Fall 2011 Copyright Exam / Model Answer #1

Part II – A Bad Apple?

A) Copyrightability of the Manual

The MacBook Air 2010 Manual is copyrightable in its entirety as a compilation work. Compilations are under the scope of protection provided by the Copyright Act *(§103*). Compilations are protected as original works of authorship based on the selection and arrangement of pre-existing materials, even if those pre-existing materials are uncopyrightable by themselves (*Feist*).

Fruit Basket will argue that the Manual is a set of instructions for a computer, which is a method of operation or a set of facts, and therefore uncopyrightable because it is not an original work of authorship (*Lotus*, §102(b)). However, the constitutional requirement of originality is satisfied by only a "modicum" of creativity (*Feist*, *Bleistein*). Some of the prose in the instructions may be dictated by efficiency, but the verbiage selected in certain areas is protectable expression. For example, the title "What's in the Box" could have been written as "Materials" with essentially the same meaning. Further, instructions are more than a simple list, and taken as a whole could fulfill the modicum of creativity requirement (*Sebastian*).

Even if the text was uncopyrightable by itself, the selection and arrangement of the text and pictures on each page satisfies the modicum of creativity requirement, a low standard that does not require all elements of a compilation to be copyrightable on their own (*Feist*). The decision to place certain pictures between, above, or below text on different pages is arbitrary at worst or artistic at best, but either way this selection is not based on efficiency. It does not make the instructions more or less difficult to follow. Courts cannot decide a selection or arrangement is uncopyrightable if it meets the lowest level of creativity (*Bleistein*).

Fruit could argue that the general order of instructions (set-up→use→possible problems, etc.) is dictated by practical considerations and the industry standard, because this is the logical order of most instruction manuals. This would fail because that argument could not be made for the sub-categories, a more relevant level of abstraction. For example, there is no efficiency based reason that "Ports on Your MacBook Air" comes before "Using the Trackpad and Keyboard." The fact that Apple chose to hire somebody outside the company for the specific job of selecting and arranging the Manual strongly supports the assertion that original thought and more than just practical decision making were put into it.

Based on the above analysis, the Manual satisfies the originality requirement for copyrightability. Aside from being original, the Manual was fixed in a tangible medium when it was printed on paper to be sold with each computer, as well as saved on PDF documents. Therefore, it is copyrightable.

B) Ownership of the Manual

Apple is also the owner of the Manual and therefore has the right to bring an infringement action. Three different people contributed to the creation of the Manual: Max Headroom, Takila Mockingbird, and Bonnie Selavy. The contributions of Max and Bonnie are both "works made for hire" by Apple, and so any ownership rights they obtained are held by Apple. Takila gave an implied license for her drawings to be used as part of the compilation, so Apple has full rights in the arrangement of her drawings within the Manual (*§103(a)*).

As an employee of Apple for five years with a salary, healthcare benefits, and a pension plan, Max would be considered an "employee" under a "work made for hire" analysis (*§101(1)*). As the team manager for the creation of the Manual, any contributions he made to the Manual, including the text would be considered "within the scope of his employment" (*Food Lion*), and therefore a work made for hire.

Bonnie and Takila are not employees of Apple even if they have cubicles and did most of the work on the Manual at Apple's headquarters, because they are paid per project and do not receive any of the other normal benefits of Apple employees (healthcare; pension).

Takila owns the rights to her drawings, because she is not an employee and drawings are not a type of work that can fall under a "work made for hire" by an independent contractor anyway (*§101(2)*). Even if the drawings were considered a "contribution to a collective work" which falls under §101(2), there was no written agreement that her drawings were a "work made for hire," therefore they do not meet the statutory requirements. However, the fact that she created the drawings specifically for the Manual would constitute an implied license for their use by Apple in the Manual, and her deposit of the check for "MacBook Air Manual drawings" supports this proposition. Since they had a license to use the drawings, Apple has ownership of their arrangement in the compilation (*§103(a)*).

Bonnie is arguably the "author" of the compilation, since she had the most control over the copyrightable elements in the compilation, the selection and arrangement of the text and pictures (*Lindsay*, *Andrien*). However, there was a written agreement that all her work in relation to the Manual would be a work made for hire, and a compilation is a type of work that can be a work made for hire by an independent contractor (*§101(2)*). Since this fulfills the requirements of a "work made for hire," Apple would be considered the author of the compilation under the law. None of the other contributors have any claims over Apple, and therefore Apple is the owner of the Manual.

C) Infringement Claims/Defenses for Reproduction and Distribution of the Manual

Since the Manual is copyrightable as a compilation and Apple is the owner, it can bring a colorable claim of infringement by Fruit of its right of reproduction and distribution. Giving the Manual to customers is a form of distribution, so if the copy given constitutes an infringing reproduction, then the right of distribution is also infringed. To establish infringement of the right of reproduction, Apple must show copying and improper appropriation of protectable expression (*Arnstein*, *Dawson*).

The evidence suggests that Fruit gives an exact copy of the Manual to its customers, which it creates by giving a PDF to Popular and having it reprinted. This is direct evidence of copying. Even if it were not, copying can be inferred by probative similarity, the combination of access and similarity in the two works (*Arnstein*). Fruit had access because Apple gives the manual to every purchaser of the product, and has it for free in PDF form on their website (likely the same PDF they sent to Popular). As a company that works in Apple's secondary market, Fruit would surely have monitored instruction manuals for their products, or gotten them from some of the people they purchase the used MacBook Airs from. Also, the reproductions are not only similar to the originals, they are exact copies. Combined with access that is sufficient for probative similarity. The better quality paper used by Fruit would not affect this analysis, as that would only constitute a slightly different medium.

The fact that the copies are exact makes the improper appropriation analysis simple. As discussed in (A), the Manual is protectable. Die hard Mac users who may be able to notice the difference in paper quality would not be purchasing a computer from a reseller, so the relevant audience is the "ordinary observer" for any computer buyer under the *Dawson* rule. Therefore, with an exact copy, there is "substantial similarity" in protectable elements. Absent any other factors, Fruit would be liable for infringement. They could not bring a defense under the first sale doctrine because they are reproducing copies and not reselling old ones, nor the de minimus doctrine because they copied the entire work.

Apple will not be successful in its claim however, because Fruit would successfully raise the claim of fair use. Exact copying, under certain circumstances, could constitute fair use (*§107*). The first fair use factor weighs against Fruit, because they are giving out the copies in conjunction with and in support of their computer sales, a commercial use that was not transformative simply because it was put on better paper. This does not necessarily create a presumption against fair use however, it is just

one factor (*Acuff-Rose*). The second factor weighs in favor of Fruit. The nature of the Manual does not go to the core of intended copyright protection. While instruction manuals are protectable, they are not the artistic and creative works that deserve higher protection, such as novels, films, or music (*Sun-Trust*, *Acuff-Rose*). The third factor weighs against Fruit, but only slightly. They took the entire work and copied it both quantitatively and qualitatively, which would normally weigh heavily against them. However, for their purposes they took only a little more than they needed, if any more at all (*Acuff-Rose*). The intent in copying was to help their customers understand how to use the products that they were selling, and this could not be done if they took out many elements.

The final fair use factor weighs heavily in favor of Fruit, and is likely to be determinative. There would be no effect on the potential market for the Manual due to their reproduction and distribution. Apple does not actually sell the Manual. Its distribution is based on the sales of MacBook Air, and Apple gives it away for free on their website. It is already established that Fruit has the right to refurbish and resell Apple's computers on the secondary market, and people will not make the decision to buy a used computer from Fruit instead of a new one from Apple because the instruction manual is on better paper. People also would not buy new computers instead of refurbished ones just because they could not get an instruction manual, since they could download it for free anyway. Since there would be no effect on the demand for new MacBook Airs, there is no effect on the market based on Fruit's use. Since there is no harm to Apple, and the use of the Manual is in support of a legitimate reseller's market, Fruit will win on fair use.

Although they are the ones who are actually reproducing the Manual, Popular cannot be held liable for direct infringement. They ask no questions and are directed completely by Fruit in this case, and are therefore acting as their amanuenis (*RMS Titanic*). If Fruit successfully raises fair use, Popular is shielded from any liability for contributory infringement. The fair use factors are split however, so a court could reasonably find that fair use does not apply. In the event that a court finds Fruit to have infringed on Apple's rights, Popular would have secondary liability for that infringement. They could defend against contributory infringement because they do not have knowledge of the infringement due to their lack of questioning, and there are "substantial non-infringing uses" for their services, such as binding essays or books written by the purchaser of their services (*Betamax*). They could possibly argue that they have no inducement liability, as there is no clear expression that they intend their service for infringing purposes, and failing to ask about copyrights is not an affirmative step taken to foster infringement, although a court could reasonably construe it as one through willful blindness (*Grokster*). Even if Popular won that argument though, they could not defend against vicarious liability. They have a direct financial interest in reproducing the Manual, as Fruit is paying them for it. They also have control over what they print, and need only ask if they are suspicious of infringement (which they should be if they are printing something with Apple's logo all over it for someone who is not Apple) (*Fonovisa*).

D) Result

If Apple brought claims against Fruit Basket and Popular, they would likely lose against both parties, because Fruit would successfully claim fair use, shielding Popular from secondary liability. If fair use is unsuccessfully argued by Fruit, they will be directly liable, and Popular will be vicariously liable.

This essay was 1,991 words (including headings).