national implementation**
 - A. United States, Singaporean, and Australian implementation – digital locks and circumvention devices
 - B. European implementation and comparative safeguard mechanisms
3. **The initial problem of mainstream internet service providers**
 - A. United States
 - B. European Union
 - C. Japan and Germany – a comparison
 - D. China
 - E. Singapore
4. **P2P internet service providers, privacy, and ramifications for other ISPs**
 - A. peer to peer systems
 - B. revisiting mainstream ISP liability in light of P2P reasoning
5. **Crafting limitations and exceptions for the network**
 - A. New enumerated exceptions or fair use?
 - B.. The problem of orphan works
 - C. Levy systems – more or less needed?
7. **Problems in music licensing**
 - a. United States
 - b. European Union

EXPANDED SYLLABUS
name in brackets is .doc or .pdf file name

Coursepack #1

0. PRELUDE

Lancôme v. Kecofa, et al., Decision of the Court of Appeals, Den Bosch, The Netherlands, 8 June 2004 [Lancome.pdf]

1. TRANSLATING 19TH CENTURY COPYRIGHT LAW INTO 21ST CENTURY PROBLEMS –

Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968) [Fornightly2.doc]

MAI Systems v. Peak Computer 991 F.2d 511, 1993 U.S. LEXIS 7522 (9th Cir., 1993) [MAIvPeak reformat.doc]

Marobie-FL, Inc. v. National Association of Fire Equipment Distributors, 983 F. Supp. 1167 (E.D. Ill. 1997) [MAROBIE2.doc]

Optional reading, not in coursepack, but available in individual files section:

Sony Computer Entertainment v. Ball, et. al., [2004] EWHC 1738 (Ch),
English High Court of Justice, Chancery Division, 19 July 2004
[sony-v-ball.doc]

Also at <http://www.courtservice.gov.uk/judgments/files/2004/sony-v-ball.htm>

2. THE INITIAL TREATY FRAMEWORK

Excerpts from the TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY (TRIPS) AGREEMENT, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994 [TRIPSexcerpt.doc], also available at http://www.wto.org/english/docs_e/legal_e/27-trips.wpf

BERNE CONVENTION ON THE PROTECTION OF LITERARY AND ARTISTIC WORKS, Articles 1-21, last revised at Paris on July 24, 1971, and amended on September 28, 1979, [BERNE.pdf] also available at http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf
[Skim these provisions – perhaps reviewing the “titles” of each article - to see how the substantive components of the Berne Convention were “integrated” into the WTO system by TRIPS Article 9.]

3. THE WIPO COPYRIGHT TREATIES AND COMPARATIVE NATIONAL IMPLEMENTATION

WIPO Copyright Treaty (WCT), World Intellectual Property Organization [WIPO] (1996) [WCTtext.pdf] available at <http://www.wipo.int/treaties/ip/wct/>

DRAFT LAW OF COPYRIGHT AND RELATED RIGHTS FOR LAO PEOPLE’S DEMOCRATIC REPUBLIC, sometime 2004 [preparatory text based on consultations with WIPO officials; NOT for distribution outside our class] [LaoCopyright.pdf]
[Read Articles 3-9 (pp. 8-13), Articles 21-22 (pp. 20-22), and Art. 29 (pp. 28-28)]

A slightly unresolved problem . . .

Excerpt from SENATE REPORT, 105-190, REPORT OF THE SENATE JUDICIARY COMMITTEE ON S. 2037, The Digital Millennium Copyright Act, May 6, 1998 [SenateReport105-190.doc]

Atlantic Recording Corporation v. Howell, CV-06-02076-PHX-NVW (D. Arizona, April 29, 2008) [Atlantic v Howell, 2008 EDITED.doc]

Coursepack #2

A. *United States, Singaporean, and Australian implementation – digital locks and circumvention devices*

Selected provisions of U.S. DIGITAL MILLENNIUM COPYRIGHT ACT (1998), 17 U.S.C. Read § 1201 (a) through (j) and § 1202 [17USC 1201-1205.pdf]

Optional reading, not in coursepack, but available in individual .doc and .pdf files section:

U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY, December 1998. [read intro and discussions of Titles I and III at this time; you may want to refer to discussion of Title II later in the course] *available at* <http://lcweb.loc.gov/copyright/legislation/dmca.pdf> [CO-on-DMCA.pdf]

Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 2000 U.S. Dist. LEXIS 11696 (S.D.N.Y. 2000) [Universal v. Remeirdes02.doc]

Lexmark International v. Static Control Components, 387 F.3d 522; 2004 U.S. App. LEXIS 22250 (Sixth Cir. 2004) [Lexmark02.doc]

Sony Computer Entertainment v. Eddy Stevens, Federal Court of Australia, [2003] FCAFC 157, 30 July 2003 [excerpts – summary and opinions of Judge French, Lindgren, and Finkelstein] [EddyStevens2.doc]

Excerpts from SINGAPOREAN COPYRIGHT ACT in response to U.S. – Singapore “FTA” (Part XIII A, Circumvention of Technological Measures . Read with a mind to comparing to the parallel provisions of the DMCA and EU Copyright Directive) [2005CopyrightAct – PART XIII A.doc], available at <http://statutes.agc.gov.sg/>.

B. *European implementation and comparative safeguard mechanisms*

EUROPEAN UNION COPYRIGHT DIRECTIVE, Directive 2001/29/EC of the European Parliament and of the Council, 22 May 2001 [2001CopyrightDirective.pdf] [Skim “whereas” provisions and read directive articles 2-4 and 6 carefully; skip Article 5, which we study later].

Recommended Reading:

Sony Computer Entertainment v. Dretschler.com, SARL, Regional Court of Munich I, Record No. 7 O 16830/07, Judgment of 10 January 2008 [paper handout in class]

Joint Press Report, Die Deutsche Bibliothek, Börsenverein des Deutschen Buchhandels, and Bundesverband der Phonographischen Wirtschaft, 18 January 2005 (showing a private sector effort to provide access and, therefore, avoid interference with any TPM or DRM)
[vereinbarung_engl_jan2005.doc or GERMANY-Joint Press Report.pdf]

Excerpts from Norwegian Copyright Act [Norway TPM excerpts.doc]

Excerpts from Greek Copyright Law, Section IX (Legal Protection), as amended 2007 [Greek Copyright Law – TPM.doc]

Excerpts from the French Intellectual Property Code, passed in 2006 pursuant to "DADVSI," Law no. 2006-961 of 1 August 2006 on Copyright and Neighboring Rights in the Information Society [DADVSI provisions in English.doc]

Nicholas Jondet, *La France v. Apple: who's the dadvsi in DRM?*, 3 SCRIPTED (June 2006) [jondet.pdf]
also available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol3-4/jondet.asp>

Re-read 17 U.S.C. § 1201 (a) (1)(B – E) implemented in U.S. law in the DIGITAL MILLENNIUM COPYRIGHT ACT (1998)

Library of Congress, U.S. Copyright Office, **Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies**, Federal Register: November 27, 2006 (Volume 71, Number 227), pages 68472-68480
[use your own judgment in determining what to skim]

Coursepack #3

3. THE INITIAL PROBLEM OF MAINSTREAM INTERNET SERVICE PROVIDERS

A. *United States*

Selected provisions of U.S. DIGITAL MILLENNIUM COPYRIGHT ACT (1998), 17 U.S.C. § 512.
[Sec.512.pdf]

Online Policy Group, et al. v. Diebold Election Systems, 337 F. Supp. 2d 1195 (N.D. Cal. 2004)
[diebold2.doc]

B. *European Union*

EU DIRECTIVE ON ELECTRONIC COMMERCE, Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 [review articles 12 - 15 reproduced here and "whereas" clauses that you think are relevant] [EUDirectiveonECommerce.pdf]

THE MULTATULI PROJECT, ISP NOTICE & TAKE DOWN, Lecture by Sjoera Nas, *Bits of Freedom*, SANE, 1 October 2004 [MULTILAT-Notice&TakeDown.pdf]

Sections 8-11, GERMAN TELE-SERVICE ACT (*Teledienstgesetz*), as amended December 14, 2001
[GERMAN Teledienstgesetz.pdf]

C. *Japan*

INTERIM REPORT BY COPYRIGHT COUNCIL OF JAPAN (FIRST SUBGROUP) REGARDING ISP LIABILITY, December 2000
(detailing two cases of defamation and ISP liability in Japanese courts, with additional story from *Yomiuri Shimbun*) [JapanCopyrightCouncil.doc]

JAPAN PROVIDER LIABILITY LIMITATION ACT, passed November 30, 2001 and effective May 27, 2002 [the version here is a translation of the “draft,” but seems to reflect the final provisions] [draftJapanPLLA.doc]

D. *China*

INTERPRETATION BY THE SUPREME PEOPLE’S COURT (CHINA) OF SEVERAL ISSUES RELATING TO ADJUDICATION OF AND APPLICATION OF LAW TO CASES OF COPYRIGHT DISPUTES ON COMPUTER NETWORK,

Adopted at the 1144th meeting of the Adjudication Commission of the Supreme People’s Court, December 21, 2000; Amended at the 1302nd Meeting of the Commission on 23 December 2003 and Entering into Force on 7 January 2004. [CHINA-2004Intpretation.doc] also available at www.cpahklttd.com/Archives

E. *Singapore*

Excerpts from SINGAPORE COPYRIGHT ACT [Chapter 63 of Singapore Laws], Part IXA, Works, and Other Subject Matter, in Electronic Form, amended in 2004 and effective Jan. 1, 2005.

[d-2005SingaporeISPprovisions.doc] available at <http://statutes.agc.gov.sg/>

Optional reading:

Go East Entertainment Company v. Yahoo! (Beijing Alibaba Information and Technology), Beijing Higher People’s Court, (2007) Gaominzhongzi No. 1191, December 20, 2007 [Go East v. Yahoo China – Decision of BJ Higher People’s Court.doc] This is slow reading in a difficult translation, but you will be able to understand what is happening.

Course pack #4

4. P2P SERVICE PROVIDERS, PRIVACY, AND RAMIFICATIONS FOR OTHER ISPS

A. *peer to peer systems*

[You have probably studied the *Universal Studios v. Sony* (“Betamax”) decision in your basic Copyright course; it would be useful for you to review the case.]

A&M Records v. Napster, Inc., 239 F.3d 1004, 2001 U.S. App. LEXIS 5446, 2001 Cal. Daily Op. Service 1255, 2001 D.A.R. 1611, Copy. L. Rep. (CCH) P28200, 57 U.S.P.Q.2d (BNA) 1729 (9th Cir. Cal. 2001) [Napster 9th edited.doc]

In re. Aimster Litigation, 334 F.3d 643; 2003 U.S. App. LEXIS 13229. Civil Case No. 02-4125, (Posner, 7th Circuit, June 30, 2003) [AimsterPosner2.doc]

MGM v. Grokster, United States Supreme Court, 545 U.S. 913 (2005) (June 27, 2005) [GROKSTER-SCopinion.pdf]

The Rogue File Case, Heisei 14 (Wa) 4249, Tokyo District Court Decision of January 29, 2003
[The Rogue File Case – FINAL.doc is a summary translation by Shinji Niioka and Justin Hughes]

The Winny Case, Heisei 15 (Wa) 2018, Kyoto District Court Decision of November 30, 2004
[Winny Case.doc].

Universal Music Australia Pty Ltd v Sharman License Holdings Ltd [2005] FCA 1242, Federal Court of Australia Decision of 5 September 2005. [KAZAAdecision02.doc]
(Although I have massively edited this 520+ paragraph opinion, there are large parts of it you will want to skim.)

A slight digression, let's compare that with the thinking of US courts

Elektra Entertainment Group v. Barker, S.D.N.Y., March 31, 2008, No. 05-CV-7340 (KMK)
[Elektra v. Barker EDIT01.pdf]

B. *revisiting mainstream ISP liability in light of P2P reasoning?*

Perfect 10 v. Amazon, 487 F.3d 701 (9th Cir. 2007). This edit of the case only covers the contributory liability and DMCA section 512 analysis [PERFECT 10 – contributory edit.doc]

SABAM v. S.A. Scarlet, District Court of Brussels, No. 04/8975/A, Decision of 29 June 2007, published in CAELJ Translation Series #001 (Mady, Bourrouilhou, & Hughes, trans.), 25 Cardozo Arts & Ent. L. J. 1279 (2008) [FM_JB_JH_translation_FINAL.doc]

Andrew Orłowski, *China's nonstop music machine*, THE REGISTER, 13 September 2008 [Baidu – the nonstop music machine.pdf]

Completely optional; not in coursepacks, but available in individual .doc and .pdf files section.

MGM v. Grokster, BREYER concurrence, United States Supreme Court, 545 U.S. 913 (2005) (June 27, 2005)
[GROKSTER-Breyer-Concurrence.pdf]

MGM v. Grokster, United States Supreme Court, 545 U.S. 913 (2005) (June 27, 2005) [GROKSTER-Ginsburg-Concurrence.pdf]

Really and truly optional

Justin Hughes, *On Suing One's Own Customers and the Dilemma of Infringement-Based Business Models*, 23 CARDOZO ARTS & ENT. L. J. 725 (2005), download from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=681401

Coursepack #5

5 CRAFTING LIMITATIONS AND EXCEPTIONS FOR THE NETWORK

A. New enumerated exceptions or fair use?

Carefully review Article 5 of EUROPEAN UNION COPYRIGHT DIRECTIVE, Directive 2001/29/EC of the European Parliament and of the Council, 22 May 2001. *You may also want to review Articles 2-4, so you understand how Article 5 works.* [2001CopyrightDirective.pdf]

European Commission, "Green Paper," Copyright in the Knowledge Economy, COM (2008),

May 22, 2008 [2008 May green paper EDITED.doc]

Also available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0466:FIN:EN:PDF>

SKIM the first 24 pages of APEC-IPEG SURVEY ON COPYRIGHT EXCEPTIONS AND LIMITATIONS PRELIMINARY TABLE OF EXCEPTIONS AND LIMITATIONS (draft, 2007) Your course pack only has only the first 24 pages, but the entire document is on ANGEL. [APECIPEGPrelimTableCRLE.pdf]

Exceptions and Limitations excerpts from the Israeli Copyright Act of 2007, passed by the Knesset on Nov. 19, 2007, effective May 25, 2008.

[Israeli Copyright Act 2007 – exceptions.doc]

Perfect 10 v. Amazon, 487 F.3d 701 (9th Cir. 2007). This edit of the case only covers the fair use analysis [PERFECT 10 – fair use edit.doc]

Executive Summary, Introduction, and Parts I and II of P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*. Study sponsored by the Open Society Institute, March 6, 2008. [OSIfinalreport.pdf]

B. The Problem of Orphan works

Article 67 of the **Japan Copyright Act** [translation from Copyright Research and Information Center, Tokyo] [Japan Copyright Article 67.doc]

Section 77 of the **Canadian Copyright Act** (“Owners Who Cannot Be Located”) [Canadian Copyright Section 77.doc]

Three sample decisions of the Copyright Board of Canada on Section 77 applications [2005-UO-TI-26.pdf, 2005-UO-TI-36.pdf, and 2006-UO-TI-29.pdf]

The “**Orphan Works Act of 2006**” introduced in the United States House of Representatives, May 22, 2006 [Orphan Works Act of 2006.pdf], also available at <http://thomas.loc.gov/cgi-bin/query/C?c109:./temp/-c1090q6wU3>

European Digital Libraries Initiative, Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works – Joint Report (June 2008) [You can skip the attached “Memorandum of Understanding on Diligent Search Guidelines,” but it is included to show you how these groups are coming together and organizing.]

Completely optional – materials online

Copyright Board of Canada, “Unlocatable Copyright Owners” available at <http://www.cb-cda.gc.ca/unlocatable/brochurecov-e.html#multi>

Testimony of Associate Register Jules L. Sigall before Intellectual Property Subcommittee of the Senate Judiciary Committee, April 6, 2006, available at

Coursepack #6

C. Levy systems – more or less needed?

Chart showing comparative levies for EU countries, THE INDUSTRY STANDARD February 5, 2001, at 70 [Copyright Levies Europe.pdf]

Relevant provisions of the **Japan Copyright Act**, Articles 30 and 104bis-104novies – pertaining to levies on blank media and recording devices [translation from Copyright Research and Information Center, Tokyo] [[Japan Copyright Act Levy Provisions.pdf]

Relevant provisions of the **German Copyright Act** (Urheberrechtsgesetz, UrhG) on levies on blank media and recording devices in the version of published on Sep 9, 1965, as last amended on May 8, 1998.

[German Copyright Law on Levies.doc]

Decision in *Canadian Private Copying Collective (CPCC)'s Proposed Tariff of Levies to be Collected in 2008 and 2009 on the Sale of Blank Audio Recording Media*, Copyright Board Canada, File: Private Copying 2008-2009, Ottawa, July 19, 2007 [2007-07-11 Board decision EDITED anglais.doc]

Selection from Salil Mehra, *The iPod Tax: Why Japanese Law Professors Rejected the Digital Copyright System of American Law Professors' Dreams*, manuscript [read Parts III and IV only].

Summary and chapters 3, 4, and 5 from INSTITUTE FOR INFORMATION LAW (IVIR), UNIVERSITY OF AMSTERDAM, *The Future of Levies in a Digital Environment* (March 2003) [The entire report is posted on ANGEL as DRMlevies-report.pdf, but only these chapters are in the course pack; read only these chapters.]

END OF FALL 2008 SYLLABUS – VERSION 6.0
