Class 18: The Right To Reproduce

- Administrative
  - Next Time: 484-506
    - Anderson v. Stallone: Not the best teaching case. Don't get too hung up on section IV.A.4 of the op: (488-90) --- "No part of the Treatment can be Granted Copr. Protection"
  - Youtube Monday
- Last Time
  - Ownership
    - Basic Rules
      - Default owner is the author --- the person who actually writes/composes/paints the original work.
      - BUT: many works are created in the employment/commission context.
        - Rules are a little complex, given intense lobbying at time of 76 Act.
        - Section 101 (434): "Work for Hire"
          - (1) Work prepared by an employee within the scope of his or her employment.
          - (2) A work specially ordered or commissioned for use as a contribution to a collective work for one of nine purposes.
    - CCNV v. Reid
      - Basic Facts
        - In support of CCNV
          - Mitch Snyder (member and trustee of CCNV) and others conceived of idea.
            - Two adults, one infant.
              - Black.
              - Life-sized
            - Pedestal
            - Grate
            - Real "steam"
          - CCNV Contributions During development of idea
            - Suggested reclining poses.
            - Many visits to check on his progress.
            - Built the pedestal and base.
            - Rejected shopping bags, suitcases in lieu of cart.
        - In support of Reid
          - Selected material to use (given funding constraints)
          - Several sketches made.
          - Sculptor: Skilled occupation.
          - Own tools
          - Distant from CCNV (Baltimore)
          - Less than two months
          - Absolute freedom as to schedule
          - Discretion as to assistants.
          - No taxes, benefits, etc.
        - Oddity in the case
          - Who "owns" the physical sculpture?
      - Held
        - Test adopted
          - "employee" carries its common-law agency meaning.
          - Refused to adopt three other possible tests
            - 1. Whenever hiring party retains right to control the product --> employee.
            - 2. When hiring party has actually wielded control w.r.t. creation of a particular work --> employee.
            - 4. Employee means only formal, salaried employees.
  - Duration
    - Not responsible for anything pre-1976 Act
    - Term
      - 1976 Act
        - Life + 50
        - Corporate, Anonymous, or Work for Hire: 75 years from publication or 100 years from creation (whichever is sooner).
      - Sonny Bono Copr Term Extension Act of 1998
        - Life + 70
        - Corporate, Anonymous, or Work for Hire: 95 years from publication or 120 years from creation (whichever is sooner).
    - Utilitarianism Incentives
      - Forbes.com Dead Celebrity earnings list.
        - Cobain: $50M
        - Presley: $42M
        - Charles Schulz: $35M
        - Lennon: $24M
        - Einstein: $20M
        - Warhol: 19M
        - Dr. Seuss: $10M
    - Constitutionality of Extensions
      - What does "limited Times" mean?
        - Mary Bono: Forever minus one day.
      - Pre-existing works (retroactive application).
    - Orphan Works
      - proposal to require renewal (for $1) at 50 years, 60, 70, etc.
    - should term vary by type of work?
- Overview
  - Exclusive Rights
    - Reproduce
    - Prepare derivative works
    - Distribute copies or phonorecords
    - Perform publicly
    - Display publicly
  - Right to Copy
    - NOT limited to exact reproductions
      - All three of today's cases are e.g.'s
      - "substantially similar" copies
        - Links to idea/expression dichotomy.
    - Test: Two prongs
      - 1. Copying
      - 2. Improper appropriation
        - independent creation is a defense.
- Prong 1: Copying
  - Arnstein v. Porter
    - Basic Facts
      - Aside: great archive of music clips from famous copyright cases at http://ccnmtl.columbia.edu/projects/law/library/song.html
      - This case: http://ccnmtl.columbia.edu/projects/law/library/cases/case_arnstein/porter.html
      - Evidence of "Access"
        - 1 Million Copies of A Mother's Prayer had been sold.
        - 2000 copies of "The Lord is My Shepherd."
        - 1 song not published, but played on radio.
        - Stooges hired by Defendant.
          - "I don't know that he had to do with it, but I only know that he could have."
        - A copy of a song had been stolen from his room, maybe by the stooges.
    - Lower Court
      - 2d Cir. 1946
  - Proof of copying -- "probative similarity"
    - Sometimes, direct proof of copying exists.
    - For circumstantial proof: sliding scale
      - 1. If there are no similarities between the works, no amount of access will suffice to prove copying.
      - 2. If there is some evidence of access and similarities exist, trier of fact must determine if the works are sufficiently similar to prove copying.
      - 3. If there is no evidence of access, but the works are strikingly similar, enough to preclude the possibility of independent creation, copying has been established..
    - What are some other examples of "Access"?
  - Role of Experts
    - This prong is measured objectively.
      - Expert testimony permitted
      - Dissection allowed
  - Subconcious copying
    - Bright Tunes v. Harrisongs
      - Basic Facts
      - Held (SDNY)
  - Planted errors as proof of copying
    - Feist, again.
- Prong 2: Misappropriation
  - Basic Idea
  - Nichols v. Universal Pictures Corp.
    - Basic Facts
      - Plaintiff's Play: Abie's Irish Rose
      - Def's Movie (Motion picture play): The Cohens and the Kellys
      - Really wonderful recap of both plots and characters in this opinion.
    - Held: (2d Cir. 1930) (L. Hand)
    - Access?
    - Reasoning
      - Very, very fact dependent.
        - Lots of good nuggets in here
        - Even if the plot was original to the plaintiff, "there is no monopoly in such background. Though the plaintiff discovered the vein, she could not keep it to herself."
        - On characters: "The lovers are so faintly indicated as to be no more than stage properties. They are loving and fertile: that is really all that can be said of them . . ."
        - "Grotesque hobbledehoy"
        - A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of Romeo and Juliet.
  - More on the Levels of Abstraction
    - (468): The levels of abstraction.
      - Important quote.
      - "There is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas' to which, apart from their expression, his property is never extended."
    - (469): Test for how to look at which level of abstraction to assess, given two works
      - Find "the most detailed pattern, common to both" and assess whether it is still protectable expression or unprotectable idea.
    - Recap of quote about characters: "the less developed the characters, the less they can be copyrighted."
  - How to apply the test?
    - Objective?
    - Subjective?
    - Experts?
    - Point of view of "Ordinary Observer"?
    - Thin copyrights
    - "No plagiarist can excuse the wrong by showing how much of his work he did not pirate."
  - Sampling Music
  - Steinberg v. Columbia Pictures