

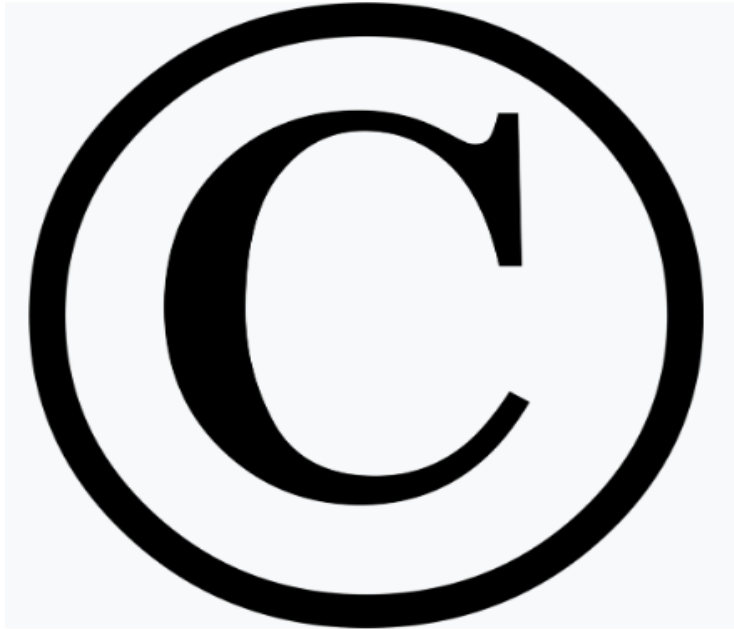
***CRACKING THE CODE:  
LEGAL ISSUES FOR ARTISTS IN THE DIGITAL  
AGE***

***WEDNESDAY, MAY 6, 2020***

***USER-GENERATED CONTENT & COPYRIGHT INFRINGEMENT –  
ROBERT J. DEBRAUWERE, PRYOR CASHMAN LLP***



# WHAT IS COPYRIGHT?





# CONSTITUTIONAL BASIS

- **Article I, Section 8, Clause 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.”

# EXCLUSIVE RIGHTS UNDER COPYRIGHT



- “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
  - (1) to reproduce . . .;
  - (2) to prepare derivative works . . .;
  - (3) to distribute copies . . .;
  - (4) . . . to perform the copyrighted work publicly;
  - (5) . . . to display the copyrighted work publicly; and
  - (6) . . . in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. §106



## WHEN DOES PROTECTION INURE?

- When an original work of authorship is fixed in a tangible medium of expression
- “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. §101





## ORIGINALITY

- “[O]riginality requires independent creation plus a modicum of creativity . . . .”
  - Feist Publications Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 351-353 (1991)
  - “Modicum” - low threshold, but alphabetic listing of names is not enough – “sweat of the brow” not protected
  - “Independent creation” – not copied, intentionally or unintentionally (“My Sweet Lord” v. “He’s So Fine” - “subconscious plagiarism”)
- Yellow pages directory is capable of protection

IDEAS ARE NOT PROTECTED



- **Idea–Expression distinction/Idea–Expression Dichotomy**

- Story about young lovers with feuding families

- Expression of that story

Government works are also not protected



## FAIR USE

- The purpose and character of the use
- The nature of the copyrighted work
- The amount of the original work that was used
  - No silver bullet – up to 10 seconds? 4 notes?
    - Quantitative
    - Qualitative – Heart of the work
- The effect of the use on the original work's value or market





## WHEN CAN YOU ENFORCE RIGHTS?

- “[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” 17 U.S.C. §411
  - ***Fourth Estate Public Benefit Corp. v. Wall-Street.com***, 586 U.S. \_\_\_\_ (2019)
- Poorman’s copyright – mail to self - evidence of creation



- **Safe Harbors (not immunity) 17 USC §512**
  - Transitory Digital Network Communications
  - System Caching
  - Information Residing on Systems or Networks At Direction of Users\* - User-Generated Content
  - Information Location Tools



- Requirements for Safe Harbor

- No actual knowledge that material on system or network is infringing
- No “red flag” knowledge (facts or circumstances where infringement is apparent)
- Expeditious removal or blocking when receive knowledge or awareness
- No financial benefit if have the right and ability to control
- Maintains and adheres to take-down process
- Registers and identifies “designated agent” to receive notices
- Repeat infringer policy and “Standard technical measures”



## ELEMENTS OF NOTICE

- Written communication to designated agent of service provider that includes substantially all of the following:
  - Physical or electronic signature of authorized person to act for © owner
  - Identifies copyrighted work(s) infringed
  - Identification and location of infringing material
  - Contact information of complainant
  - Statement of good faith belief that use is not authorized [Lenz]
  - Statement under penalty of perjury of accuracy and authorized agent



## COUNTER NOTICE

- Upon receipt of a counter notification
  - Promptly provide the person who provided the notification with a copy
  - Informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and
  - Replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless designated agent first receives notice an action seeking to restrain the infringing activity

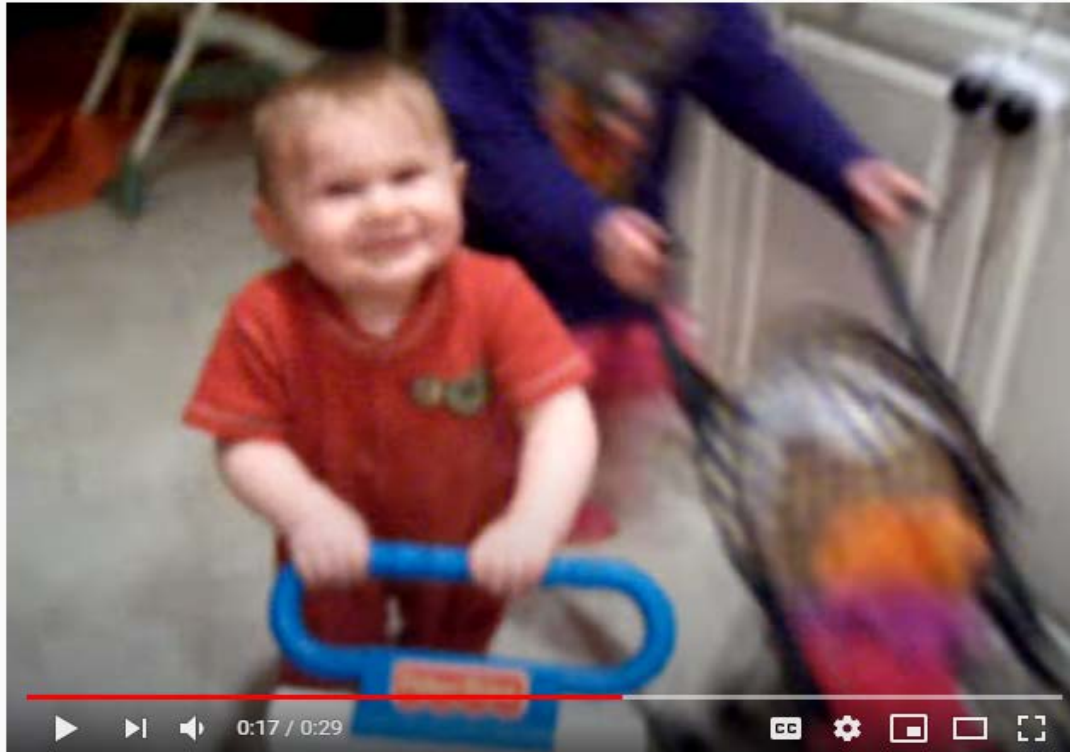
NOW THAT REGIME IS SET UP





# LENZ V UNIVERSAL

- Prince “went crazy”?



"Let's Go Crazy" #1

1,986,842 views • Feb 7, 2007

👍 3K    🗨️ 360    ➦ SHARE    ≡+ SAVE    ...



## OWNERSHIP OF CONTENT

- Terms of use
- Contests/Promotions
- Comments
- Work-for-Hire





## PRACTICAL ADVICE

- Practical Experiences Copyright Litigation –
  - *Fameflynet v. Shoshanna*
  - *Rosenberg v. Metropolis*
  - *Enclosed Music LLC v. Steinman et al.*



# Section 230(c) of the Communications Decency Act



## WOLVES OF WALL STREET

- *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995)
- In October 1994 anonymous user of a Prodigy bulletin board created post stating Stratton Oakmont committed criminal and fraudulent acts
- No good deed goes unpunished
- Impetus for Section 230 of Communications Decency Act

# PUBLISHER v DISTRIBUTOR LIABILITY



- Common-law principles distinction
  - Person who publishes a defamatory statement by another bears the same liability as if they created it – e.g., newspapers and book publishers
    - "publisher" deemed to have knowledge, opportunity, and ability to exercise editorial control over its content
  - Distributor liability limited. Newsstands, bookstores, and libraries are generally not held liable for the content of the material that they distribute. They cannot read every publication before they sell or distribute. Avoids self censorship because distributors not likely to know if content is actionable.



## 47 USC §230(C)(1)

- “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

# IMMUNITY EXAMPLES



- Fair Housing Act Claims

*Chicago Lawyers' Committee For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008)

*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc)



## SCOPE OF IMMUNITY

- Specifically excepts federal criminal liability and intellectual property claims
  - Federal IP – DMCA, Tiffany v. Ebay
  - State IP laws – Right of publicity/Misappropriation
  - FOSTA – Challenged and In January 2020 court allowed challenge to proceed



# TERRITORIALITY

- DMCA and CDA are US-only
- Laws around the world differ greatly – US v UK defamation law
- Geo-gating – limit distribution
- Different Cites for Different Regions



# QUESTIONS





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