COPYRIGHTS OUTLINE

Property Rights:
• transferable, descendible by gift and will
• Subject Matter: some thing (res)
• Right in Rem: A right against the world for some thing

Personal Rights:
• torts and contracts
Rights in personam: A right against a contracting party, e.g.

I. Theoretical Considerations

Philosophical Foundations
A. Lockian—Labor as property theory:
• That which I mix w/ my labor should be mine. (He discusses both personal and real property).
• Arguments from antecedents (self-evident truths)
• Conditions his theory on the fact that there is enough an as good left for the common.
• Can’t take more than you can use yourself.

B. Hegelian—Property as an extension of personhood
• We have a right to reach our full potential as persons which necessarily includes ownership and property.
• Arguments from antecedents (self-evident truths)

C. Utilitarian/Economic Perspective—
• Consequences of IP law are good—spurs intell achievement/innovation
• Arguments from consequences

Constitutional Basis for IP Law:
• Based on Utilitarian Perspective
• Art. 1, Sec. 8: 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
• Useful arts—technological (a means to an end)

II. Ownership, Exclusive Rights, Infringement—§ 102 Copyright Protection “subsists” at the moment something meets the S/M and stnds.

A. Subject Matter: Original Works of Authorship

Feist Phone book case (compilations § 103)
• Selection and Arrangement in factual compilations can be original and ©able.
• Originality test: “independent creation” and “minimal level of creativity”

B. Standards: Fixed

COPY HR 94-1476 (p. 364, 386, 398)
**Fixation** matters at two points:
(1) required for © protection,
(2) determines when there has been an infringement (Defendant must have fixed work)

**§ 1101—Unfixed Exception (add more here)**

- Statute limitations come from Con Law
- Alfred Bell—Constitutional limits (“Writing” means fixed, and “author” means originality)
- *Limits on what can be copyrighted:* (short slogans, typeface, etc. is not ©able)

37 C.F.R. § 202.1

C. Formalities

1909 Act:
- *Fed protection begins* at “general publication”
- If no *notice*, wk goes to public domain.
- Needed *registration* to renew.
- Constructive publication—file w/ © office and you get fed protection w/o general publication
- Individ rights under § 106 (as we know them today) must be transferred all/nothing.
- Licensees can’t sue for infringement.

Post 1976 Act/Pre-Ratification of Berne Convention (1978):
- *Fed Protection begins* at creation (fixation)
- *Notice requirement* continues but more leeway (offered as a defense—failure to give notice on a small number of copies wasn’t fatal nor were large-scale omissions [as long as it was inadvertent and © was registered w/in 5 yrs of publication and reasonable efforts to make known once error was discovered]).
- *Registration* needed to bring suit

Post-Ratification of Berne Convention: (March 1, 1989)
- *Eliminated notice and publication prospectively* (1909 and 1976 are still law for those under them).
- *Deposit Requirement* is limited to US works
- *Registration*: Has never been required. But is required for bringing suit.

GATT-TRIPS:
- Restoration of copyright protection to foreign copyright wks but it is not retroactive and there are problems w/ derivative works of their own based on newly protected works.

D. Idea-Expression Dichotomy—§ 102(b)

*Baker v. Selden* Accounting Book/Ledger case (system of bookkeeping)
- Not ©able b/c exclusive use of a system (its an *idea*) = patent law S/M
- Nichols case: L Hand—series of abstractions
- Non literal copying cld be infringement of fictional works.
- © office says blank forms aren’t ©able. no *conveying* of info
Morrisey Contest Rules case
- Topic requires that the uncopyrightable S/M is very narrow, so that there is really only one form of expression (or a very limited number), then it can’t be copyrighted.
- Merger Doctrine case

E. Useful Article Doctrine (for P, G, & S wks § 102(5)) from § 101 of PGS

Brandir v. Cascade bicycle rack case (cld have been a TM case—but is was ©)
- Denicola: If item merges artistic and functional considerations, the artistic parts cannot be conceptually separated from the functional parts.
- the aesthetic changes mirrored the needs of function in this case.
- Result justified b/c of design patent. (§ 171 Patent Act protects ornamental designs”)

**Govt Works Exclusion (§ 105) (can receive © by assignment, though).

F. Categories of Protected Works

1. Musical Works and Sound Recordings (these are two separate things)
   - Sound Recordings—No public performance right (when radio plays songs—agencies enforce royalty rights on songs—like ASCAP)
   - **Exclusive Rights (§ 106)**—3 are general to any wk. Sound record.aren’t in (4) or (5).
   - (6) was added recently to give some public perf rights to sound recordings.
   - **Compulsory licensing scheme w/ musical wks** (not sound record.)—once a musician records a song, anyone can cover it for a fee. § 115
   - §§107-122 are limitations on § 106 or scope of exclusive rights.
   - Musical composition is protectible as sheet music.

2. Motion Picture/Other Audiovisual wks

3. **Derivative wks and compilations (§ 103)**—see notes for more.

Roth (greeting card case)
- **Compilation that is ©: Protection is selection, arrangement (not for the parts).**
- This is Pre-1976/Pre-Feist case (must have original.)—may have come out diff today!

G. Ownership

CCNV v. Reid (Org hires sculptor to create wk and sculptor takes work)
- Have to make distinction btwn sculpture wk and the object itself. § 202
- This isn’t a work for hire b/c it doesn’t fit definition in § 101
- After this, agency law used in fed © law (for “employee”) (See factors p. 420).
- Dictum: Facts suggest Reid is joint author w/ org. (But joint authorship req.intent).
  - (skill required, the source of tools/instrumentalities, location of the wk, the duration of the relationship, whether hiring party has right to assign more projects, the extent of hired party’s discretion over when/how long to work, method of payment, hired party’s role in hiring/paying assistants, whether the wk is part of the reg business activity of hiring party; whether the hiring party is in business; employee benefits, tax tx of hired party.)
Duration of joint wks and works for hire: § 302(b) and (c).

**Tasini** (computer database puts freelancer’s articles on along w/ rest of the periodical)
- A denial of an injunction in a © case is basically a compulsory license.
- Ct left remedial issues open: Held for authors but how to balance rights w/ a remedy.
- **When wks were transferred from original form for the database (this was not a revision under § 201(c)).**
- Practical effect: Next time--Times will make authors sign Ks--saying commissioned.

H. Duration

- § 303-305
- This renewal right gave starving artists a second bite at the apple. (But *Fisher* (1943) © owners cld assign contingent renewal rights.)
- *Whenever you have an author w/o a lifespan use term. based on publication/fixation.*

I. Division, Transfer, & Termination of Transfer--§ 106 ff. Rights are divisible (you can sell distribution rights and retain other rights).

**J. Rights of Copyright Owners**

**Arnstein** (Cole Porter song case—guy sues cole porter) infringement suit
- Fragmentary literal copying—court held that guy was improperly deprived of a trial
- *To prove copying (confession or circum. evidence [access + substantial similarity]*)
- Two inseparable elements (copying/improper appropriation).

**Nichols** (Cohens and Kellys)
- Case focuses on requirement of *improper appropriation* element.
- Wholesale non-literal copying here of unprotectable ideas, here.
- Levels of Abstraction

**Steinberg** (Moscow on the Hudson case)
- Δ admitted copying. Fragmentary literal copying, but ct also--some wholesale non-literal copying.
- Subst similarity shifts: Would a lay observer recognize the alleged copy as having being appropriated from the alleged copyrighted work? (lower stnd than previously) Diff cts take diff views: One circuit: Only improper if similarities are protectible and Another circuit: Look at overall look and feel
- Jury decides on unlawful appropriation. But ct decided on MSJ here for plaintiff!
- Dictum: can’t be held liable for using egocentric myopic view of world.
- Idea/expression dichotomy = sliding scale (depends on if it involves factual/functional v. fictional)

1. **Right to Prepare Derivative Wks:** McManis (he writes a chatty bk and movie studio hires mime to peform? Not a completely superfluous derivative wk (see n. 1, p. 467)). §106 (2) (Nimmer)
2. Adaptation and Distribution Rights:

**Midway Mfg.** Video game circuit board—sped up game play
- 2 ©ed things here: the game and the audiovisual wk on the computer
- § 106(2) “based upon”—no one knows what this really means.
- Holding: Owners of games shld be able to monopolize it on the same theory that one is allowed to monopolize derivative wks listed in § 101.
- Contrib infringe (requires reckless or intentional)
- Can we have a violation even w/o fixation?

**Quality King v. Lanza** Shampoo importation case
- § 106(3) distribution
- § 109 limitation (first sale doctrine you can sell bks back to bkstore)
- Distribution: (© holder: only controls right the first time sold unless a license.)

**Mirage** (cutting out pics and putting in frames) A.R.T. was held liable for this. You can violate adaptation right w/o violating reproduction right. This doesn’t fall under § 109 b/c it was creating a derivative work (§ 109 doesn’t limit the adaptation right). This is a controversial case b/c no copyrighted material was added to create the derivative work. (There may have been originality in the mounting of the work??)

3. Public Performance/Display Rights
- §§ 110, 111, 116, 118, 119 (Compulsory licensing schemes)
- Except for § 119, all others are limits on public performance
- See “perform” S/M in § 101
- See “publicly” in § 101

4. Moral Rights
- § 106A—added so we cld adhere to the Berne Convention, Art. 6 bis (p. 418 in supp).
- Authors have moral rights to be known as authors and have protection against threats to integrity. But only visual wks of art.

**K. Fair Use Privilege** (have to apply on final exam)
- § 107—factors function as a balancing test—if it is a wash—what is important is who has the burden!! (usually this is defendant).

**Harper** (use of quotations from a public figure’s unpublished manuscript)
- Purpose of the Use: news reporting (but also exploitation b/c for profit!)
- Nature of the Copyrighted Wk: highly factual (plus) and unpublished (minus)
- Amt and Substantiality: Took small quantity (+) but qualitative (-).
- Effect on Mkt: Biography mkt not affected (but pre publishing rights is what is impt here)
- Holding: Court finds for the plaintiff.

**Sony** (Studio sued makers of VCRs for contributory infringement)
- Ct didn’t want to give damages b/c it didn’t want to be a pseudo-compulsory licenser.
- Non-commercial purpose to use VCRs (timeshifing) (+)
- Non-factual (-) and published free of charge (+).
- Strong negative on the amt (-). Sony says sometimes you can take the whole thing and still no infringement!
• Timeshifting has a positive effect on the mkt (but if people are keeping libraries, this is a problem).
• One big problem for Sony: implied consent by other © owners such as Mr. Rodgers.
• Selling copying equip is not contrib. infringe if the product is widely used for legitimate purposes. (must be capable of subst non-infringing purposes)

**Amer Geophysical Union v. Texaco** (copying of scientific journal)

- Holding: Not fair use
- Indirect commercial effects, archival photocopying, institutional setting (systematic form of copying), no transformative use, no mkt value for indiv. articles.
- Utilitarian justification—heart of controversy over fair use privilege. It is a legislative way of dealing w/ mkt failures suggesting that if things coming along where you can make $, no more fair use.
- Dissent: Fair use is a critical part of leg balance of people’s rights. Customary use.
- Copyright Clearance Center (wants to be ASCAP of photocopying—CCC wldn’t offer Texaco a safe harbor—it’s a privately created licensing arrangement (not so safe and not so free as ASCAP)

**Campbell** 2 Live Crew

- Holding: maybe fair use (ct remanded)
- “Transformative use”—something new was added to the work.
- Commercial use and fictional (published)
- Copied the heart of the work
- Parody won’t replace original wk in mkt but possibly took away from the mkt for non-parody rap version of the song.

**L. Other Defenses: Int’l Issues; Remedies**

- Other defenses (non-statutory) (independent creations, consent/license, inequitable conduct, © misuse, first amendment, Immoral/Illegal/Obscene wks, statute of limitations). §§ 108-18
- *Inequitable conduct*—Doctrine of Unclean Hands

Remedies:

- Legal—granted as a matter of right (property rights)
- Equitable—discretionary (availability of an injunction).
- **Congruence of Right and Remedy**—remedy must be connected/appropriate to the right violated.
- § 504 Statutory Damages (20,000 for innocent infringement and 100,000 for willful infringement) (to be used when a plaintiff can’t prove actual damages) v. actual
- Property right—This is the reason you can get an injunction for ©. Damages arise from Ks.

**Sheldon**

- Holding: Award only profits attributable to defendant’s infringement.
- Case was construing “all” in statute.
- Defendant’s burden to do the apportionment in such a case (liberal evidentiary rule).

**III. State Intellectual Property Law and Federal Preemption**

1. Misappropriation and Common Law Copyright

**INS v. AP** Copying news case AP got an injunction against INS.

- Holding: Pfc of misappropriation (Unfair competition where plaintiff has acquired something fairly at subst cost and may be sold at subst profit. A competitor misappropriates it when for the purpose of making a profit, he disposes of it, to the disadvantage of complaintant. The competitor cannot argue that the something appropriated is too “fugitive or evanescent” to be property.)
• AP was found to have a “quasi-property” right. Analogy to unfair comp.
• INS v. AP made up a tort called misappropriation. (Erie, abolished fed CL in diversity cases)—case is no longer the law. State cts have followed—it has become part of some state common law. It is now a common law de facto property right.
• After pre-emption analysis, all that exists are the facts in this case (non-copyrightable S/M b/c news = facts—it is state tort law protection for this).
• Remedy for misrepresentation (what was happening here) is disclaimer so b/c ct gave an injunction (no congruence of right/remedy)

• NBA v. Statts; NBA v. Motorola—lurking tension btwn state and fed law—“INS survives today where:
  o Plaintiff gets or produces time sensitive information at a cost
  o Defendant’s use constitutes free-riding on plaintiff’s work
  o Defendant is in direct competition w/ plaintiff re: info provided
  o Ability of others to free ride so reduces incentive to produce the product that its existence or quality are subst threatened.

Estate of Hemingway conversations—are they the S/M of ©? 1967 case
• H: Assuming common law © for speech might be recognized, it wld be required at least that the speaker indicate he meant for it to be ©d. (that he wished to mark off the speech as special and intend to have the right of publication).
• Dictum: Suggestion that common law © shld protect unfixed, unpublished wks.
• This is one common law ©—this is ok as long as they don’t overlap w/ § 301.

§1101 does allow © protection for unfixed, unpublished live performances.
• What is the constitutional authority, since this throws it out of Art. 1, sec. 8? Cld argue treaty power or commerce clause.

2. Trade Secrets and Idea/Submissions

Downey Jell-O/Mr. Wiggle case
• Ct gave MSJ to Defendant but seemingly bases it on implied K (but there was an express K and it is hard to imply a K based on the facts!)
• Ct views the idea as a property right also (otherwise it would been an express K case)
• Rule in case discusses consideration for K. Another problem with the case: In Ks the consideration does not have to be property.
• Ct confusing the three rights:
  o Law of Unfair competition—law of torts
  o Law of copyright—subspecies of property
  o Law of Idea/Submission—law of K.

Desny Billy Wilder gets sued for using idea from a play.
• Ct reversed/remanded (Defendant not entitled to win as a matter of law).
• C: ideas aren’t normally property—“as free as the air.” There must be K-ual rights.
• Ct holds that there can be express or implied K.
• Also, W/ Ks that are enforceable, agreement to pay can be made after disclosure of the idea so there must be a trial to determine if secretary agreed to pay submitter.
• This is a trade secret case b/c B. Wilder was in the business.
Arrow’s Information Paradox:
- When a person wants to sell what he has written and conveys his idea to get someone to buy it, he has lost the result of his labor!!

**Warner-Lambert** Listerine case—TRADE SECRET CASE
- formula was in the public domain but Law of Ks enforces Ks even if unfair.
- ½ of trade secret law is enforcement of Ks (the other ½ is tort).
- Misappropriation must occur in K or tort.

3. TMs, Publicity Rights, State Moral Rights, Resale Royalties

**TM:**
- Doesn’t protect a property right.
- Its about confusion and remedy is disclaimer.

**Midler** protectibility of her voice from exploitation for commercial
- Cld have possibly argued TM infringement (passing off)? Or Lanham Act?
- **ct makes a common law right of publicity** v. statutory right of publicity.
- Ct says no unfair competition b/c she doesn’t do ads.
- Remedy under passing off—it wld be disclaimer.
- Ct says this is common law rights (they take the 990 as persuasive authority). They make this a descendible property right (as opposed to leaving 990 separate and just having the right as a personal right). They color it like a property right and then say it is a common law tort of misappropriation.
- **Moschenbacher:** Said CA will recognize an injury for appropriation of attributes of identity. Racecar and helmut are attributes in this case (so voice surely is).
- **Nancy Sinatra**—No confusion w/ look alike so she didn’t win case.
- **Lahr**—won on unfair competition claim (was doing commercials so he had damges).

**White** Vanna White case—this is a statutory case
- Lynchpin: “identity.” Really the show shld own this not her.
- **Case definitely moves toward identity as a property right.**
- App Ct: This broadens the identity stuff forward—anything that conjures up the identity is enough to get relief. Dissent says this is too much.
- Cal. § 3344—descendible property right. State law is protecting S/M not protected by fed © law so no preemption issues.
- McTorts worried—getting close butting heads w/ Art I. Sec. 8 (implied preemption).

**New Kids on the Block**


- Constitutional basis—Art. 6 Supremacy Clause
- The other constitutional arguments are where something goes against another constitutional provision.
- **Implied preemption**—ct decides conflict is real b/c undermines policies of federal law.
What right is state law creating?  What right is fed law creating?
What is the policy behind the law?  What is the policy behind the law?

Is there a conflict?  If so, then preemption

IMPLICIT PREEMPTION (JUDICIAL)

**Sears-Compco**  Pole lamp inventor sues sears.
- Patent was invalidated.
- Trial ct didn’t follow congruence of right and remedy b/c it found for plaintiff on unfair competition and then gave an injunction for *selling* pole lamps (patent remedy)
- **H:** B/c of fed patent, states may not (when something is unpatented and uncopyrighted), prohibit copying of the article or award damages for copying.
- Partial preemption (remedial preemption) and limited substantive preemption of misappropriation.  (passing off claims are still ok but not INS branch).
- Was this specific to invalid patents or are expired patents considered within this too?
- Dictum:  States can’t stop *copying* through unfair competition law (they can still use disclaimers though).
- Only way a state cld deal with something like this is TM claim (disclaimer remedy).

Patent law protects an invention in exchange for full disclosure of it. Trade secret law protects the opposite thing from patent law (don’t disclose invention to protect it).

**Bonito Boats**  Vessel hull design—copying by direct mold process
- FLA Statute—cld argue this is a patent claim (more like this than a copyright claim (PGS work??  No b/c useful article)).  Looks like no copying through a certain process (which is like patent)  Law gave property rights.
- Held:  Vessel Hull statute is totally preempted via the Supremacy Clause b/c of fed patent law.
- Object of FLA statute butts heads w/ policies behind patent law (to protect inventor’s investments).
- This case is really getting at misappropriation.  FLA Leg says INS not limited to its facts (hence the statute)—the way you misappropriated in INS doesn’t matter.
- **Digital Millenium © Act**—federal vessel hull protection (this was the effect of the case).  § 1301 and § 1304 of © act.  Protection commences on publication of registration or date upon which design is first made public (whichever is first).  § 1305—length is 10 yrs.  (This looks like industrial design statues from Europe).
- Cld say this is the difference btwn prohibiting unfair competition (passing off) and unfair competition due to copying (INS branch) (this u.c. isn’t as unfair b/c consumer can benefit).
- Vessel hull statute embodied a right against the world. (even no reverse engineering!)
- **Waits**—tried to use *Bonito* to preempt state law publicity rights (ct found no implied preemption).

**Kewannee Oil**  Trade secret case
- **Held:**  No preemption of trade secret law by patent law.
- Guy knew invention was patentable—he just didn’t get one.
- Ct keys in on the weaker protection provided by state law—trade secret law won’t undermine patent law b/c in theory, people who can get patents wld do so and not worry w/ state trade secret law.
• Also some trade secrets aren’t the proper subjects of patents b/c they are inventions (customer list, e.g.) (ct looking to Goldstein for this proposition).
• But people forgo fed patent in favor of state trade secret (the guy in this case!).
• Dictum: If lots of people were opting out, then preemption would occur.
• Reverse engineering protects trade secret law. (“ripeness of time” idea).
• This guy was a fool b/c someone cld reverse engineer and get a patent on it and he wld be shut out. Trade secret is for people who can’t get patents.
• Dictum in case: invitation for lawyer to write a Brandeis brief and preempt state trade secret law.
• Two things ct cld have done: limited substantive preemption or partial remedial preemption (no injunctions—just damages) (ct gave perm injunction here).

COPYRIGHT PREEMPTION

§ 301—Express Preemption Test

Goldstein Copyright (criminal offense to pirate recordings)
• Held: No exclusive grant to Congress on ©. No implied unconstitutionality under Supremacy clause (b/c different policies btwn trade secret law and ©).
• Held: No preemption. b/c Congress has left arena of recordings of musical performances (balance btwn rights hasn’t been struck in this area).
• This was before sound recordings had been added to S/M.


§§ 102-103: Step one:
• Is it a literary work? (the S/M of copyright?) under 102(a)
• It is trade secret protecting utility of formula (non protectible under copyright).

§ 106: Step two:
• Is this creating an equivalent right to those under § 106?

What about breaching implied K under state law? © rights are property rights and K rights are personal rights so no preemption.

What about right of publicity? and what S/M protected? protection from uses for commercial profit. Cld argue it is a personal right (right to damages). It is not transferable like a property right, but right of publicity in deceased people (like in California statute), is a property right.
• Midler rights—personal right to privacy. V. Statutory—property rights given in identity (White).
• If property right, then § 106 is equivalent right. So it is in S/M listed in §102.
• If there is an equivalent right--have to ask what we mean by equivalence (transferable? No).

National Car Rental Licensing agreement (National can only use for internal use).
• Not preempted: Extra element rule—relevant to equivalent rights/2nd prong of test (© rights do not equal breach of K rights)). You cld argue K claims NEVER preempted (except in ProCD—shrinkwrap/clickwrap).
UCITA—Uniform Computer Information Transaction Act:
- NCCSL—promulgated this as a stand alone uniform act—only passed in two states. VA and MD. But every license has a choice of law provision so this is significant!
- § 105(b)—only good thing as McTorts sees it—public policy unconscionability provision—cuts down all Ks that violate free speech and free competition.
- § 209—Post transaction terms are enforced!!
- Only equitable relief is a return right (you can send the stuff back).

State Moral Rights and Resale Rights Statute:
- § 301(f)—preemption provision against state moral rights statutes (such as CA ct case Lubner)
- Morseberg v. Baylon: § 986 CA laws

Non-Issue of TM preemption—state dilution statute (fed dilution statute passed (but then Congress said we’re not preempting state © law).
No TM preemption of state law.

3 Big Picture Questions:

1) Does § 301 preemption test preempt the implied preemption test? Do we still look at policies underlying state law?

2) Express preemption v. Right of Publicity? Under express preemption (102(a) says this is what’s protected and 102(b) says what’s not protected), does system of (a) and (b) together—does this mean that the state’s can protect what’s in (b) or are they saying that things in (b) aren’t protectible at all?

3) Assume that preemption of the state law does NOT occur under 301 b/c it doesn’t fall under the test, cld the state law still interfere w/ fed © policy to warrant an implied preemption. Using Feist, why shld the states be able to protect this S/M, shld it be preempted impliedly?

Live Question: Extent to which INS is preempted by Motorola case (escaped preemption if the following conditions were met—see above notes).

IV. Protection of Computer Software

- Hybrid S/M—cld qualify for copyright/patent/TM protection all at the same time!
- Machine readable form is publicly distributed, but human readable cld be protected by trade secret!
- Shrinkwrap licenses: no further distribution allowed, no first sale privilege, can’t reverse engineer. You are only a license. There are terms/conditions on use.
- Until UCITA, there was controversy over whether such licenses were valid Ks—some state cts had said no. Two states have “bomb shelter” legis—no UCITA provision can bound citizens unless they expressly agree (IA is one of the states).
- 1980 © Act amended to apply to computer software: § 101—“computer prgm” def, and § 117 (safe haven for back up copies and to load RAM copies)
- Problem w/ § 117—it only applies to “owners”—protection from licenses then, is still Kutal.
- Fair Use privilege doesn’t limit to owners, however.
- Choice for them to use to protect: (1) encryption, (2) Kutal trade secret, (3) licenses (McTorts likes electronic trade secret as the wave of the future).
Data General  Design drawings sent w/ computers to consumers
- Elements of trade secret claim:
  - existence of a trade secret and corp defendant has either (1) received the information w/in the confines of a confidential relationship and proposes to use the info in violation of the relationship, or (2) that the corp Δ improperly received the info in question in such a manner that its confidential nature shld have been known to it and it nonetheless proposes to misuse the info.
- Defendant argued it wasn’t a secret here.
- Holding: **Just be c/c it was a mass distribution to public, doesn’t mean you’ve lost your enforceable trade secret. As long as distribution was made with reasonable methods to maintain secrecy.**
- Holding 2: **Only can have an injunction for the amt of time it wld take someone to reverse engineer a product!!**
  - Defendant knew there was a proprietary stamp saying it was a design trade secret so when Δ created its product, it was a contributory infringer.

Second Generation © cases—problem is protecting non-literal codes
Semi-conductor chip act—included chips as ©able subject matter

Whelan  Dentalab case
- H: **Infringement—literal similarity in organization—no literal copy of the code.**
- **Copying flow chart is more like copying idea than expression.**
- Nichols—increasing levels of abstraction. B/c of functional nature of computer prgms (it is more like a factual wk)→ unprotectable idea (Whelan ct misguided in quoting Nichols)  But so maybe Nichols and Whelan.
- Holding: **Where there are various means of getting a desired purpose, then the means chosen is not necessary to the purpose, hence it is expression and not idea. (So ct draws line way up—lots of things are expression)**
- Dinosaur case in the law

Altai  Oscar/Adapter Scheduler prgm
- There is also a trade secret case (not preempted b/c of Kewanee Oil and Natl Car Rental.
- **Advantages of © claim over trade secret:** remedy is perm injunction and strict liability tort.
- **Advantages of trade secret over ©:** B/c on contributory infringement claim it seems there isn’t enough info here on knowledge (state or mind of Altai). But cld sue on vicarious liability (it’s a strict liability theory).
- Ct presumed access on Oscar 3.5.
- Law:
  - Abstraction—find the diff levels (no similarity w/ OSCAR source or object code).
  - Filtration—This is the key here—expression v. non protectible…..
  - Comparison
- If there is only one EFFICIENT way to say something, then it is not protectible (b/c of efficiency-driven computer world). Expansion of merger doctrine.
- Line drawn lower on the pyramid.
**Lotus**  copying of menu tree  This is literal copying (not like Altai and Whelan)

- **No infringement b/c this is excluded S/M (can’t write in different ways to achieve same functionality—so it is a method of operation—kicked out by § 102(b).**
- Another H in this case wld give Lotus a monopoly.

**Apple v. Microsoft**  Windows—more “mac-like” case trashcan case

- This isn’t expression—it’s a trashcan
- But we do have a license in this case!

**MAI v. Peak**  computer maintenance case.  Trying to create a no competition situation and ct said no.

- § 117(c) created to stop this—it includes both creators and licensors. (Digital Millennium © Act).  **This overruled MAI.**
- Also, if shrinkwrap licenses are allowed to exist, people can K-utally get out of § 117.

**Chapter 12 in the Copyright Act:**

**§ 1201**—Anti circumvention protection—violation to circumvent anti-copying technology including encryption (doesn’t matter if encrypted material is copyrightable)

**§ 1202**—copyright management info system provision—illegal to delete/modify any © management info (clickwaps!)

So you have:
- Kutal security thru state case law
- Electronic security (1201)
- Physical Security (1202)
- So why do you need © law???

But 1201(f)—you can reverse engineer.

**Galoob**  Galoob making Game Genie.

- Like Midway Mfg (except Midway doesn’t require concrete, etc.)
- Also—a derivative wk must exist in “concrete and permanent form” McTorts like this requirement.

**Microstar**  Duke Nukem case

- **Rule:** concrete and permanent and must substantially incorporate protected material from the preexisting work.

**Sega**  Fair Use Test review (games for Sega systems).  H: No infringement

- Decompilation—decompile game to figure out what is needed to unlock (and they found it, put it in their own game and it wkd.
- Character purpose: (commercial but only indirectly) and character—was to increase works available (pro-competitive)
- Effect on potential mkt (not enough to make it not a fair use).  Compatible games don’t compete w/ Sega games b/c they’re different.
- **Dictum:** Sega misusing b/c imonopolizing (but ct lets plaintiff win on fair use).
- Nature of the wk: use of actual key for lock is highly functional part of prgm.
- Amt and subs (large portion copied).
ProCD
- What if © holder has you sign a shrinkwrap license K saying you won’t reverse engineer.
- Electronic equivalent of Feist facts.
- This is a K case NOT a © case.
- Ct reasons to conclusion that K is not a right against the world b/c “finder” isn’t bound (b/c no shrinkwrap), but this ignores the clickwrap license. So ct doesn’t go to UCITA b/c it sees it as a K case.
- § 301 preemption analysis: Software is the S/M of ©, but the database fails under Feist for originality.
- Dictum: Kutal restriction on reverse engineering (no problem/no preemption)

V. Antitrust

Sherman Act:
§ 1—Ks, combination, conspiracies (“unreasonable” (Stnd Oil Case) restraint of trade)
§ 2—monopolization of trade, and attempts/conspiracies of this

Clayton Act: Civil Law provisions
FTC Act: Admin Law

§ 1: unreasonable restraints of trade are prohibited (tho some things are still per se prohibited—like price fixing and division of markets.).
   - Per se violations—no balancing
   - Otherwise, rule of reason balancing (tying, e.g.)

Rule of Reason is a balancing test. affects both § 1 and § 2.

§ 2—it is not illegal to be a monopoly

   Two step to determine p.f.violation: (rebuttable presumption)
   1) Do you have mkt power?
   2) If yes, have you engaged in anti-competitive or exclusionary conduct?

Data General v. Grumman (like MAI Pete case)
- Ct said refusal to license © material is not an antitrust violation b/c otherwise © holders wld be punished for asserting their rights.

Microsoft
- Tortious acts on the part of a party w/ mkt power is not consistent w/ good conduct of a monopolist.

BMI v. CBS blanket license for use of their music library
- No per se rule against tying their music all together.