**Handouts of Lecture 13 Professional Practices (IT)**

**Lecture Title: Intellectual Property Rights (Cont.)**

**Copyright**

A copyright is how the US government provides authors with certain rights to original works that they have written. The owner of a copyright has five principal rights:

1. The right to reproduce the copyrighted work

2. The right to distribute copies of the work to the public

3. The right to display copies of the work in public

4. The right to perform the work in public

5. The right to produce new works derived from the copyrighted work.

Copyright owners have the right to authorize others to exercise these five rights with respect to their works. The owner of a copyright to a play may sell a license to a high school drama club that wishes to perform it. After a radio station broadcasts a song, it must pay the songwriter(s) and the composer(s) through a performance rights organization such as ASCAP, BMI, or SESAC. Copyright owners also have the right to prevent others from infringing on their rights to control the reproduction, distribution, display, performance, and production of works derived from their copyrighted work.

Several important industries in the United States, including the movie industry, music industry, software industry, and book publishing, rely upon copyright law for protection. “Copyright industries” account for over 6 percent of the United States gross domestic product, with over $900 billion in sales. About 5 million US citizens work in these industries, which are growing at a much faster rate than the rest of the US economy. With foreign sales and exports of $134 billion, copyright industries were the leading export sector in the United States in 2010.

**Key Court Cases and Legislation**

GERSHWIN PUBLISHING v. COLUMBIA ARTISTS

Columbia Artists Management, Inc. (CAMI) managed concert artists, and it sponsored hundreds of local, nonprofit community concert associations that arranged concert series featuring CAMI artists. CAMI helped the associations prepare budgets, select artists, and sell tickets. CAMI printed the programs and sold them to the community concert associations. In addition, all musicians performing at these concerts paid CAMI a portion of their fees. On January 9, 1965, the CAMI-sponsored Port Washington (NY) Community Concert Association put on a concert that included Gershwin’s “Bess, You Is My Woman Now” without obtaining copyright clearance from Gershwin Publishing Corporation. The American Society of Composers, Authors, and Publishers (ASCAP) sued CAMI for the copyright infringement. CAMI argued that it was not responsible for the copyright infringement, since the concert was put on by the Port Washington Community Concert Association. However, the US District Court for the Southern District of New York ruled that CAMI could be held liable because it was aware that the community concert associations it supported were not obtaining proper copyright clearances. In 1971 the US Court of Appeals for the Second Circuit upheld the ruling of the district court.

BASIC BOOKS v. KINKO’S GRAPHICS

In the 1980s, Kinko’s Graphics Corporation engaged in what it called the “Professor Publishing” business. It distributed brochures to university professors asking them to provide lists of readings they planned to use in their courses. Kinko’s used these lists to produce packets of reading materials for students taking these classes. The packets typically contained chapters from books. In 1991 the US District Court for the Southern District of New York ruled that when Kinko’s produced these packets it infringed upon the copyrights held by the publishers. The judge ordered Kinko’s to pay statutory damages of $510,000 to the plaintiffs, a group of eight book publishers. Kinko’s subsequently got out of the Professor Publishing business.

DAVEY JONES LOCKER

Richard Kenadek ran a computer bulletin board system (BBS) called Davey Jones Locker. Subscribers paid $99 a year for access to the BBS, which contained copies of more than 200 commercial programs. In 1994 Kenadek was indicted for infringing on the copyrights of the owners of the software. He pleaded guilty and was sentenced to six months’ home confinement and two years’ probation.

**Copyright creep**

According to Siva Vaidhyanathan, “in the early republic and the first century of American legal history, copyright was a Madisonian compromise, a necessary evil, a limited, artificial monopoly, not to be granted or expanded lightly”. Over time, however, Congress has gradually increased both the term of copyright protection and the kind of intellectual properties that are protected by copyright. One reason has been the desire to have international copyright agreements. In order to complete these agreements, Congress has had to reconcile American copyright law with European law, which in general has had much stronger protections for the producers of intellectual property. Another reason for “copyright creep” has been the introduction of new technologies, such as photography, audio recording, and video recording. For example, since 1831 music publishers have been able to copyright sheet music and collect royalties from musicians performing this music in public. In 1899 Melville Clark introduced the Apollo player piano, which played songs recorded on rolls of heavy paper. Apollo manufactured and sold piano rolls of copyrighted songs. White-Smith Music Company sued Apollo for infringing on its copyrights. In 1908 the Supreme Court ruled that Apollo had not infringed on White-Smith Music’s copyrights. The court suggested that Congress ought to change copyright law if it wanted owners of copyrights to have control over recordings such as piano rolls and phonograph records. Congress responded by revising the Copyright Act in 1909. The new copyright law recognized that player piano rolls and phonograph records could be copyrighted.

In 2004 the Royal Society of Arts in London commissioned an international group of artists, scientists, and lawyers to create a statement regarding intellectual property laws. The group wrote the Adelphi Charter on Creativity, Innovation and Intellectual Property. Within the charter is the following statement: “The expansion in the law’s breadth, score, and term over the last 30 years has resulted in an intellectual property regime which is radically out of line with modern technological, economic and social trends. This threatens the chain of creativity and innovation on which we and future generations depend”. The charter proposes a set of public interest tests that governments should apply before approving further changes to intellectual property laws. To date, the Adelphi Charter has had little influence on the global debate over intellectual property.

**Fair Use**

The right given to a copyright owner to reproduce a work is a limited right. Under some circumstances, called fair use, it is legal to reproduce a copyrighted work without the permission of the copyright holder. Examples of fair use include citing short excerpts from copyrighted works for the purpose of teaching, scholarship, research, criticism, commentary, and news reporting. The United States Copyright Act does not precisely list the kinds of copying that are fair use. Instead, what is considered to be fair use has been determined by the judicial system? The courts have relied upon Section 107 of the Copyright Act, which lists four factors that need to be considered.

1. What is the purpose and character of the use? An educational use is more likely to be permissible than a commercial use.

2. What is the nature of the work being copied? Use of nonfiction is more likely to be permissible than use of fiction. Published works are preferred over unpublished works.

3. How much of the copyrighted work is being used? Brief excerpts are more likely to be permissible than entire chapters.

4. How will this use affect the market for the copyrighted work? Use of out-of-print material is more likely to be permissible than use of a readily available work. A spontaneously chosen selection is better than an assigned reading in the course syllabus.

Fair use Example #1

A professor puts a few journal articles on reserve in the library and makes them assigned reading for the class. Some students in the class complain that they cannot get access to the articles because other students always seem to have them checked out. The professor scans them and posts them on his Web site. The professor gives the students in the class the password they need to access the articles.

The first factor to consider is the purpose of the use. In this case the purpose is strictly educational. This factor weighs in favor of fair use.

The second factor is the nature of the work being copied. The journal articles are nonfiction. Again this weighs in favor of fair use.

The third factor is the amount of material being copied. The fact that the professor is copying entire articles rather than brief excerpts weighs against a ruling of fair use.

The fourth factor is the effect the copying will have on the market for journal sales. If the journal issues containing these articles are no longer for sale, then the professor’s actions cannot affect the market. The professor took care to prevent people outside the class from accessing the articles. Overall, this factor appears to weigh in favor of fair use. Three of the four factors weigh in favor of fair use. The professor’s actions probably constitute fair use of the copyrighted material.

Fair use Example #2

An art professor takes slide photographs of a number of paintings reproduced in a book about Renaissance artists. She uses the slides in her class lectures.

The first factor to consider is the purpose of the copying. The professor’s purpose is strictly educational. Hence the first factor weighs in favor of fair use.

The second factor is the type of material being copied. The material is art. Hence this factor weighs against a ruling of fair use.

The third factor is the amount of material copied. In this case, the professor is displaying copies of the paintings in their entirety. Fair use almost never allows a work to be copied in its entirety.

Note that even if the original painting is in the public domain, the photograph of the painting appearing in the art book is probably copyrighted. The final factor is the effect the copying will have on the market. The determination of this factor would depend on how many images the professor took from any one book and whether the publisher is in the business of selling slides of individual images appearing in its book. Overall, this professor’s actions are less likely to be considered fair use than the actions of the professor in the first scenario.

***Sony v. Universal City Studios***

In 1975 Sony introduced its Betamax system, the first consumer VCR. People used these systems to record television shows for viewing later, a practice called ***time shifting***. Some customers recorded entire movies onto videotape. A year later, Universal City Studios and Walt Disney Productions sued Sony, saying it was responsible for copyright infringements performed by those who had purchased VCRs. The movie studios sought monetary damages from Sony and an injunction against the manufacturing and marketing of VCRs. The legal battle went all the way to the US Supreme Court. The Supreme Court evaluated the case in light of the four fair use factors.

The first factor is the intended purpose of the copying. Since the purpose is private, not commercial, time shifting should be seen as fair use with respect to the first factor.

The second factor is the nature of the copied work. Consumers who are time shifting are copying creative work. This would tend to weigh against a ruling of fair use.

The third factor is the amount of material copied. Since a consumer copies the entire work, this weighs against a ruling of fair use.

The final factor is the effect time shifting will have on the market for the work. The Court determined that the studios were unable to demonstrate that time shifting had eroded the commercial value of their copyrights. The movie studios receive large fees from television stations in return for allowing their movies to be broadcast. Television stations can pay these large fees to the studios because they receive income from advertisers. Advertising rates depend upon the size of the audience; the larger the audience, the more a television station can charge an advertiser to broadcast a commercial. Time shifting allows people who would not ordinarily be able to watch a show to view it later. Hence it can be argued that VCRs actually increase the size of the audience, and since audience size determines the fees studios receive to have their movies broadcast on television, it is not at all clear whether the copying of these programs harms the studios.

**Digital Recording Technology**

In the not-so-distant past, music publishers distributed content on vinyl records, and some purchasers made backup copies on cassette tapes. The copying process introduced hiss and distortions that significantly degraded the quality of the music. Trying to make a copy from a copy resulted in a nearly worthless tape. Music publishers focused on suing major violators of copyright law (those producing thousands of tapes) and ignored people who made a few copies of albums for their friends.

Digital technologies disrupted the status quo. The first of these technologies was the compact disc (CD). Initially the introduction of CDs was a huge boon for the music publishing industry. The per-unit production cost of CDs was lower than vinyl albums or tapes, but their sound quality was higher, meaning companies could charge more for them. As a result, their profits swelled.

**Audio Home Recording Act of 1992**

The Audio Home Recording Act represents a compromise between the desires of the recording industry, the electronics industry, and consumers. The Act protects the right of consumers to make copies of analog or digital recordings for personal, noncommercial use. For example, a consumer may copy a recording to put in another music player, to give to another family member, or to use as a backup.

To reduce the problem of unauthorized copying, the Audio Home Recording Act requires manufacturers of digital audio recorders to incorporate the Serial Copyright Management System (SCMS). The SCMS allows a consumer to make a digital copy from the original recording, but it prevents someone from making a copy of the copy. To compensate artists and recording companies from the loss of sales due to copying, the Audio Home Recording Act requires a royalty to be paid on the sale of all digital audio recording devices and blank digital audio recording media. The royalties are divided among songwriters, music publishers, musicians, and recording companies, based on the popularity of their music. As it turns out, these royalty payments have never been a significant source of income for any of these groups.

***RIAA v. Diamond Multimedia***

A compression algorithm reduces the number of bits needed to store a picture or sound. The most popular compression algorithm for music is MP3, which was developed by a team of European scientists. An MP3 music file is typically less than 10 percent the size of the original file, but it is difficult to hear the difference between the original and the compressed versions.

The availability of MP3 encoders and decoders in the mid-1990s helped speed the development of portable music players. Diamond Multimedia Systems introduced the Rio MP3 portable music player in 1998. About the size of an audiocassette, the Rio stored an hour of digitized music. The Recording Industry Association of America (RIAA) asked for an injunction preventing Diamond Multimedia from manufacturing and distributing the Rio. The RIAA alleged that the Rio did not meet the requirements for the Audio Home Recording Act of 1992 because it did not employ the Serial Copyright Management System to prevent unauthorized copying of copyrighted material.

The US Court of Appeals, Ninth Circuit, upheld the ruling of a lower court that the Rio was not a digital audio recording device as defined by the Audio Home Recording Act. It denied the injunction on these technical grounds. In addition, the Court affirmed that space shifting, or copying a recording in order to make it portable, is fair use and entirely consistent with copyright law.

**Space Shifting**

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***Kelly v. Arriba Soft***

Leslie Kelly was a photographer who maintained a Web site containing many of his copyrighted photos. Arriba Soft Corporation created an Internet-based search engine that responded to user queries by displaying thumbnail images. Arriba Soft created the thumbnail images by copying images from other Web sites. When Kelly discovered that the Arriba Soft search engine was displaying thumbnail images of his photographs, he sued Arriba Soft for copyright infringement. The US Court of Appeals, Ninth Circuit, upheld the ruling of a lower court that Arriba Soft’s use of the images was a fair use of the work. Two factors heavily favored Arriba Soft’s claim of fair use. First, the character and purpose of Arriba Soft’s use of the images was “significantly transformative”. Kelly’s original images were artistic creations designed to provide the viewer with an aesthetic experience. Arriba Soft’s use of the thumbnails was to create a searchable index that would make it easier for people to find images on the Internet. The thumbnail images had such low resolution that enlarging them resulted in a blurry image with little aesthetic appeal. Second, Arriba Soft’s use of Kelly’s images did not harm the value of the original images or the market for these images. If anything, the search engine’s display of Kelly’s images “would guide users to Kelly’s web site rather than away from it,” increasing the demand for his photographs.

***Reference***

***Lecture 13 slides: Intellectual Property Rights***

***Gao, Y. (2012). Ethics for the Information Age by Michael J. Quinn. World Libraries, 20(1).***