

IPRs and their data analysis

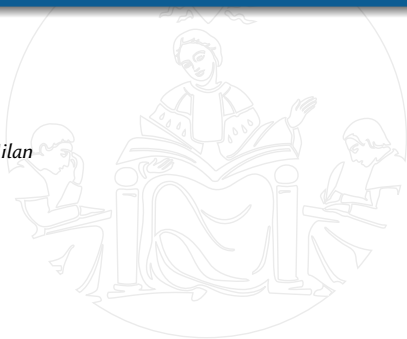
MODULE 3 – COPYRIGHTS AND OTHER IP REGIMES

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1 Copyrights

- What copyright is (not)
- Expression
- Originality
- Authorship
- Rights of the owner
- Limitations and exceptions

2 Other IP regimes



What copyright is not

- copyright does not protect *ideas*
 - telling to a friend a joke you heard from someone else is not copyright infringement
 - what makes people laugh is the idea, not the exact words
- copyright does not protect *inventions*
 - that is the realm of patents
 - sometimes the subject matter overlaps, e.g. computer software¹
 - in this case still, copyrights protect components other than inventions
- copyright does not protect *brands*
 - that is the realm of trademarks
- copying something does *not* imply copyright infringement
 - copyright infringement requires copying in a specific way
- copyright does not need *registration* for protection
 - copyright protection is *automatic*

¹https://en.wikipedia.org/wiki/Software_patents_under_TRIPs_Agreement



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What copyright is

*“Copyright protects **original expression** that is fixed in a tangible medium and is a product of **authorship**.”*
[rephrased from USC 17 § 102]

- expression is the *only* domain/subject matter of copyright protection

Q what is expression?

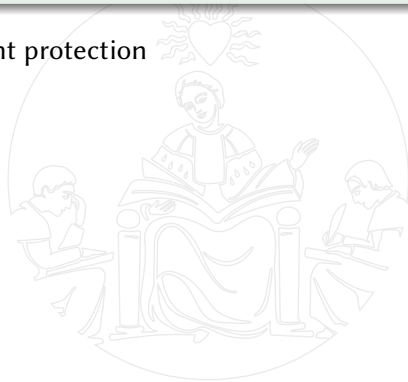
- no comprehensive definition is given
- expression is understood by exclusion of what it is not

ex. 1 newspaper article about a current event

- underlying facts/data do not constitute expression
- expression is the exposition of the article

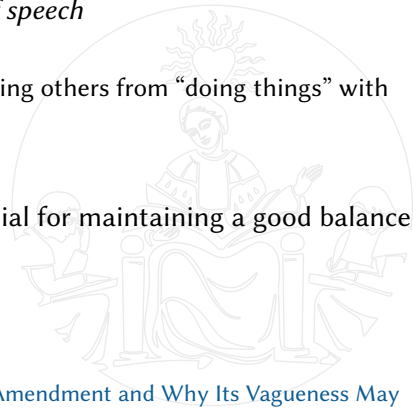
ex. 2 artist depiction of a building

- the building/architecture does not constitute expression
- expression is the drawing



Expression and freedom of speech

- there is interference between expression and *freedom of speech*
 - expression is “speech”, at least in abstract terms
 - copyrights grant creators rights in their speech, preventing others from “doing things” with their speech
 - copyright restrictions are essentially speech restrictions
- *policing* the boundaries of protectable expression is crucial for maintaining a good balance with freedom of speech²



²Wang, Edmund T. (2010) “[The Line between Copyright and the First Amendment and Why Its Vagueness May Further Free Speech Interests](#)”. *Journal of Constitutional Law* 13(5), pp. 1471–1498

The idea-expression dichotomy

Baker v. Selden (1879)

- Selden produced a method of double-bookkeeping accounting and published it in a book
- Baker copied the accounting forms used to illustrate the method, with minor modifications
- Selden claimed copyright infringement in the underlying method of accounting
- court ruled there is no copyright infringement in the method or the idea

idea-expression dichotomy

- copyrights do not protect ideas, but only expressions of ideas

“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” [USC 17 § 102]



The idea–expression dichotomy (cont'd)

Bikram's Yoga College v. Evolation Yoga (2015)

- Bikram Yoga had developed a sequence of yoga poses that it commercially taught people
- Evolation used a similar set of poses
- Bikram sued Evolation claiming copyright infringement in the sequence of poses
- court ruled that creative and aesthetically pleasing as they may be, the sequence of yoga poses is nothing more than a “system” or “method”, which are synonymous with *ideas*
- Bikram could not obtain copyright protection on the sequence of yoga poses



The idea–expression dichotomy (cont'd)

- the idea–expression dichotomy is nuanced in practical applications
- every expression has some underlying idea
- demarcating the idea from the expression is difficult in practice
 - copying the expression involves copying an idea, to a certain extent
- it is not true that if an idea is copied, it is not copyright infringement
 - when an idea is *also* copied (together with the expression) there can be copyright infringement
- courts decide on a case-by-case basis

“ideas per se fall on the free speech side of the line, while the statement of an idea in specific form, as well as the selection and arrangement of ideas fall on the copyright side of the line.” [Nimmer, 1970]



Merger doctrine

Herbert Rosenthal Jewelry Corp. v. Kalpakian (1971)



- how might one create a jewel bee which does not resemble another?
- there are not many ways of arranging gemstones on the body of a tiny bee

merger doctrine

- sometimes an idea can be expressed in only one way or in a very limited number of ways
- in this case the idea “swallows” the expression
- since ideas are ineligible for copyright protection, the expression is also ineligible

Fact-expression dichotomy

International News Service v. Associated Press (1918)

- AP published world news stories
- INS picked out facts from AP newspapers issued on the US East Coast, rewrote the stories, and published them on the US West Coast (–3h time zone difference)
- court did not protect AP under copyright infringement
 - court had to consider different kinds of protection

fact-expression dichotomy

- copyrights only protect expression of facts, but not the facts themselves
- the same facts can be taken and expressed differently w/o copyright infringement

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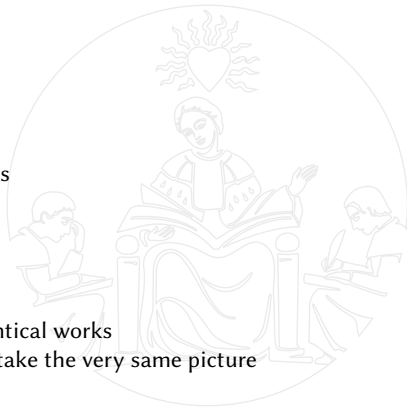


Originality

- expression qualifies for copyright protection only if it is *original*

Q what is originality?

- originality is *not* novelty
 - something original need not be previously inexistent
 - novelty is required for patents
- originality is *not* distinctiveness
 - something original need not be distinct from other things
 - distinctiveness is required for trademarks
- the work has to *originate* with the author³
 - i.e. as long as it is not copied from elsewhere
 - *non-copying* requirement or *independent creation*
 - it does not matter if there exist other similar or even identical works
 - e.g. two photographers who don't know each other and take the very same picture



³US also requires *creativity*, but it is very jurisdiction-specific

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Authorship

- for copyright protection to apply, the work has to be *authored*
- 1 work must have a *human* claimant of authorship
- 2 expression must be *causally* connected to the human agent involved



Monkey selfie episode

- a photographer left a camera on autofocus near a group of macaques
- one macaque picked the camera and pressed the shoot button
- the photographer claimed copyright of the selfie
- court ruled that the selfie does not have a human author
- author is in fact the macaque, but it is not a human
- there is a human element, but not causally linked with the work



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Reproduction right

- copyrights protect the exclusive right to *copy* the work
- owner alone can *reproduce* the work in copies or authorise someone to do so

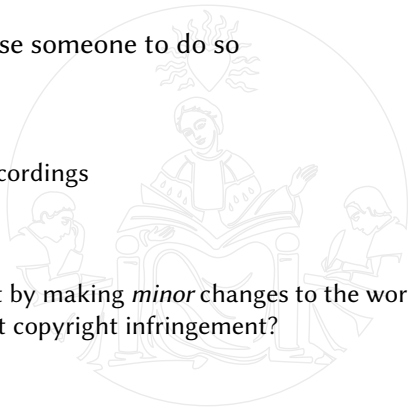
Q how to determine if this right has been violated?

literal copying : copying is exact/verbatim/identical

- e.g. digital downloads, electronic copies, photocopies, recordings
- easy to figure out infringement

non-literal copying : copying with some modifications

- potential infringer should not be able to get away with it by making *minor* changes to the work
- Q how much modification is needed beyond which it is not copyright infringement?



Substantial similarity test

substantial similarity test

1 was there *actual copying*?

2 did the copying produce a *substantially similar copy*?

1 was there an *appropriation*?

- independent creation can produce copyrights for very similar works

Q has the defendant actually viewed, heard, known... the work and sought to reproduce it?

2 are two works *qualitatively* and *quantitatively* similar enough that the act of copying should be considered wrongful?

- very subjective question based on the overall comparison of the two works
- courts decide on a case-by-case basis

Software use https://en.wikipedia.org/wiki/Abstraction-Filtration-Comparison_test



Substantial similarity test (cont'd)



Public distribution right

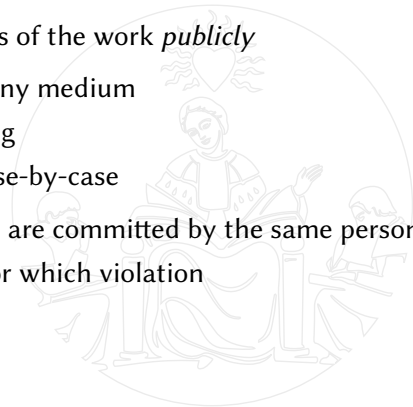
- copyrights protect the exclusive right to *distribute* copies of the work *publicly*

copy: a reproduction of the protected expression in any medium

distribution: sale, transfer of ownership, rental, lease, lending

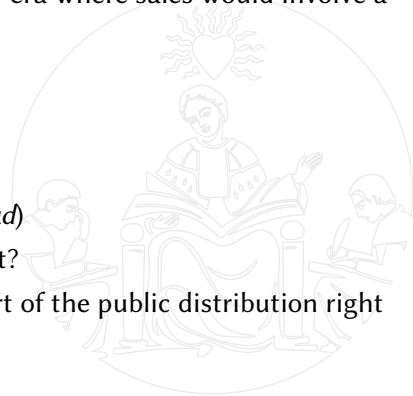
public vs. private: hard to trace the boundary, courts rule case-by-case

- sometimes violations of copy and [re]distribution rights are committed by the same person
- sometimes are not, and owner can choose who to sue for which violation



Public distribution right and the internet

- public distribution right was conceived in the “physical” era where sales would involve a tangible copy and transfer of possession
 - with the advent of the internet
 - a copy can be made easily
 - that copy can be circulated as easily
 - impossible to tell the original from the copy
 - controversy over internet *uploads* (for others to *download*)
- Q does uploading a file violate the public distribution right?
- in many jurisdictions the “making available right” is part of the public distribution right



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First-sale doctrine

example

- you buy a book lawfully from a bookshop
- once you read it, you want to resell it or engage in “bookcrossing”
- taken *literally*, you are violating the public distribution right
- you do not have authorisation from the copyright owner to distribute the copy

first-sale doctrine (AKA doctrine of exhaustion)

- if first copy was *lawful*, the *owner* of that copy is entitled to transfer/distribute it without violating the public distribution right
 - 1 first copy must be lawful
 - 2 person must be the owner
-
- first-sale doctrine allows second-hand markets for copyrighted works of expression



fair use doctrine

“the fair use of a copyrighted work [...] 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 [...] 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.”*

[US Copyright Act § 107]

Fair use doctrine (cont'd)

transformative fair use

- sometimes the use of a copyrighted work modifies, adapts, or transforms it, giving it a new purpose, content, or meaning
 - e.g. parody, collage
- not automatically fair use but some of the factors get influenced

technological fair use

- fair use standards are adapted to new technologies
- time-shifting and space-shifting (*ordinary* fair use)
- thumbnails and snippets in search engines (*transformative* fair use)

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trade secrets

<i>subject matter</i>	secret information
<i>standard</i>	actual secrecy and <i>effort</i> to protect it
<i>acquisition</i>	automatic
<i>term</i>	potentially perpetual

Rights of publicity

rights of publicity

<i>subject matter</i>	public reputation, public image
<i>standard</i>	public recognition
<i>acquisition</i>	automatic
<i>term</i>	potentially perpetual



design patents

<i>subject matter</i>	product designs ($\neq$ trade dress)
<i>standard</i>	novelty, disclosure
<i>acquisition</i>	application process
<i>term</i>	jurisdiction-specific (14 years in US, 5-25 years in EU)