Class 20: Fair Use (Part 1)

- Administrative
  - Next Time: 525-39; 539-50
  - Spring Copyright Class: Same Time slot
  - Final Preparation
    - Final in Six Weeks
    - The Mind Maps
      - Won't print perfectly without some manipulation.
        - You can bring them, printed, to the final.
      - Don't make too much of them.
        - Creates a common "floor" of notes.
        - They lack the "big picture focus" of your own outlines.
    - Help from Me During Prep
      - Two Review Sessions
        - One: Tentatively Friday, December 1st, afternoon.
          - Review a practice exam.
        - Two: Last Day: Wednesday, December 6th, ordinary class time
          - More about filling in parts of your notes that do not make sense.
      - Other questions for me
        - You can schedule a meeting with me at any time.
        - You can e-mail me questions at any time.
        - DEADLINE FOR ALL QUESTIONS: Saturday, December 16, 2006, at 7pm.
      - I will send important updates (if any) via e-mail.
  - Youtube Monday
    - Photoshopping Contests
    - Bush + U2
    - Grey Video
      - Encore (Jay-Z) + Glass Onion and Savoy Truffle (Beatles)
- Last Time
  - Public Performance / Display
    - Defined
      - Roughly: If it moves, it's a performance, if it stays still, it's a display.
        - Copies of Books can be read (performed) or placed in a museum (displayed).
        - Single photos can be hung on a wall (displayed) or shown in a slide show (performed).
    - First Sale
      - Exception applies ONLY to display right, not to performance right.
        - Why?
      - Limit: cannot "display" it over a broadcast.
        - From text on 498-99.
    - What is "public"?
      - Hypos
        - DJ hired to play at a small party in an apartment...
        - DJ hired to play records at wedding with 75 guests in the backyard of a home.
        - ...in a church.
        - ...in a public park.
        - Couple wants to give commemorative CDs to the guests with favorite songs burned on each.
        - Pop-culture obsessed professor regularly shows copyrighted works to class without permission.
          - Section 110(1) -- educational exception.
            - House Report: Students regularly enrolled in a class.
    - Bars, Clubs, Restaurants, and Stores
      - FMLA
        - Extended exemption for small business to play music.
        - 72% of bars; 27% of retail stores now exempt.
        - BUT: violated TRIPS (WTO panel).
      - Blanket licenses can be purchased from copyright societies:
        - ASCAP
        - BMI
        - SESAC
        - Hire enforcement monitors who travel from bar to bar...
        - Also collect fees from radio stations.
  - Distribution
    - Right to distribute, through sale or other means, either the original or subsequent copies of a copyrighted work.
    - First Sale
      - 109(a): Copyright holder can't prevent lawful owner of a copy from selling THAT COPY.
      - Cuts back considerably on scope of right.
    - Problem 4-26
      - Casebook bought (first sale) and passages are underlined and marks are made in the margins.
      - Student sells marked-up book back to bookstore.
      - Bookstore sells them to incoming law students as used books.
- Fair Use Generally
  - Old Doctrine, but codified in 76 Act
  - Section 107
    - Some sample purposes
      - Criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.
    - "Not an infringement"
    - Four Factors (illustrative, not exhaustive)
      - 1. Purpose and character of the use
        - Commercial?
        - Nonprofit educational?
      - 2. Nature of the copyrighted work.
      - 3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole.
      - 4. Effect of the use on the potential market for or value of the copyrighted work.
  - How to Apply
    - Sony: Equitable rule of reason.
  - Public Policy Rationale?
- Harper & Row v. Nation Enterprises
  - Basic Facts
    - Gerald Ford wrote an autobiography after leaving office.
      - Lots of "newsworthy" tidbits, most importantly his telling of the events leading up to the pardon of Nixon.
    - Time magazine entered into contract with Ford & publishers to publish excerpts from the book one week before release date.
      - Two payments. Second was supposed to be for $12,500.
    - Two to three weeks before release, someone stole a copy of the manuscript and gave it to the editor of The Nation
    - Editor of The Nation (Navasky) worked quickly to excerpt passages in his magazine to scoop Time.
      - Selected "most interesting and moving parts" and from among the "most powerful passages."
    - Time canceled second payment ($12.5k)
  - Held
    - NOT a fair use; infringement
  - Reasoning
    - A. The importance of the unpublished nature of the manuscript.
    - B. No "Public Figure" fair use exception; no blanket "news reporting" fair use exception; No "important work" fair use exception.
    - Four Factors
      - 1. Purpose of the Use
      - 2. Nature of the Copyrighted work.
      - 3. Amount and Substantiality of Portion Used
      - 4. Effect on the market.
        - What market?
          - Memoirs
          - Market for prepublication excerpts
  - Other questions
- Sony v. Universal