COPYRIGHT CHECKLIST

(Use this to review copyright law and to test your understanding.)

Does the plaintiff have a valid copyright?

- Identify the copyrighted work(s). Be specific. For example, in a video game there are copyrights over the underlying computer code as well as the audiovisual work on the screen.
- Is it **original** and **creative**? *Feist, West*
- Is it **fixed** in a tangible medium of expression? § 101 definition
- Is it within a category in § 102(a), and not excluded by one of the categories in § 102(b)?
- Is it **expression**, as opposed to **facts** or **ideas**? *Nichols*
- Even if it is expression, is there **merger** of expression and idea (or of expression and other unprotectable material)? *Selden, Kalpakian, Morrissey, Kregos* (note that *Selden* contains an early discussion of idea/expression, merger, and copyright not extending to useful arts)
- Is it a **compilation** of otherwise unprotectable material? If so, is the **selection** and/or **arrangement** copyrightable? If so, is there only minimal creativity, so that the compilation has "**thin**" copyright? *Feist, West, Kregos*
- Is it a **method of operation**? *Lotus* (note that in *Google v. Oracle* the Supreme Court declined to reach the subject matter question on APIs and methods of operation)
- More generally, with **software**, there will be a large amount of material that is not copyrightable—extending far beyond methods of operation. This will include issues of functionality, merger, material taken from the public domain, etc. Much of this will be dealt with in the infringement analysis. *Computer Associates*
- For pictorial graphic and sculptural works, is it the "design of a **useful article**"? If so, is it separable from the "utilitarian aspects of the article"? *Star Athletica*
- Is it a **character?** *Anderson*
- Should it be excluded in the infringement analysis as "***scènes à faire***"? See the discussion after *Computer Associates*
- Is it in another unprotectable category: titles, names, slogans, short phrases, **government works**? § 105, *West, A Natural Experiment, Public.Resource.Org*
- Note on **fixation**: computers, and the world wide web, create a multitude of arguably "fixed" copies. *MAI* But implementing a system that automatically creates temporary copies without human intervention may not be direct infringement. *Netcom*, § 512

Was there direct infringement?

- Did the defendant's activity implicate one of the **exclusive rights in § 106**—reproduction, preparing derivative works, distribution, public performance, public display?
- Was it **literal or non-literal copying**? For analyses of non-literal copying, see *Nichols* (patterns of increasing generality and idea/expression) and *Computer Associates* (for computer programs, abstraction-filtration-comparison).
- Apply the **two-part test** from *Arnstein*: 1) factual copying (access and probative similarity) and 2) unlawful appropriation (substantial similarity). Who should decide part 2, the ordinary/lay observer or intended audience? *Dawson* What standard should they use?
- **Exclude *unprotectable* material**—unoriginal material, facts, ideas, § 102(b), merger, scènes à faire, unoriginal selection/arrangement, useful articles without separability, unfixed material, government works. *Computer Associates*; see subject matter section above. If the only material used by the defendant was a character, think about whether the character was copyrightable. *Nichols, Anderson*
- Was the copying merely **de minimis**? *Newton*

Was the use a non-infringing "fair use"?

- Go through § 107, including its four factors listed below. Under each factor is a general spectrum from weighs against fair use to ⇔ weighs in favor of fair use
  1) the **purpose and character of the use**
     commercial; duplicative ⇔ nonprofit; educational; *transformative* (even if commercial)
  2) the **nature of the copyrighted work**
     more creative; unpublished ⇔ more factual; published
  3) the **amount and substantiality of the portion used**
     large amount; heart of the work ⇔ small amount; insignificant portion, only that which was needed for privileged or progress-promoting purpose
  4) the **effect of the use upon the potential market**
     market substitute ⇔ limited impact or non-cognizable market harm
- Apply relevant analysis from the cases you have read: *Sony, Harper & Row, Campbell, SunTrust, Sega, Perfect 10, Authors Guild, Oracle, MDS,* notes on *Cariou, Warhol, ComicMix*

Was there secondary liability?

- Is there direct liability? If not, there is no secondary liability.
- If so, what kind(s) of secondary liability apply? **Contributory** (knowledge + material contribution), **vicarious** (right and ability to control + direct financial benefit), or **inducement** (*Grokster*)? *Sony, Napster, Grokster*
- Does the *Sony* safe harbor apply? *Sony, Napster*

Does the DMCA § 512 safe harbor apply?

- Is the defendant a qualifying service provider? § 512(k), § 512(i)
- Do its activities fit within the relevant § 512 safe harbor—e.g. § 512(a) mere conduit? § 512(b) caching? § 512(c) storage at the direction of a user? § 512(d) information location tool?
- Did the defendant comply with the statutory requirements in the relevant section? § 512*, Viacom*

Is there a DMCA § 1201 violation?

- Is there a "technological measure"? If so, is it an access control or rights control? § 1201
- Was the technological measure circumvented? Was there a tool that enabled the circumvention? What is the copyrighted work covered by that measure? Determine whether the defendant violated § 1201(a)(1), § 1201(a)(2), and/or § 1201(b)(1). § 1201, *Corley*, *Skylink*, *Blizzard*
- If circumvention of an access control is for fair use or other non-infringing activity, do you follow *Corley*/*Blizzard* or *Skylink*?

Is there a violation of a contractual or license term that covers a copyrighted work?

- The intersection of copyright and licensing is a complex question that goes far beyond the space available in this book. We focused particularly on some of the basic questions brought up by software—where *using* the copyrighted work may also result in creating a *copy* of the copyrighted work, potentially allowing the copyright owner to impose licensing terms that go far beyond what copyright law itself would require.
- If the copyrighted work is software, is the defendant an owner protected by § 117(a)?
- If the defendant is not an owner but a licensee, does violation of the term = copyright infringement? *Blizzard* (No, if the term is a covenant, Yes, if it is a condition with a nexus to copyright)