University of California
Berkeley Law School
Professor Pamela Samuelson

Take-Home Course Examination
Fall 2010

Student Exam # _____

FINAL EXAMINATION
For Law 278.31 Copyright Law

TAKE-HOME INSTRUCTIONS: You have 24 hours within which to complete this exam. For the exam to be considered timely, you must upload your answers within 24 hours of downloading the questions.

Make sure your exam number, course name, page number and my name are visible on each page of your typed answers. Answers should be typed and double-spaced.

There are three questions on this exam. The first question will be accorded 40% of credit toward your final exam grade. The other two questions will be count for 30% each of your final exam grade. Please allocate the time you spend answering the questions according to the weight they will be given. (Over-answering one question will not counterbalance under-answering another.) An excellent answer for the first question would be between 1000 and 1200 words; please answer the other two questions with between 700 and 900 words. If I detect that the exam exceeds 3000 words altogether, that will weigh against a higher grade.

Substantive analysis will be the main basis for judging the excellence of answers, but sound structure and good exposition will count as well, so think through your answer before starting to write and take care with your words.

Please read each question very carefully and make sure that you answer the questions I actually asked, rather than questions I might have asked but chose not to. Your answers should be as concise as possible while at the same time being as detailed as is feasible given the constraints of the exam genre. Please also make sure to answer each subpart of each question. Trust your judgment about which subparts can be answered more concisely than others.

Except when I specifically ask you otherwise, you needn't cite any case names or other authorities to do well on this exam. Certainly you should not cite a case (or some other authority) instead of explaining the principle or concept that you think this authority stands for. Where a question calls for analysis of a complicated factual situation, it is often a good idea to make pro and con arguments about how it might be resolved and consider the policy implications of alternative outcomes, but when the question calls for a resolution, make sure you offer your conclusion. Where relevant, you should cite or quote statutory provisions. As will be true in your practice, some questions call for a straightforward right/wrong answers and some call for your best judgment.

EXCEPT WHEN I SPECIFICALLY AUTHORIZE IT, DO NOT DO ANY OUTSIDE RESEARCH IN PREPARING YOUR ANSWERS. Just rely on the materials we studied.

It was great fun to teach this class and to have you as a student in it. Best wishes on the exam and with the rest of your life. I promise to read the exam answers when I am in a good humor.

QUESTION 1:

As you know, Google has scanned millions of books from the collections of major research libraries, including UC's for its Google Book Search (GBS) initiative. For books that were published prior to 1923 or that are U.S. government works, Google considers the books to be in the public domain; it makes these book available for free downloads or display uses in response to search queries. For in-copyright books, Google currently makes a small number of snippets of book contents available in response to search queries (unless rights holders have come forward to authorize more extensive uses or to ask that snippets not be made available for display). Google also makes what it calls "non-display" uses of book contents, such as testing out search algorithms on the corpus of GBS books, refining its automated translation tools, and developing services for GBS.

The Authors Guild and five major publishers sued Google for copyright infringement, claiming that scanning in-copyright books, indexing their contents, and making snippets available in response to user search queries infringes copyrights. (Neither plaintiff has challenged non-display uses of the books as infringement).

For the sake of this question, I want you to assume that the complex settlement agreement of these lawsuits is disapproved and the matter goes back into litigation.

(a) Based on the fair use cases we studied this term, was Google's scanning in-copyright books to index them and serve up snippets a fair use of them?
(b) Should the potential risk of excessive statutory damages be a factor in ruling on Google's fair use defense? If so, in what way?
(c) Are Google's non-display uses of in-copyright books fair use?
(d) Do you think scanning of in-copyright books by research libraries would be fair use, even if the same sort of scanning by Google isn't? What if the libraries only scan out-of-print books?
(e) Would your answer to subpart (d) be different insofar as the books are "orphans" (that is, books whose rights holders cannot be located after a reasonably diligent search)? How much of the contents of orphan books should be available for display uses under the fair use doctrine, in the absence of orphan works legislation?
(f) If libraries own copies of out-of-print, but in-copyright books, should they be able to digitize the books and lend the digital copies out to patrons as long as they don't lend out more copies than they own and the lent copies are programmed to be rendered unusuable after two weeks?

(g) As between authors and publishers, whom do you think should be held to be the owner of rights to authorize Google (or anyone else) to digitize in-copyright books? You may make reference to the *Random House v. Rosetta Book* decision in answering this question, and you may assess whether you find it persuasive.
(h) Assume that some authors of books in the GBS corpus decide they would like to make the books available on an open access, Creative Commons noncommercial license or to decide to dedicate the books to the public domain. Is a CC license or a public domain dedication a transfer that is subject to the termination of transfer rules of the Copyright Act of 1976?
(i) Assume for the sake of this subpart that Google loses its fair use defense and a court decides that unauthorized scanning of the contents of whole books is per se an unfair use. What (if any) kind of injunctive relief should the court order? Should the GBS corpus be impounded and destroyed?

QUESTION 2:

Viacom sued YouTube for more than $1 billion for copyright infringement because hundreds of thousands of clips from Viacom programs, such as the Colbert Report and The Daily Show with Jon Stewart, have been uploaded to YouTube without Viacom's permission. These Viacom programs have been viewed more than 1.5 billion times. (Viacom is not claiming that remixes and mashups are infringing, only verbatim copies of the whole or substantial parts of the programs.) The direct infringement claims are for violation of the public performance, public display, and reproduction rights. The indirect infringement claims are for inducement of infringement, contributory infringement and vicarious infringement. Viacom asserts that YouTube should use filtering software to thwart the uploading of Viacom content; that certain features of YouTube, such as one that allows users to share a video with up to 1000 friends and one that allows embedding a video into other websites, are contributing to infringement; that YouTube is running an infringement-driven business because infringing videos are a draw to the YouTube site; and that YouTube has actual knowledge of infringing content, but chooses to do nothing about it until after Viacom has notified YouTube about specific infringing content; and that YouTube makes it too easy for users to reupload videos after they have been taken down.

A trial judge has granted summary judgment to YouTube on the ground that YouTube is eligible for the DMCA safe harbors embodied in sec. 512 of Title 17. The Second Circuit Court of Appeals is likely to hear the appeal in this case some time in 2011. Please predict the outcome of this appeal.

You are welcome to look at Viacom's complaint which is available at: http://lessig.org/blog/archives/vvg.pdf.

(a) What do you think of Viacom's assertion that YouTube is ineligible for the DMCA safe harbor because it is a media company, not a "service provider" under the definition of sec. 512 (k)(1)?

(b) How do you think the Second Circuit should rule on the direct infringement claims in this case?
(c) How do you think the Second Circuit should rule on the indirect infringement claims in this case? Does it make a difference to your answer that YouTube's founders exchanged some emails well before Google acquired YouTube in which they recognized that users liked the presence of infringing content on the site?

QUESTION 3:

The Berkeley Technology Law Journal will shortly be publishing an article entitled "The Copyright Principles Project: Directions for Reform," which explores 25 recommendations for reforming U.S. copyright law. Please comment on the pros and cons of recommendation #1 which appears below; please also announce your ultimate conclusion about the recommendation.

(You need to know that although I am a coauthor of this paper and hence I endorse this recommendation, I REALLY want your honest appraisal of it. It is perfectly acceptable to say that it is a lousy idea for the following ten reasons. If you have suggestions for how it might be shaped differently, it would be fine to say so and explain why.)

Recommendation #1: Copyright law should encourage copyright owners to register their works so that better information will be available as to who claims copyright ownership in which works.

Copyright law in the United States has long included a system of procedural mechanisms, often referred to collectively as "copyright formalities," that helped to maintain copyright's traditional balance between providing private incentives to authors and preserving a robust stock of public domain works from which future creators could draw. These formalities included requirements to give notice of one's copyright claim by placing copyright notices on copies of protected works and registering with the U.S. Copyright Office to qualify for a renewal term.

Under current law, copyright protection arises the moment a creative work is fixed in a tangible medium of expression. Authors are under no obligation to register their interest in copyright or put notices on copies distributed in the marketplace. Although current law attempts to induce registration by conditioning the ability to recover attorney's fees and statutory damages on prompt registration, relatively few copyright owners register their works at all, let alone within three months of publication.[1]

This "deformalization" of U.S. copyright law has obviously had some advantages for authors and those who exploit copyrighted works, for there is no longer a risk that failure to put notices on copies of works or to register claims of copyright will cause the work to go into the public domain. However, deformalization has also harmed creators, follow-on users, and social welfare more generally because it is more difficult than it should be to determine who owns what rights in which works and how to locate the rights holders to ask permission for uses. Deformalization inhibits reuses of many works because there is no simple way to distinguish between those works whose authors care about copyright protection and those who do not.

[1] *See, e.g.*, Christopher Sprigman, *Reform(aliz)ing Copyright Law*, 57 STAN. L. REV. 485, 495–96 (2004).

The vast majority of copyrighted works created each year have little or no commercial value. Billions of works, such as emails and business memos, are created without the incentive of copyright and lack independent commercial value as expressive works. Many other works that people create, such as blog posts, are subject to copyright, although their authors intend to distribute them without restraint or with fewer restraints than the default rules of copyright impose. Many works are created with the intent to exploit their commercial value as expression, but lack that value at inception or perhaps enjoy evanescent commercial value that endures for a much shorter period than the current copyright term.

These types of works are similar in one important respect. They are not producing revenues. For this reason, continued copyright protection serves no real economic interest of the author. Copyright does not, of itself, create commercial demand for protected works. In a deformalized, opt-out copyright system, commercially "dead" works cannot safely be reused as building blocks for potentially valuable new works. The costs of locating the rights holder and obtaining permission will often be prohibitively expensive. In such instances copyright is unbalanced: its potential benefits are absent or depleted, and it therefore imposes only social costs.

To respond to the overly expansive copyright regime now in place, there emerged strong interest within the CPP group for "reformalizing" copyright law. Copyright law should not just re-introduce the formalities from the past. However, a more robust registration system would be desirable. Non-compliance with this registration procedure would not, as in the past, consign a work into the public domain. Instead, it would affect the rights and/or remedies available to the rights holder, so as to reduce certain liability risks for reusing unregistered works. The law presently does this in part by making the availability of statutory damages and attorney fee awards dependent on prompt registration, but this inducement to registration has not sufficed.

We believe that a reinvigorated registry regime would comply with U.S. obligations under the Berne Convention and the subsequent Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which incorporates by reference many of Berne's provisions.

The core idea is to make copyright registration an attractive and easy option for copyright owners so that members of the public can have better information about the works currently protected by copyright and about those works' respective owners. This idea can be implemented by restructuring the availability of certain rights and remedies depending on the rights holders' registration of the work with a registry service. Advances in information technologies and networks will, we believe, substantially assist copyright owners in complying with an updated registration system. We describe some of these advances and how they might be used to construct a more effective and user-friendly registration system in [a later section] in connection with our discussion of the administrative reforms to the U.S. Copyright Office.

We do not envision that the Office itself would retain all registration responsibilities; instead, we envision a series of registries that would meet the needs of particular authorial communities and industry participants and that could compete for business from copyright owners, as has occurred with the domain name registration system. Creative Commons, for instance, could become a registry for authors of works who prefer to allow wider uses of their works, but want control over commercial

distributions of them. The Office would take on new responsibilities to set standards for registries, which should include requirements for interoperability of key registration data.

This new registration system would provide meaningful incentives to register works that authors or other rights holders expect to have commercial value, ease user access to registered works, and reduce the consequences of infringement for unregistered works. A subgroup of the CPP developed some possible implementations of a new copyright registration regime that would distinguish between rights and remedies available to registered and unregistered copyright owners. Owing to constraints of time, among other things, we were not able to articulate all details of this new regime, but we offer here a few suggestions about how it would work and why it would be beneficial.

The class of unregistered works would obviously include both works that already exist and works that will be created after the new registration regime is adopted. There should be a grace period to allow owners of existing works for whom copyright incentives are important to register under the new regime to enjoy the benefits it would provide. Authors of newly created works would similarly be encouraged to register works if they expect the works to have commercial value and they created the works with copyright incentives in mind.

Unregistered works would still be protected by copyright law against exact or near-exact copying that would cause commercial harm, but fair uses might well be broader as to such works. Moreover, certain remedies, such as statutory damages and attorney fees, would not be available if unregistered works were infringed. Millions of works, such as blogs, YouTube videos, fan fiction tales, Flickr photos, and Twitter streams, if unregistered, would be fair game for follow-on creators and archivists to reuse in non-commercial ways without fear of copyright damage awards because of the inference that non-registration would create.

Registration, by contrast, would signal to the world that copyright incentives are important to the owner of rights in a particular work and would help potential reusers and follow-on creators to locate the person who owns the rights and possibly the conditions under which licenses might be available. Because we envision that registries would be obliged to make registration data available through an interoperable networked system, it should be possible for potential reusers to find rights holders more easily.

Benefits of registration would mainly flow from the greater accessibility of copyright ownership information but would also potentially include a more extensive set of rights and remedies. Termination of transfer rights could, for example, be granted to registered rights holders but not unregistered ones. One could also allow infringement to be found for copying of non-literal elements of registered works but not for such copying as to unregistered works. Registered rights holders might also be able to sue to stop certain non-commercial exploitations of a work likely to have market-impairing effects. Authors who initially did not register their works could do so later, but they would only enjoy the extra rights and remedies arising from registration as to future reusers.

Owners of rights should also be obliged to inform the registry about updated information, such as assignments of copyright or the death of the author and the identity of the author's successor in interest, so that the registry has current information. Failure to provide this sort of updated information could result in a loss of registration benefits.

A more effective registry system would tailor copyright to provide more appropriate protections in a wide range of circumstances. It would do so by identifying

those rights holders who place significant value on their works and who wish to obtain the widest range of protections; it would ease the identification of rights holders; it would encourage voluntary transactions; and it would reduce the penalties for infringement of, and thereby ease access to, unregistered works (i.e., works which, on the whole, owners do not value highly enough to invest in registration). For this large class of works, the copyright system can permit wider public access and use without harming author interests. Limiting the scope of rights and/or remedies available to those rights holders who do not register their works encourages rights holders to identify themselves, thereby facilitating licensing by those who wish to make use of a work.

Lest this proposal seem unduly radical, we wish to point out that it is, in many ways, a logical extension of the private registry regimes that already exist, such as ASCAP, BMI, and the Copyright Clearance Center, which have taken on increased importance in the years since the removal of copyright's formalities. The new registry regime we envision would allow for private registries to exist for particular communities of copyright owners, and ideally, public and private registries would be able and have incentives to share information about registered works, thereby increasing the social value of all of the registries.

Registration regimes are, moreover, common in many areas. Compliance with the domain name registration system, for instance, is necessary to obtain a website address, and many thousands of ordinary people have been able to take advantage of this registration system without undue difficulty. Similarly, it is common to require registration of cars, professional licenses, and real property interests, just to name a few.

Authors and other owners of copyright interests should have the ability to comply without undue difficulties as long as the registration system is carefully designed and incentives exist to steer them toward registration when that suits their interests and needs. The new registration regime would need to be carefully designed so that it did not inadvertently lead to abuses, such as enabling conflicting claimants to register the same work with different registries or burdening copyright owners with multiple registry requirements. It is a risk of establishing a reinvigorated registration regime in the U.S. that some other nations might be induced to adopt registries in a manner that would disadvantage U.S. copyright owners. Attention must be paid to the practical details as to how this new registry regime would work internationally.