

Internet Law

- Module 8
- Database Protection

© And Collections of Facts or Other Materials

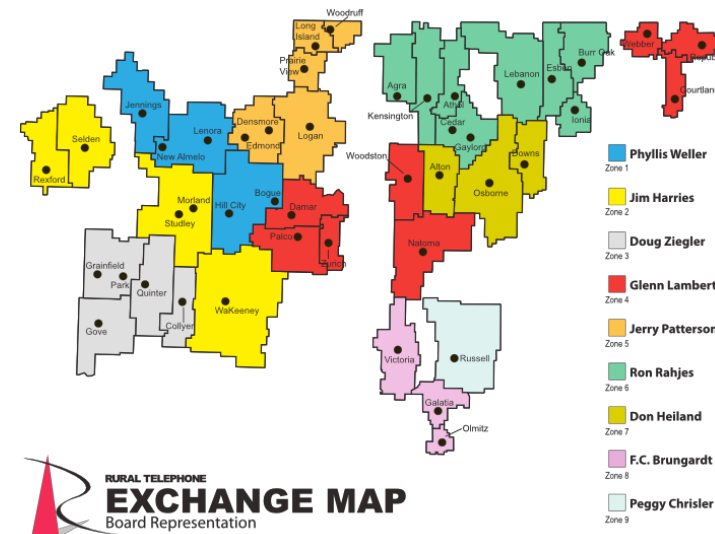
- It had long been established that a separate © protection could attach to **collections** of items, over that in the individual items (whether copyrightable or not) themselves...
- Traditional © doctrine held that in order to qualify for © protection, it is only the **CREATIVITY** in the **SELECTION** and **ARRANGEMENT** of the items that is separately protected by the law of © in collections...
- But, over time the issue of protecting investment of time or money appeared...

Protection for “Sweat of the Brow”

- *Gray v. Russell* (CCD Mass. 1839)—© in maps...
 - *Justice Story*—”although all maps of the same region feature the same *selection* and *arrangement*, another person has no right, without any such surveys and labors to sit down and copy the whole of the map already produced by the skill and labors of the first party, and thus to rob him of all the fruit of his industry, skill and expenditures...”
- However, in the *Trademark Cases* (US-1879)—Creativity
 - In ruling that the IP Clause did not give Congress the power to enact Federal Trademark Law (Commerce Clause does...), the court held unequivocally that the use of the word “original” in that clause requires that “originality” (i.e. *creativity*) is an absolute requirement for Federal Copyright protection. (This was expressly imposed in the 1976 © Act).
 - *Bleistein v. Donaldson* (US 1903) “The quantum of originality required is very low...”
 - Unfortunately, this was not seen as a revocation of “Sweat-of-the-Brow.”
 - Many cases upholding “Sweat-of-the-Brow” followed (even after the 1976 © Act!!!)
 - (e.g. *Schroeder v. William Morrow & Co.*, (7th Cir. 1977), and *Illinois Bell Tel. v. Haines & Co.* (N.D. Ill. 1988))
- Preemption Precludes many attempts to obtain “Sweat-of-the-Brow” protection through State Laws.
 - That which Federal Law explicitly casts into the public domain, may not be taken back from The Public by the states... (But see State Causes Below...)

Feist v. Rural Telephone – 499 U.S. 340 (1991)

- Feist wanted to publish a composite “White Pages” for all of an area of Kansas served by several local telephone companies. They offered to buy the subscriber information, and all of the companies agreed, except Rural Telephone...
- So, Feist copied the names, addresses and telephone numbers from Rural’s published White Pages, and Rural sued for copyright infringement...



Rural embedded a number of fake entries in their White Pages as a check against copying, and that is how they could prove copying...

Creativity v. Facts & “Sweat-of-the-Brow”

- © clearly protects creativity, but because of the earlier cases suggesting that where someone had also invested substantially (either monetarily or by “sweat of the brow”) that © protection would also attach, was still good law...
- In *Feist v. Rural Telephone*, Justice O’ Connor eloquently put to rest any remaining doubt about the “Sweat-of-the-Brow” doctrine.
- The holding in *Feist* stated unequivocally that: “the *sine qua non* of copyright is originality”. However, the standard for creativity is extremely low. It need not be novel, rather it only needs to possess a “spark” or “minimal degree” of creativity to be protected by copyright. “Sweat-of-the-Brow” carries no weight in this standard...
 - (Rural argued that alphabetized the list of names was their creative contribution—Justice O’ Connor stated that the threshold for creativity is very low, but not that low...

Federal Preemption by the © Act

- Any State Law that purports to protect **subject matter** that is included within the protection of the © Act...
 - Note that this means the class of subject matter, and NOT whether it possess sufficient “originality” to be protected...
- **AND**, the **rights granted** are equivalent to those granted by the © Act...
 - e.g. reproduction, distribution, derivative works, public display,....
- **ARE PREEMPTED...**
- The existing preemption case law has held:
 - If an **extra element** is required in addition to infringement of the rights granted in the © Act, then the State Law may not be preempted...
 - Courts have suggested that in order not to be preempted, the State Law must change the “nature of the of the action so that it is qualitatively different from a copyright infringement claim.
 - And, as already stated, it cannot generally remove from the public domain that which the © Act has effectively placed there...

State Law Protection—Misappropriation

- A tort cause of action within the Law of Unfair Competition, wherein a business cannot misappropriate information from a competitor gaining and unfair competitive advantage...
 - P generates or gathers information at a cost, and
 - The information is “time-sensitive,” and
 - D’s use constitutes “free-riding” on P’s efforts, and
 - D and P are in direct competition, and
 - The ability to “free-ride” would reduce the incentive to provide the product or service associated with the information...
- It has been successfully applied mostly in “Hot-News” situations...
 - NBA v. Motorola (2nd Cir. 1997)
 - US Sporting v. Johnny Stewart Game Calls (TX Ct. App. 10th Dist. 1993)
 - P recorded actual wild game sounds and provided the recordings of them for use by hunters. D copied and marketed them in competition with P. The Court ruled that this was Misappropriation and granted a permanent injunction and damages.

State law Protection—Trade Secrets

- *Kewanee Oil Co. v. Bicron*, (US 1974)
 - SC ruled that State Trade Secret Laws were NOT PREEMPTED by the © Act, using the “Extra Element Test,” the extra element being the requirement for secrecy...
 - This is usable to protect databases which contain information that is not generally available to the public, and is useful in commerce. (e.g. customer lists, etc.)

State Law Protection—Breach of Contract

- Generally, Contract law can be (and is widely) used to protect factual information in databases by requiring the formation of a contract to obtain access to the database's information, and then contractually limiting the rights the user has regarding the data, including, but not limited to all of the rights of a © owner.
- This is not preempted because of the requirement for there to be a contract.
- “Click-wrap” licenses have been ruled valid contracts as are the normal “I Agree” online contracts...
- However, contract is only valid to constrain those in privity, and cannot reach anyone who is not in privity.
 - But See... Tortious Interference with Contract...
 - However, this requires knowledge on the part of the third party, and there is no protection against an innocent third party...

State Law Protection—Trespass to Chattels

- If a database resides on a computer system and someone gains access for an unauthorized purpose, there may be causes under the theory of Trespass to Chattels...
 - Consider:
 - eBay v. Bidder's Edge...
 - Bidder's Edge accessed eBay's website which contained a factual information database (the current bids for all objects for sale on eBay), and because their access was deemed not to be authorized by implication, their access was ruled Trespass to Chattels...

State Law Protection—Computer Fraud

- Beyond Trespass to Chattels, absolute unauthorized access, such as stealing passwords and accessing a protected site, Computer Fraud statutes would provide criminal causes of action to protect such databases...
- This access does not have to be by theft of passwords, but can apply whenever someone “intentionally accesses a computer without authorization.”
 - For example, if I just leave a computer connected to the Internet and un-password protected, there is no implied license to access that computer...

The Fallout from Feist...

- International Legal Response:
 - Canada
 - *Tele-Direct Inc. v. American Bus. Info. Inc.* (1997) 76 C.P.R. (3d) 296
Adopted *Feist*.
 - *CCH Canadian Ltd. v. Law Society of Upper Canada*. (2004) S.S.C.
Carved out an exception: ...where facts were not obtained from others...
 - UK
 - *Walter v. Lane* (1903) House of Lords—holding that reporters of verbatim speeches were also authors for the purpose of © law. Still good law in the UK.
 - Australia
 - Follows the UK, but additionally held as Canada did that © would protect facts only when they were NOT obtained from others...
 - Civil Law—"Droit d'auteur" or "*Urheberrecht*"
 - Generally follow Feist regarding the requirement for "originality" in the sense that the protection must arise from the author's "creativity" and not just from the author's efforts...
 - ...But they include "Moral Rights" that go beyond explicit US © law...

The Database Industry In the US and Europe

- At the dawn of the Internet age (1990' s) the statistics on commercially useful Database ownership were mirrors...
 - In the US, 80% were Private, and 20% were Governmental.
 - In Europe, 20% were Private, and 80% were Governmental.
- Feist sent shockwaves through the Private Database Industry.
 - It was felt that contract was insufficient to protect investment, and if © would not do so, then the incentive to provide them was severely reduced
 - In Europe, they also felt the need to specifically encourage the development of the private database industry.
- Citing Feist, the European Commission sponsored a Directive to create *Sui Generis* protection in the factual content of databases.
 - The goal was to specifically create protection parallel to © for the contents of databases that had been created through substantial “Sweat-of-the-Brow.”
 - For the first time, property rights in facts would become possible...

European Database Directive 96/9/EC (1996)

- This Directive required all EU countries to enact enabling legislation providing protection for:
 - Compilations of Data in Any Form...
 - That were created at **substantial investment** of effort and/or money.
 - The protection extends to the “structure” of the database, and it creates a *sui generis* intellectual property right in the contents.
 - Independent Creation is allowed and the **option** to enact Fair Use (Teaching, Scientific Research, Security, etc.) restrictions was provided. Extraction of “insubstantial parts” are also excluded.
 - The rights protected included: Reproduction, Adaptation, Distribution, and Communication, Display or Performance to the Public. (Extraction and Re-utilization)
 - 15 year term of protection...
 - Requires Reciprocity in order to grant the protection to Non-EU citizens...

Effects of the EU Database Directive

- The first Official EU Report on the Database Directive concluded:
 - Database Producers enthusiastically support the Directive...
 - The *sui generis* protection has had “no proven impact on the production of databases... and no evidence of stimulating the database industry in Europe.” It has had “no discernable effect.”
 - They also concluded that there was evidence for a continuing growth in the US database industry even in the absence of similar protection.
- EU Database Protection Case Law:
 - *British Horseracing Board v. William Hill*
 - UK High Court of Justice ruled in favor of BHB under the EU Directive
 - The EU Court of Justice ruled on appeal against BHB due to issues in choice of words in the various languages into which the provision had been translated. They ruled that because of the choice of wording in German, that they would protect only the contents that had been expensive to “obtain” and not to “create,” and in this case they argued that the expense was involved in the process of creating the information in the first place.

Final Exam Review—Commercial Identity Online and Trademarks

- Trademark Law Basics
- Traditional Confusion - Playboy v. Universal Tel-A-Talk (E.D.Pa.1998)
- Albert v. Spencer (SDNY.1998)
- Niton v. Radiation Monitoring Devices (D.Mass.1998)
- Initial Interest Confusion - Brookfield v. West Coast (9th.1998)
- Playboy v. Netscape (9th.2004)
- Rescuecom Corp. v. Google Inc. (2d Cir.2009)
- Bihari v. Gross (SDNY.2000)
- Trademark Dilution
- Trademark Defenses - Fair Use - Brookfield v. West Coast (9th.1998)
- Bihari v. Gross (SDNY.2000)
- Nominative Use - Playboy v. Welles (9th.2002)
- First Amendment - Planned Parenthood v. Bucci (SDNY.1997)
- Bally v. Faber (C.D.Cal.1998)
- Name.Space v. Network Solutions (2nd.2000)
- Taubman Co. v. Webfeats (6th.2003)

Final Exam Review—Domain Names

- Trademark Infringement and Domain Names - Lockheed Martin v. Network Solutions (9th. Green Products v. Independence Corn (N.D.Iowa.1997)
- Cardservice Intl. v. McGee (E.D.Va.1997)
- AntiCyberSquatting Consumer Protection Act
- Sporty's Farm v. Sportman's Market (2nd.2000)
- Alitalia-Linee v. Casinoalitalia (E.D.Va.2001)
- Electronics Boutique v. Zuccarini (E.D.Pa.2000)
- GlobalSantaFe Corp. v. GlobalSantaFe.com (E.D.Va.2003)
- Gripe Sites - Taubman Co. v. Webfeats (6th.2003)
- TMI v. Maxwell (5th.2004)
- ICANN UDRP - Helfer & Dinwoodie
- Madonna v. Parisi & "Madonna.com" (WIPO.2000)
- Weber-Stephen Prods. v. Armitage Hardware (N.D.Ill.2000)
- Barcelona.com v. City of Barcelona (4th.2003)
- Registering Domain Names
- Registering Domain Names as Marks
- New gTLDs
- In re Dial-A-Mattress (Fed.Cir.2001)

Final Exam Review—Consumer Protection Online

- Consumer Protection Overview
- Fraud Online
- [Click Fraud](#)
- Agency Responses & Law Enforcement
- Online Advertising Issues - Information Disclosures
Applicability of Rules referencing writing
- Blurring Advertising and Editorial Content
- Online Sweepstakes
- E-SIGN and Consumer Issues

Final Exam Review—Jurisdiction over Disputes in Internet Commerce

- Web sites - 3 categories - Zippo Manuf. v. Zippo Dot Com (W.D.Pa.1997)
- Cybersell, Inc. v. Cybersell, Inc. (9th.1997)
- Effects of online activities - Panavision Int'l v. Toeppen (9th.1998)
- Revell v. Lidov (5th.2002)
- Entering into transactions - Compuserve v. Patterson (6th.1996)
- Distribution of Publications Online
- Computer Eqpt. in the Forum State
- Combined online/offline contacts
- Foreign Defendants under FRCP 4(k)(2)
- Long Arm Statutes - business within the state
- Tortious injury within the state - Bensusan Rest. v. King (2nd.1997)
- Regularly Soliciting Business in a State
- Equipment Location as a Long Arm Factor
- Choice of Law - Rothchild; Goldsmith
- Subject Matter Jurisdiction
- General Jurisdiction

Final Exam Review—Privacy Online

- Privacy Protection - U.S.
- Reidenberg
- Tensions within Privacy
- FTC - Fair Information Practices Principles
- Online Surveillance
- Online Profiling
- Uses and Abuses of Online Privacy Policies
- State Law Requirements to Post a Privacy Policy
- Security Breaches
- Piercing Online Anonymity - Columbia Ins. v. Seescandy.com
- Models for Privacy - Self Regulation
- 3rd Party Certification
- Technological Tools
- The EC Directive & U.S. Safe Harbor
- Privacy Commodified? – Laudon
- Litman
- Radin

Final Exam Review—

Final Exam Review—© Online

- Copyright Overview
- The Reproduction Right
- The Derivative Work Right
- The Distribution and Public Display Right
- Limitations on Exclusive Rights
- Copyright and Common Internet Activities
- Fundamentals of Digital Music Copyright – Reese
- Digital Reproduction of Music - UMG Recordings v. MP3.com (SDNY.2000)
- Downloads – Reese
- A&M Records v. Napster (9th.2001)
- RIAA v. Diamond Multimedia (9th.1999)
- Secondary Liability - ISPs - Religious Tech. Ctr. v. Netcom (ND.Cal.1995)
- ISP Safe Harbors - Ellison v. Robertson (9th.2004)
- Ellison v. Robertson (CD.Cal.2002)
- A&M Records v. Napster (ND.Cal.2000)
- ALS Scan v. RemarQ Communities (4th.2001)
- Hendrickson v. Amazon.com (CD.Cal.2003)
- Intellectual Reserve v. Utah Lighthouse Ministry (D.Utah.1999)
- Perfect 10 v. CCBill (CD.Cal.2004)
- Secondary Liability - Control over Technology - Sony Corp. v. Universal (1984)
- Metro-Goldwyn-Mayer v. Grokster (2005)