The Manual Copyrights are Valid

The manual contains three copyrights: prose as a literary work, graphics as a work of visual art and the manual layout as a compilation. Apple's manual is copyrightable because it contains sufficient originality and is fixed in a tangible medium of expression. The originality requirement is met because the work was independently created (not the result of copying) and possesses a modicum of creativity. *See Feist* (creativity threshold is low). The prose's creativity includes descriptions of computer features; the graphics' creativity includes selected angles, object arrangement and framing; the layout's creativity includes selection, coordination and arrangement of prose and graphics. Fruit Basket will lose an argument that the manual isn't copyrightable.

Fruit Basket will cite the §102(b) bar against copyrighting methods of operation or processes to argue the manual is an unprotectible method of instructing users how to operate computers. In *Apple v. Franklin*, the defendant lost a similar argument that an operating system application was an unprotectible method of instructing the computer how to operate. Likewise here, Apple seeks to protect the specific expression fixed in this manual, not the method of instructing users in general. Competitors are free to create their own manuals; they simply cannot copy Apple's copyrighted expression.

This case is distinguishable from *Baker v. Selden* where the plaintiff attempted to use the book copyright to control the use of the bookkeeping method when the defendant hadn't directly copied the forms. In contrast, Fruit Basket directly copied Apple's manual and is freeriding off the creative work-product of Apple's designers in order to capture a larger share of the computer market.

Fruit Basket's other argument that the manual consists of unprotectible short phrases dictated solely by functional concerns is wrong. While some sentences taken out of context could be considered unprotectible phrases, the manual as a whole is copyrightable. Apple's manual is distinguishable from the unprotectible short game rule in *Morrissey v. Procter* because Apple's manual is long, detailed and contains unique graphics, prose and layouts (iLife page).

Fruit Basket will argue even if the manual contains copyrightable expression, protection should be withheld under the merger doctrine because there's only a limited number of ways to express these instructions-ideas. Yet, like the menu command displays in *Lotus*, there are different ways to express these instructions then by Apple's unique manual, therefore the merger doctrine doesn't apply.

Apple's Manual Ownership

Apple's safest argument is that they own the manual because Max, Bonnie and Takila were employees working under the scope of their employment pursuant to §101(1). While the facts show that Max was a traditional employee, Bonnie and Takila's statuses are less clear. If Bonnie and Takila were independent contractors, then Apple has an issue because only Bonnie executed a work-for-hire agreement under §101(2). If Takila was an independent contractor then, unless Apple locates an agreement, Takila still owns the graphics copyright and is a joint author in the manual. Since Bonnie and Takila had similar work situations, it's not wise for Apple to argue Bonnie was an independent contractor, while Takila was a traditional employee.

Fruit Basket will argue Bonne's "layout designs" cannot be subject to a work-for-hire agreement because layouts aren't listed in §101(2). Apple will counter their ownership is valid

because layout designs are either a contribution to "instructional text" or a "compilation" of pre-existing prose and graphics; both options are listed in §101(2).

Fruit Basket may argue the work-for-hire doctrine has no constitutional basis because "authors and inventors" imply individuals and the Constitution makes no mention of institutional ownership by employers. This argument lacks weight because Congress expressly recognized the work-for-hire doctrine in the Copyright Act of 1976 and case law supports the doctrine.

To avoid work-for-hire complexities, Apple should claim Manual ownership because Max, Bonnie and Takila worked as employees within the scope of their employment §101(1). The determination of employment status follows the common law definition of agency and in *CCNV* the Court set forth relevant factors. Facts that show Max was a traditional employee include the longevity of his work for Apple (5 years), his bi-weekly salary and compensation benefits. As team manager of the Manual project, the Manual production was within the scope of Max's employment and Apple maintained control over the entire project.

The best facts to argue Takila and Bonnie were traditional employees are the longevity of their work for Apple (6 and 8 years), they were assigned cubicles at Apple and did most of their work at Apple's headquarters on Apple's equipment. Also, the production of computer instruction manuals is part of Apple's regular business and Apple appears to have exercised control over the means and manner of the Manual's creation.

Fruit Basket will counter Takila and Bonnie were independent contractors because they were hired as skilled laborers for specific projects and were paid per-project. Fruit Basket may claim Bonnie's work-for-hire agreement is evidence the parties knew Bonnie was an independent contractor. Apple can counter the parties believed Bonnie was an employee and only executed

the work-for-hire agreement to ensure that under any interpretation the copyright would belong to Apple.

The facts don't strongly tilt towards one employment interpretation. It will help Apple's case to show that Bonnie and Takila had paycheck taxes withheld, received employee benefits, couldn't hire assistants and had little discretion over when and how long to work.

Fruit Basket can still raise issue with Takila's cancelled check, which may mean she wasn't paid for her graphics work. Even if Takila completed the graphics as an employee within the scope of her employment, it's possible Apple's failure to pay Takila constituted a breach that jeopardizes their ownership of her graphics. We need to see the employment contract and understand the meaning of the cancelled check.

Fruit Basket's and Popular's Infringement Liability

Fruit Basket is liable for infringing Apple's rights of reproduction and distribution under §106(1) and (3). Under the infringement test Fruit Basket directly copied the entire manual and the copying was an improper appropriation of protectible expression. Apple may prove copying by direct evidence, but it's unclear whether Fruit Basket will admit they copied, or bizarrely attempt to argue independent creation. Even without direct admission or direct evidence (unlikely Popular will testify Fruit Basket copied the manual), Apple can prove copying by circumstantial evidence of access and probabitive similarities. Fruit Basket's access can be assumed because the manual is freely available to the public online. *See Bright Tunes.* The similarities are so striking as to preclude independent creation; this proves both probabitive similarity under prong one and substantial similarities under prong two. The only difference is paper quality, which is a circumstance of printer's supply, not creative expression. Even if

Apple only had a thin copyright over the manual, Fruit Basket is still liable because they copied Apple's exact expression. *Contra Continental Cas. Co.* (holding the thin copyright over forms was not infringed because the defendant didn't copy the exact expression).

Fruit Basket will raise a §107 fair use defense. Fruit Basket may argue their manual was a parody: by printing on high-quality paper they were commenting on Apple's penny-pinching use of cheap paper. Parodists get more leeway under a fair use analysis because they need to take a recognizable amount of the original work in order to parody it. But here Fruit Basket's use doesn't seem parodic. While courts aren't the arbiters of taste or good parodies (*Bleistein*), Fruit Basket parody claim seems a dishonest *ex-post* attempt to evade infringement liability. If Fruit Basket argues parody, Apple can counter they infringed Apple's §106(2) right to prepare derivative works. Fruit Basket cannot own a copyright in a "high-quality" derivative because changing paper quality is a trivial variation on the original, not enough to constitute a protectible derivative work. Plus, although Apple's online pdf distribution is implicit permission to print, mass printing of the manual exceeds the scope of Apple's permission.

Under fair use, the second prong weighs in favor of fair use because the manual was published, freely distributed online, and not the core of creative work protected by copyright. The third prong weighs against fair use because Fruit Basket copied the entire manual; they could've taken quantitatively and qualitatively less and still adequately instructed their customers. They also could've directed customers to Apple's website for a free copy.

Under the first prong, Fruit Basket may claim their use was educational/instructional, not commercial. They don't charge customers for manuals and Apple's free distribution of the manual is proof that widespread use doesn't harm Apple's potential markets. *See Sony v. Universal*. Apple can successfully argue the use was commercial (trends away from fair use)

because Fruit Basket distributes the manual in a commercial transaction; the cost of each computer includes Fruit Basket's manual printing expenses and they commercially benefit from selling computers with official manuals.

Fruit Basket will also argue its use is transformative because providing instructions to used computer purchasers creates a new use for the manual in the second-hand computer market *See Kelley v. Ariba* (finding transformative use sufficient even though the work was not greatly transformed). Apple can counter the transformative use approach is controversial and overextends the fair use doctrine. Under a proper analysis, when the protected work isn't transformed, a transformative use of copied work should not matter.

Trending away from fair use under the first and fourth prongs is the fact that Fruit Basket's intensions weren't legitimate. Fruit Basket is freeriding off Apple's design talents in order to supplant Apple on the computer sales market. Fruit Basket can counter that new and used computer markets are separate, and they aren't trying to scoop Apple like the Nation scooped Time. *See Harper*.

It's unclear whether Apple also occupies the used computer market. If so, then the fourth prong weighs against fair use because it's unfair for Fruit Basket to use Apple's copyrighted manual to directly compete with Apple on the market. If Apple doesn't sell used computers then we need to determine whether sales of used Apple computers helps or harms Apple's new computer sales.

Since Popular printed the infringing manuals, they're liable for violating Apple's §106(1) exclusive right of reproduction. Like above, this can be shown because access is presumed and the similarities are so striking as to prove probability and substantial similarities. Popular will counter they aren't liable because they lacked knowledge or intent to infringe. However, Popular

will lose because knowledge and intent aren't required elements of direct infringement. *See Bright Tunes.*

If Popular is liable for direct infringement, then Fruit Basket is liable for contributory infringement because they knowingly sent Popular copyrighted materials to print and thus materially contributed to the infringing reproductions. Fruit Basket may argue they lacked knowledge of Apple's copyright. However, Apple's manual contains copyright notice and Fruit Basket's subjective belief that the copyrights were invalid doesn't negate knowledge.

Fruit Basket may be vicariously liable because they had a right to control Popular's printing and directly financially benefited off the infringing reproductions via their computer sales. We need more information on the extent of Fruit Basket's control over the printing. Popular physically carried out the printing, but did so according to Fruit Basket's specific parameters. This may be sufficient control to trigger vicarious liability. *See Fonovisa.*

If Fruit Basket loses fair use and is liable for infringement, then Popular may be liable for contributory infringement. Popular's printing materially contributed to Fruit Basket's infringement, thus contributory liability turns on whether Popular had specific knowledge of the infringing activity. Popular can argue they lacked knowledge and knowledge cannot be imputed simply because their business model is capable of infringing activity. *See Sony v. Universal*. There are substantial non-infringing uses of Popular's service so they shouldn't be liable for contributing to one infringing use. But if Apple can show Popular's previous copyright infringements, then the failure to ask customers about copyrights constitutes willful blindness, which imputes knowledge. *See Aimster*. Also if Popular promotes infringing uses then they may be liable under inducement. *See Grokster*.

[this essay is 1999 words]