

COPYRIGHT, COPYWRONG:
U.S. COPYRIGHT LAW UNDER ATTACK

First-Year Writing Seminar 1135 – Spring 2011

[course syllabus](#)

TOPICS FOR LEGAL BRIEF

The final version of the brief will be due April 1.

*Please let me know by March 16 (Wed. after the break) your top two choices for a topic.
(Two or three students in each section can work on each of the topics.)*

[course archives](#) (previous assignments)

Mon. Feb. 28:

No new case to read. In class we'll discuss some of the cases you wrote articles on, as well as other recent constitutional cases, in particular, *Virginia v. Black*: [decision](#) (see pp. 348-49), with [oral argument](#) by Rodney Smolla.

For Wed. Mar. 2:

Read the opinion in *MGM v. Honda*, on a Honda commercial apparently spoofing the James Bond character. Here's the [commercial](#), banned as a result of the court's decision. The term *scène-à-faire*, important to the legal doctrine invoked in the case, is explained [here](#).

For Fri. Mar. 4:

Read the decision in *Carol Barnhart Inc. v. Economy Cover Corp.*, which deals with the principle that utilitarian objects (like garments, furniture, tools) are normally not copyrightable.

[From this point, I haven't yet revised the dates of the assignments for this year's schedule.]

I. The Supreme Court handed down in 2005 an important decision on peer-to-peer file-sharing software, *MGM v. Grokster*. You can find [here](#) a useful (but partisan) explanation of the issue and decision.

This time, instead of reading the Supreme Court's opinion, read one of the briefs submitted to the Court. (This will provide you an example and model for the brief you're writing yourself this week.) You can choose either:

- [Brief submitted by the motion picture companies](#) (plaintiffs), or
- [Brief submitted by the Grokster and StreamCast](#), who make the file-sharing software (defendants), or
- Any of the "amicus" briefs – briefs submitted by other interests in support of either of the parties as "friends of the court." You can find these [here](#) under the headings "Amicus Briefs Supporting Respondents" and "Amicus Briefs Supporting Petitioners."

Some of the briefs are very long; you can limit your reading to the first 30 pages or so. In class on Monday, please be prepared to summarize the arguments of the brief you read.

II. Summary of your legal brief at the beginning of class. This should include a statement of the legal issues you plan to address, and citations to legal cases or other sources you have found on the issues (with one-sentence summaries). I would have expected you to find (using Westlaw) and cite at least two legal cases having some bearing on your case (though the facts may be very different).

To help you in preparing the summary of your legal brief, [here's an outline of copyright analysis and a sample summary](#).

The summary should be between one and two pages (double-spaced, 12-point font). (The full brief, four to eight pages, will be due Mon. Mar. 1).

For Fri. Feb. 26:

Oral argument: format, clips, and practical suggestions

I'll post here a schedule for oral arguments based on the briefs you've written, to take place during the week and a half after the spring break.

TOPICS FOR LEGAL BRIEF

Mon. Mar. 1:

We discussed the [on-going litigation in the Obama poster case, Fairey v. A.P.](#)

For Mon. Mar. 15:

Watch the clips of oral arguments listed on [this page of information for preparing oral arguments](#). In class we'll critique and compare several of the attorneys shown in the videos, as preparation for our own oral arguments beginning Wednesday.

For Wed. Mar. 17:

Students should read [these two decisions](#) before class to prepare for today's oral arguments.

Oral argument on Case I, *Body Art Creations v. Rick Majors*

12:30 class – Andrew Kopp (for plaintiff), Andy Clifford (for defendant)

1:30 class – Wilkerson Given (for plaintiff), Dr. Morgan (for defendant)

For Fri. Mar. 19:

Students should read [this decision](#) before class to prepare for today's oral arguments on Case IV.

Oral argument on Case IV, *Cherokee Indians v. 20th Century Fox*

12:30 class – Anna Delchamps (for Cherokees), Liz Ehrhardt (for 20th Century Fox, Berstein, and Mitchell)

1:30 class – Emily Powell (for Cherokees), Tyler Thompson (for 20th Century Fox, Berstein, and Mitchell)

For Mon. Mar. 22:

Oral argument on Case V, *Arlan v. New York Times*

12:30 class – Catie Donnelly (for plaintiff), Alex Rice (for defendant)

1:30 class – Joanna Curran (for plaintiff), Carson Poplin (for defendant)

For Wed. Mar. 24:

Oral argument on Case VII, *Frost v. Infinite Monkey*

12:30 class – Wilson Duty (for Estate of Robert Frost), Alex Moore (for Universal Music Group), Miles Taylor (for Infinite Monkey Society)

1:30 class – Ashley Baker (for plaintiffs), Dr. Morgan (for defendant)

For Fri. Mar. 26:

In the 12:30 section, we'll complete oral argument on Case VII.

Students in the 1:30 section should read [this decision](#) before class to prepare for today's oral arguments on Case VI.

Oral argument on Case VI, *Vivian Dior v. Tomcat Playpen*

1:30 class only – Anabella Soto (for plaintiff), Harrison Callaway (for defendant)

For Mon. Mar. 29:

Read the article "[Copyright in the Age of YouTube](#)," from the *American Bar Association Journal* – be sure to watch the video of the baby dancing to Prince. Also read pp. 4-8 of the court's initial decision [here \(Lenz v. Universal Music Corp.\)](#) (The important part of the case is on pp. 4-8). Finally, read [this brief discussion of the case](#) at the site of the Electronic Frontier Foundation, a non-profit digital rights advocacy group.

For Wed. Mar. 31 and Wed. Apr. 7:

Watch a [program \(Remix: Making Art and Commerce Thrive in the Hybrid Economy\)](#), with Lawrence Lessig, one of the two or three best known scholars on copyright law, and Shepard Fairey (the Obama icon artist) that took place a couple of weeks ago at the New York Public Library. The entire program is about an hour and half; you're only required to listen to Lessig's speech (from 16:30 to 41:30 on the video clip). You might want to download it rather than stream it (the streaming version tends to stall) – I've backed up the video file [here](#). As an alternative, you can listen to this [very similar speech by Lessig](#) (with better quality video and sound).

For Fri. Apr. 9:

Read a book review (in *American Scholar*) of Lessig's *Remix*, published last year. To access the review, go to [Academic Search Premiere](#), and enter author "Saint-Amour," title "copyright." Note also this [NPR story](#) on e-books formatted so as to be uncopiable.

For Wed. Apr. 14:

No new reading. We'll finish Monday's discussion, and I'll ask everyone to present briefly the original work (showing or describing it) you turned in Monday.

For Fri. Apr. 16:

Read a talk by Richard Stallman, [Copyright and Globalization in the Age of Computer Networks](#). The bearded, unkempt Stallman is – at least in style – much more of a rebel and iconoclast than Lessig; I'll ask you in class what specifically is different about his position in the copyright controversy.

Watch also at least the first half or so of this [video](#), where Stallman gives an engaging presentation on his main passion – free software. Stallman's ideas go back to his experience as a part of the early "hacker" community at MIT in the 60s and 70s – an almost utopian group of idealistic young programmers who played a key but little-known role in the evolution of technologies we all use today (see this [brief clip](#) of a younger Stallman nostalgically remembering that community).

This best talks by Stallman available as video clips are in [French](#) (in an intelligentsia-packed Parisian café) and [Spanish](#) (on a Barcelona TV network). But if you haven't done your language requirement yet, don't worry, I'll translate a couple of key passages from these in class.

For Fri. Mar. 20:

Read the article "[Google and the Future](#) of Books," from the *New York Review of Books*.

For Wed. Mar. 25:

No new assignment, as we'll continue discussing Lessig's presentation. I'd encourage you to use the time to work on the legal memorandum assignment.

Writing Assignment, Due Monday, March 30 – Legal Memorandum

Compose a legal memorandum, two to three pages in length, dealing from a neutral (rather than an argumentative or partisan) perspective on a copyright issue of your own choosing. Choose an issue on which you can find relevant case law, and, if possible, one that seems interesting to you and perhaps directly relevant to decisions or activities of yourself or people you know.

Legal memos are typically written by junior (or summer) associates in law firms at the request of senior associates or partners, on issues not yet actually in court – often as a basis for responses to clients, who are considering a particular course of action.

Here are some examples of appropriate ways to begin a memo:

"You have asked me to determine whether Furman University may legally, under current copyright law, show films over its internal television network that are being assigned by instructors as part of specific courses. A quick survey of the statutes and cases laws indicates that such showings, if available to the entire student body, would most likely be held to infringe copyrights on the film," etc.

"Furman University has asked us to investigate whether it may legally," etc.

"Furman University has received legal notice from MGM studios threatening litigation unless it immediately ceases the showing of its films over the university's internal television network. I have been asked to determine whether it is advisable for Furman to litigate this issue," etc.

In class on Mon. Mar. 30:

We discussed the Authors Guild's threatened copyright suit against Amazon's "Kindle 2" e-book reader over its text-to-speech function. See these sources:

- [NPR story](#) on Kindle 2's introduction.
- [New York Times opinion piece](#) by president of Author's Guild (with video example of Kindle 2 "reading").
- [Response of Amazon](#), defending Kindle 2's text-to-speech function.
- From [Wall Street Journal article](#): "Some publishers and agents expressed concern over a new, experimental feature that reads text aloud with a computer-generated voice. 'They don't have the right to read a book out loud,' said Paul Aiken, executive director of the Authors Guild. 'That's an audio right, which is derivative under copyright law.'"
- For the opposing position, this entry in the [Electronic Frontiers Foundation blog](#).
- Here's a demonstration site for a text-to-speech program available commercially (you can have any text read by it, in any of a number of languages): [Loquendo speech engine](#).

For Wed. Apr. 1:

For one more encounter with the thought of Lawrence Lessig, listen to this [interview on the NPR program "Fresh Air"](#) and watch this brief [video introducing Lessig and Creative Commons](#). (For much more information on themes interesting Lessig – and as a good research tool for your last two papers in the course – see also [Lessig's blog](#).)

Assignment due Wednesday, April 22 (at class time) Political speech and proposed new copyright statute

After thinking through the arguments we've been considering the past few weeks, pretend you are a member of Congress, and adopt a position in the controversy over copyright law. (You may of course decide to adopt a position not so much out of conviction as for the sake of argument – or because you don't want to hurt the feelings of one of your major campaign contributors.) Articulate that position by writing two documents:

1. A new copyright statute for the United States, replacing the essential provisions of the current 17 U.S. Code (presumably §§ 102, 103, 106, 107, 202, and 302(a) – but you can decide exactly which matters you'll want your statute to cover). This should be a page or two (double-spaced).
2. A political speech (four pages or more double-spaced) defending your proposed new statute. Since the speech is political, it may include highly emotional or inflammatory appeals, slick rhetoric, purple prose, populist pandering, below-the-belt jibes, sarcasm, mud-slinging, and outright ridicule of opposing views – but be sure to get in some cogent logical arguments as well. No research is required in preparing the speech; but a little research (internet or library) going beyond the speeches and works we've discussed in class could help stimulate your own thinking and provide you with more original and unexpected arguments.

You might of course propose abolishing entirely copyright law (or replacing current law with an extremely simple and short statute); in that case, since your statute we'll be non-existent or very brief, I'll ask you to prepare a speech of five or more pages.

I'll ask everyone to present an abbreviated version of their speech in class during the week of April 20, and we'll see if the class can reach a compromise among the proposals and pass a bill.

(Note that there will be one more assignment in the class – a paper of two or more pages expressing your final position on copyright law, this time from a more scholarly or philosophical viewpoint, due on the date of the final exam for your section. This will be in lieu of an in-class final exam, and will be due for both sections on Monday, May 4, at 10am.)

For Mon. Apr. 6:

Read a talk by Richard Stallman, [Copyright and Globalization in the Age of Computer Networks](#). The bearded, unkempt Stallman is – at least in style – much more of a rebel and iconoclast than Lessig; I'll ask you in class what specifically is different about his position in the copyright controversy.

Watch also at least the first half or so of this [video](#), where Stallman gives an engaging presentation on his main passion – free software. Stallman's ideas go back to his experience as a part of the early "[hacker](#)" community at MIT in the 60s and 70s – an almost utopian group of idealistic young programmers who played a key but little-known role in the evolution of technologies we all use today (see this [brief clip](#) of a younger Stallman nostalgically remembering that community, or listen to this more in-depth [interview](#)).

The best talks by Stallman available as video clips are in [French](#) (in an intelligentsia-packed Parisian café) and [Spanish](#) (on a Barcelona TV network). But if you haven't done your language requirement yet, don't worry, I'll translate a couple of key passages from these in class.

Richard Stallman

GROUPS IN CLASS

1. Outline history of copyright (from ancients) as Stallman sees it (cf. Lessig's view).
2. Summary of Spanish (or French) interview– Stallman's position on free software, music, etc.
3. Skit – copyright police state.

For Wed. Apr. 8:

Moving from a hippie-activist to a corporate attorney, please read this article by William Patry (author of the most influential treatise on copyright law and currently senior copyright counsel for Google): [The Failure of the American Copyright System: Protecting the Idle Rich](#), 72 Notre Dame L. Rev. 907 (May, 1997) (also available in WestLaw – search for the citation "72 Notre Dame L. Rev. 907").

Feel free to go quickly through the more technical discussion in parts III and IV of the article – the important point is to understand who primarily (according to Patry) are the beneficiaries of copyrights today, and how a Congress – by a series of revisions to the copyright statute – has brought about that result.

Wed. Apr. 15:

[What would happen if copyright were abolished? \(notes from class discussion\)](#)

For Fri. Apr. 17:

Read an article by Egen Moglen, "[Framing the Debate: Free Expression versus Intellectual Property.](#)" [Moglen](#) is a professor at Columbia University; his perspective is shaped by that fact that he is at once a legal scholar, like Lessig, and a pioneering software designer, like Stallman. (In class, we'll look at a couple of passages from [a speech of Moglen.](#))

For Mon. Apr. 20:

Read an article by Lawrence Lang, "[The Black and White \(and Gray\) of Copyright.](#)" Lang, a legal scholar and anti-copyright activist in India, argues that the copyright, far from being natural or normal, is a peculiarity of the Western nations over the last hundred years or so, and has little relevance to many of the forms of creativity that have flourished throughout the world for centuries.

Wed. Apr. 22:

In class, dramatic reenactment and discussion of these hypotheticals (involving question when the assertion of private property is just); the events are assumed to take place on a small village located on the current site of Furman, in the spring of 1809, beyond the settled area where South Carolina and federal law applied.

1. Old widow, living in shack, is baking a cornbread loaf; she grew the corn, got the buttermilk from her own cow. Vagrant (fell into hard times because of recession of 1808-09, traveling from town to town looking for work), attracted by odor of, first asks widow for piece of cornbread, offering to work in exchange; then, after she refuses, sneaks in back of shack and takes half the loaf. She catches him, pulls her gun on him.
2. John Paris, local landowner, had bought (for a pittance) hundreds of acres (on and around what is now called Paris Mountain), mostly forest, unused. Traditional Cherokee hunter, crossing this territory, shoots with bow and arrow magnificent stag bounding down from Paris Mountain. Paris claims the stag as his.
3. Huge plantation owner from area now Rock Hill sends his lawyers to village, demanding entire village and surrounding dwellers pay him steep annual rent or move off. Claims this is his land, based on deeds going back to original land grant (1660) to his ancestor of strip of land between A and B latitudes reaching to Pacific.
4. Cherokee man, now hardworking farmer, saves up by dint of hard work, over many years, \$500. Takes it all to Greenville, buys a slave to help him work his land. Slave flees to judge, begs his freedom.
5. Sequoyah sets up printing press in the village, translates into Cherokee and prints editions of contemporary literary works; sells them cheaply, as part of literacy campaign among Cherokee nation. Philadelphia publisher hears about the press, attempts to have it shut and Sequoyah prosecuted.

For Fri. Apr. 24:

Read [this excerpt](#) from John Locke's *Second Treatise of Government* (at least through sec. 41). This is a text I've mentioned in class – the classic statement in European thought of a just and rational system of private property.

For Mon. Apr. 27:

Read the [introduction](#) from a recently published book, *Copyrights and Copywrongs*, by Siva Vaidhyanathan. This sums up many strands of our discussion throughout the course, and so provides a fitting conclusion. (If the above link doesn't work, just go to [books.google.com](#), and put in the search terms "Vaidhyanathan copywrongs"; it should be the first book that comes up.)

MATERIALS FOR RESEARCH

Books in Furman Library

William Patry
Moral Panics and the Copyright Wars
New York: Oxford Press, 2009

Lawrence Lessig
Remix : Making Art and Commerce Thrive in the Hybrid Economy
New York : Penguin Press, 2008

Lawrence Lessig

CASEBOOKS (LAW SCHOOL TEXTBOOKS)

Copyright Cases and Materials [Hardcover]
Robert A. Gorman (Author), Jane C. Ginsburg (Author)
Publisher: Foundation Press; 7TH edition (July 19, 2006)

Copyright Law: Essential Cases and Materials (American Casebook Series)
Alfred C. Yen (Author), Joseph P. Liu (Author)
Publisher: Thomson West; 1 edition (April 11, 2008)

OUTLINES, STUDY GUIDES

Intellectual Property-Patents, Trademarks And Copyright in a Nutshell [Paperback]
Arthur R. Miller (Author), Michael H. Davis (Author)
Publisher: Thomson West; 4 edition (July 3, 2007)

Copyright Law in a Nutshell [Paperback]
Mary LaFrance
Publisher: West; 1 edition (June 4, 2008)

First Written Assignment. Due Mon. Feb. 28
(Please send name of case with web link by Mon. Feb. 21, midnight.)

Write a newspaper article (or prepare a radio or television report) on a judicial decision from the last few months or years that interests you. As an alternative, prepare a Wikipedia article on the case. I'll place here a list of suggested decisions, or you can do a little research to find one on your own. The case need not be on copyright law; but avoid a case well-enough known to have produced thorough press coverage (or a full summary on Wikipedia).

You just focus almost exclusively, in your article or report, on explaining clearly the facts and legal doctrine of the court decision itself. Avoid devoting any substantial part of it to peripheral matters like statement by the lawyers or parties to the case, public reaction or controversy, or political ramifications. Make sure you adopt the approach, tone, and style of good journalism or Wikipedia articles (rather than that of legal writing or of the typical college paper).

Length: three-and-a-half to four pages, single-spaced, one-inch margins, 12 point New York Times font (not counting any long quotes). Citation is not necessary, except to provide me at the end a link to the text of the case. (If you chose to actually prepare the sound file or video clip for a radio or television, please talk with me about how the length requirement will apply to your project.)

You'll find [here links to the articles of Adam Liptak](#), who has won a Pulitzer Prize for his legal reporting for the New York Times. His articles could be a good model to follow for the approach, format, and style of your own article.

Suggestions for cases to report on:

[Summers v. Adams](#) (U.S. District Court for South Carolina, 2008): South Carolina license plates with motto "I believe," image of cross and stained-glass window held unconstitutional.

[United States v. United Foods](#) (U.S. Supreme Court, 2001): Making fresh mushroom handlers pay assessments used to fund advertising promoting mushroom sales violates the First Amendment.

[Watchtower v. Village of Stratton](#) (U.S. Supreme Court, 2002): Jehovah's Witnesses successfully challenged, under First Amendment, a town's ordinance requiring "canvassers" to get permission from mayor.

[Good News Club v. Milford Central School](#) (U.S. Supreme Court, 2001): A public school that prevented a Christian prayer group from meeting on school premises was held to violate that group's free speech rights.

[Newdow v. Elk Grove School District](#) (Ninth Circuit Court of Appeals, 2002): Inclusion of "under God" in pledge of allegiance, as used in public schools, held to violate First Amendment establishment clause.

[Rice v. Gaetano](#) (U.S. Supreme Court, 2003): Hawaii state law, restricting voting in a statewide election for heads of Office of Hawaiian Affairs to citizens who can show significant Native Hawaiian ancestry, held a violation of the equal protection clause of the Fifteenth Amendment.