US Constitution
Article I, Section 8

The Congress shall have Power…

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
Copyrights vs. Patents vs. Trademarks

- **Copyrights** protect original artistic expressions in a tangible medium
- **Patents** protect inventions, must have utility
- **Trademarks** protect brand identity, customer good will

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Each grants a bundle of rights to its respective owner; either the exclusive right to do OR the right to exclude others from doing
Copyrights vs. Patents vs. Trademarks

• Overlap between Copyright and Trademark is possible
  – Logos
  – Mascots
  – Graphic designs
Copyrights vs. Patents vs. Trademarks

• Overlap between Copyright and Trademark is possible
  – Logos
  – Mascots
  – Graphic designs
• Separate registration is required
• Different government entities
  – US Patent and Trademark Office
  – US Copyright Office
What is the scope of copyright?

Copyright over a work is the EXCLUSIVE right to:

– Reproduce the work
– Prepare derivatives (sequels, prequels, modifications, translations, etc.) based on the work
– Distribute copies of the work by sale or other transfer
– Display the work publicly
– Perform the work publicly
What is protected? (17 USC § 102a)

1) literary works;
2) musical works, including any accompanying words;
3) dramatic works, including any accompanying music;
4) pantomimes and choreographic works;
5) pictorial, graphic, and sculptural works;
6) motion pictures and other audiovisual works;
7) sound recordings; and
8) architectural works.
Protection is NOT extended to

- Ideas
- Procedures
- Processes
- Systems
- Methods of operating
- Concepts
- Principles
- Discoveries
- Information (distinguished from Collections of)
Derivative and Collective Works

In the case of a compilation, collection, or derivative work, copyright extends only to material contributed by the author of the compilation, collection or derivation, and NOT to any of the underlying work(s).
Derivative and Collective Works

The author of a compilation, collection or derivative work may not individually reproduce (standing alone or otherwise out of context) any of the underlying work(s).
Who owns a copyright?

• Generally speaking, the author or artist
• If a joint work, each author or artist, unless there is an agreement to the contrary
• Works for hire, generally owned by the Employer
  – Written agreements?
  – Scope of employment?
  – Control by employer?
  – Intent of parties?
  – Express assignment?
Who owns a copyright?

• When in doubt, obtain a written assignment.

• A Copyright is just like any other piece of personal property.

• It may be sold, traded, gifted, devised, or put up for collateral.

• Upon death, it passes by will or via intestate succession.
Who owns a copyright?

• However, ownership of the work is NOT equal to ownership of Copyright in that work.

• The grantor must intend that the Grantee take Copyright as well.

• Transfers may be recorded in the Copyright Office, but not required.
Joint Works

- Two or more authors contribute to a work with the shared intention that the contributions be merged to form a whole

- Each co-author owns an undivided equal share in the copyright

- Subject to a duty to account for profits
Term

- Life of author + 70 years

- Joint work, last surviving author

- Anonymous, Pseudonymous, or Works for hire, 95 years from publication or 120 years from date of creation, whichever is shorter
Yours or Mine?

• Many works prepared by employees would ordinarily fit the definition of works for hire

• HOWEVER…

• UND recognizes and honors a long-standing academic tradition that vests creators with copyright in their scholarly works.

• The University will disclaim its ownership.
Yours or Mine?

• Some types of works by employees are retained by the University
  – Works specifically commissioned
  – Works prepared at the University’s direction

• Creators may also choose to have the University retain ownership even where they might otherwise be entitled.
Benefits of University ownership

• The University is responsible for registering, protecting and enforcing copyright
• The University will handle all contract negotiations with publishers, others
• Authors are entitled to a percentage of royalty income derived from their copyrighted work
Notice

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• Informs the public of a claim to copyright ownership.
• Before March 1, 1989, notice was a requirement.
• Publication without notice was FATAL.
Notice

• Now, notice is no longer required to maintain protection, but still a good idea.

• Defeats claim of ‘innocent infringement’.

• No registration is required to affix a notice.
Registration

- Handled through US Copyright Office, a division of the Library of Congress
- NOT required for protection to attach
- IS required before an action for infringement may be brought
- If made within 5 years of publication, establishes presumption of validity in court
- If made within 3 months of publication, entitles owner to damages and attorney fees in court
Registration

- Recordable with customs service to block importation of infringing copies
- May be made at any time during life of copyright
- Effective date = date on which the Copyright Office receives all materials
- Electronic filing has basically supplanted paper filing
Enforcing Copyright

• Upon discovery of infringement, usually mail a ‘cease and desist letter

• Place infringer on notice
Enforcing Copyright

STATUTORY DAMAGES (early Reg req’d)

• An award of between $750.00 and $30,000.00 for each act of infringement
• If willful, cap increases to $150,000.00
• If ‘innocent’, award may be reduced to $250.00.
• Costs and attorney fees at discretion of Court
Enforcing Copyright

CRIMINAL SANCTIONS
• Infringement may constitute a crime
• Punishable by fines and imprisonment
• Generally requires willful conduct
• Committed for purposes of commercial advantage or private financial gain

STATUTE OF LIMITATIONS
• Civil, 3 years
• Criminal, 5 years
Enforcing Copyright

• Fraudulent copyright notice
• Fraudulent removal of copyright notice
• False representation to the Copyright Office in procuring a registration

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• Each punishable by fines up to $2,500.00
Enforcing Copyright

How does a Plaintiff win a copyright infringement case?

1) Must prove ownership (i.e., a valid US registration)

2) Must prove access to copyrighted work by Defendant

3) Must prove “substantial similarity” of infringing work to copyrighted work
Enforcing Copyright

• Defendant’s intent and knowledge are not relevant.
• NOT AS EASY AS IT MAY SEEM!
• Identical rip-offs are rare
• The more variations between original and “copy”, the more difficult the proof of infringement becomes
“Moral Rights”

• “Non-Copyright” causes of action
  – False attribution
  – Distortion
  – Truncation
  – Mutilation
  – Destruction
Enforcing Copyright

• Defenses to copyright infringement
  – Fair use
  – Independent creation
  – Borrowed from public domain
  – Invalidity of copyright
  – Misuse by copyright owner (e.g., unreasonable conduct; against public policy)
  – Abandonment by copyright owner (e.g., explicit grant of work into public domain)
Can I use it?

- Two “safe harbors”
  - Get permission
  - Don’t do it
- Everything else involves risk
- Is it worth it?
- Alternatives?
  - Public domain
  - Creative Commons
Fair Use

• “Fair use” of a copyrighted work is allowed
• No liability for infringement and author is not entitled to a royalty
• Generally limited to:
  – Criticism
  – Comment
  – News reporting
  – Teaching
  – Scholarship
  – Research
Fair Use

- Fair use is not carte blanche
- There are restrictions
- Competing interests are balanced

CONSIDERATIONS
1) Purpose and character of use (commercial vs. non-profit)
2) Nature of copyrighted work
3) Amount of work used versus work as a whole
4) Effect of use on market value of copyrighted work
(In)Famous Cases

• Sony v. Universal (1984), U.S. Supreme Court holds that VCR home recording of copyrighted television programs for personal viewing is protected as fair use

• Napster (2001), Ninth Circuit holds that Napster may be held liable for hosting ‘file-swapping’ downloads of copyrighted music

• Campbell v. Acuff-Rose (1994), U.S. Supreme Court holds that commercial parody (2 Live Crew’s rap version of popular Roy Orbison song “Oh Pretty Woman”) qualifies as fair use
Copyright Litigation

- Controversies and lawsuits frequently arise out of popular films and television programs
- Normally, an aggrieved author or screenwriter complains that the script of a (usually successful) film was stolen by an unscrupulous studio
- Compare ‘scènes à faire’, discrete genres
- Idea-expression dichotomy
Online Resources

- Official
  
  www.copyright.gov

- Unofficial web-sites abound; browse with care!
Contact Information

• Office of Intellectual Property Commercialization and Economic Development
• Twamley Hall, Room 102
• 777-6772
• Michelle Meyer, Marketing and Legal Assistant
• Tara Kopplin, Licensing Assistant
• Jason Jenkins, Patent Attorney
• On the web: www.und.edu/dept/ipcomm
Thank you.
Upcoming U2 Seminar

• Office of IP Commercialization & Economic Development – What Does it Do
  – Tuesday, June 1, 9:00 a.m.
• Session meets here in Swanson 16-18