

ApacheCon

American Fair Use in Court

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Fair Use in Context

- What does copyright law cover?
- What constitutes infringement?
- When is infringement okay?
- How have the courts ruled on Fair Use?



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Copyright

- Protects fixed creative expressions
- Exclusive rights:
 - reproduction (to copy)
 - creation of derivative works (to modify)
 - distribution (to publicly release)
 - public display (to exhibit)
 - public performance (to stream)



Infringement

- *Direct* infringement:
 - direct violation of another's copyright rights
- *Contributory* infringement:
 - knowledge and contribution/inducement
- *Vicarious* infringement:
 - control and financial benefit



Proving Infringement

- Two factors in determining infringement:
 - access to a work
 - substantial similarity to that work
 - literal elements and concept/feel
 - Abstraction, Filtration, Comparison

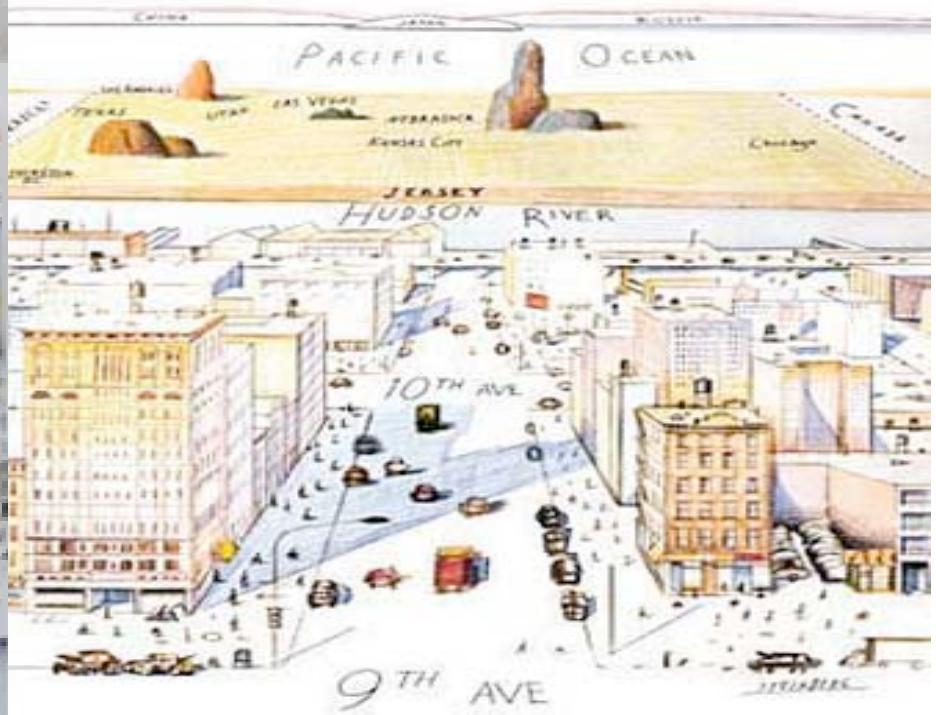


Not Protected by Copyright

- Facts
- Ideas
- Commonplace elements
- Trivial violations



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Legitimate Infringement

among others...

- Estoppel
 - Copyright owner knew & implied permission
 - *Field v. Google* 2006
- Fair Use
 - Formalized in Section 107 of Copyright Act
 - Can one agree to forfeit this exception?

Fair Use: Section 107 Factors

1. Purpose and character of infringing work
2. Nature of the infringed work
3. Substantiality used relative to whole
4. Impact on potential market/value of work



Cases: Interoperability

- Sega v. Accolade (9th Cir 1992)
 - disassembly to access unprotected aspects for discovery of compatibility to create compat. game
- Galoob Toys v. Nintendo (9th Cir 1992)
 - Game Genie not creating deriv work since not incorporating original work in concrete form
- Sony v. Connectix (9th Cir 2000)
 - copied Playstation BIOS to create emulator
 - issue was intermediate copying, not final product

Cases: Web Copying / Linking

- Kelly v. Arriba Soft (9th Cir 1999)
 - thumbnails more transformative than consumptive
- Perfect 10 v. Google (9th Cir 2007?)
 - incorporation test vs. server test
 - market for thumbnails and AdSense
 - not vicarious since no control like Napster



Applying Fair Use

- Attempt to get explicit permission first.
- Be careful with EULAs and Fair Use.
- Use four factors and case law as a guide.
- Consult your attorney.
- Understand there can be no certification of fair use before a trial.



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Questions?

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