

More Exclusive Rights: Distribution

<http://wendy.seltzer.org/brooklaw/07copyright/>

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Swirsky v. Carey

- District court granted summary judgment to defendant, saying plaintiff hadn't satisfied the "extrinsic" test for similarity.
 - Flawed expert methodology
 - Court found no similarity in many measures
 - Scenes a faire similarity to "For He's A Jolly Good Fellow"
 - Key, harmony, tempo, and genre don't support substantial similarity
- 9th Circuit?

[link](#)

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Where does this leave songwriters and musicians?

- Consider Spider Robinson's "Melancholy Elephants" (available online)
- If it's wrong now, how would you rewrite the law?



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Marobie-FL, Inc. v. National Association of Fire Equipment Distributors



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§ 106. Exclusive rights in copyrighted works

- Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ...
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- Recall §101: "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

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Hotaling v. Church of Jesus Christ of Latter-Day Saints



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§ 501. Infringement of copyright

- (a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a) or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

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§ 602. Infringing importation of copies or phonorecords

- a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. This subsection does not apply to—
 - ... (2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States with respect to copies or phonorecords forming part of such person's personal baggage; or ...
- (b) In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. In a case where the copies or phonorecords were lawfully made, the United States Customs Service has no authority to prevent their importation unless the provisions of section 601 are applicable. In either case, the Secretary of the Treasury is authorized to prescribe, by regulation, a procedure under which any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Customs Service of the importation of articles that appear to be copies or phonorecords of the work.

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Another way to segment distribution



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Sharing Tangible Objects

- LaLa or Peerflix are CD and DVD swap services, respectively. Members pay fees for the services, which facilitate the exchange of used CDs or DVDs.
 - Are these services "distribution"?
 - Do they infringe the distribution right?

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Protozoa Records

- Protozoa Records runs a used CD store, purchasing CDs from sellers, marking them up, and re-selling.
 - Can Protozoa make extra money by renting those CDs?
 - Can it sell CDs, then offer purchasers 75% back if they return the CDs within a week of purchase?

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