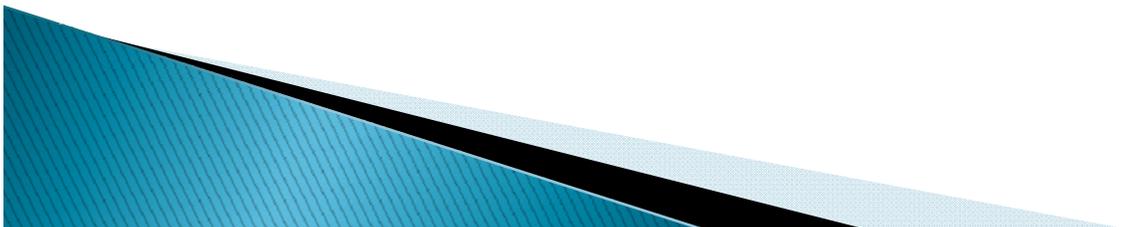


**COVERING THE COURTS:
PROCEDURAL & INTELLECTUAL PROPERTY BASICS
THAT EVERY JOURNALIST SHOULD KNOW**

Hon. Richard L. Gabriel
Judge, Colorado Court of Appeals
Presentation for Law School for Journalists
February 22, 2011

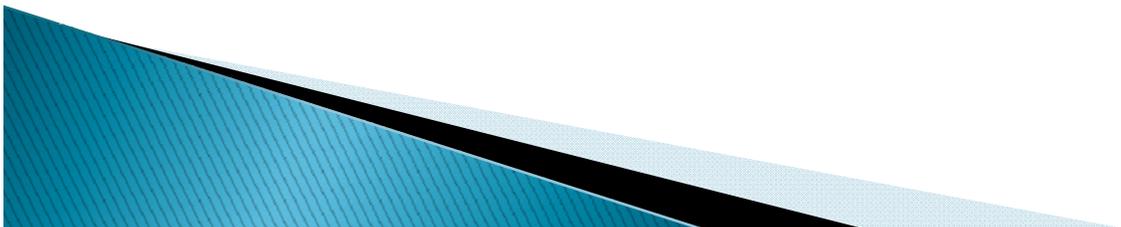
Introduction

- ▶ Program Goals
- ▶ Topics to be Covered:
 - State v. Federal Courts
 - The Roles of the Trial and Appellate Courts
 - What Happens in Our Trial Courts
 - Direct Appeals to the Court of Appeals
 - Certiorari to the Supreme Court
 - Why Lawyers Won't Talk to the Media
 - Copyright Issues of Interest to Journalists



State v. Federal Courts

- ▶ Parallel Court Systems
- ▶ State Courts: General Jurisdiction
- ▶ Federal Courts: Limited Jurisdiction
 - Federal questions
 - Disputes between states or citizens from different states



The Roles of Trial and Appellate Courts



Trial courts find the facts (and make the record)



Court of Appeals corrects legal errors



Supreme Court corrects legal errors/big policy questions

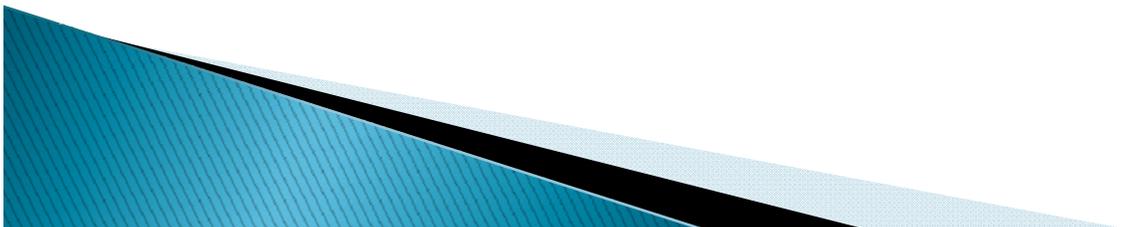
Trial Courts: Criminal v. Civil Cases

▶ Criminal Cases

- Government v. Defendant
- Jury determines: guilty or not guilty (not innocence)

▶ Civil Cases

- Plaintiff v. Defendant
- Jury determines: liability (not guilt)



Remedies in a Civil Case

- ▶ Money damages
- ▶ Injunctions
- ▶ Declarations of parties' rights



Trial Courts: The Life of a Civil Case

- ▶ The Complaint: Notice, Damages Claim???
- ▶ Answer and Counterclaims
- ▶ Discovery
- ▶ Motions:
 - Dismissal
 - Discovery
 - “Summary Judgment”
- ▶ Alternative Dispute Resolution
- ▶ Trial

Civil and Criminal Trials

- ▶ Jury Selection
- ▶ Opening *Statement* (Not Opening *Argument*)
- ▶ Plaintiff's / Prosecution's Case
- ▶ Defendant's Case
- ▶ Plaintiff's / Prosecution's Rebuttal
- ▶ Closing Arguments
- ▶ Jury Instructions (the Rule of Law)
- ▶ Jury Deliberations
- ▶ Verdict

What is Evidence?

- ▶ Testimony of laypeople
- ▶ Expert opinions
- ▶ Documents and Things
- ▶ Agreed on Facts



Collecting Your Judgment

- ▶ Myth: The court helps the plaintiff collect any award
- ▶ Fact: It is up to the plaintiff to try to collect (and the plaintiff has to pay his or her lawyer to do it)



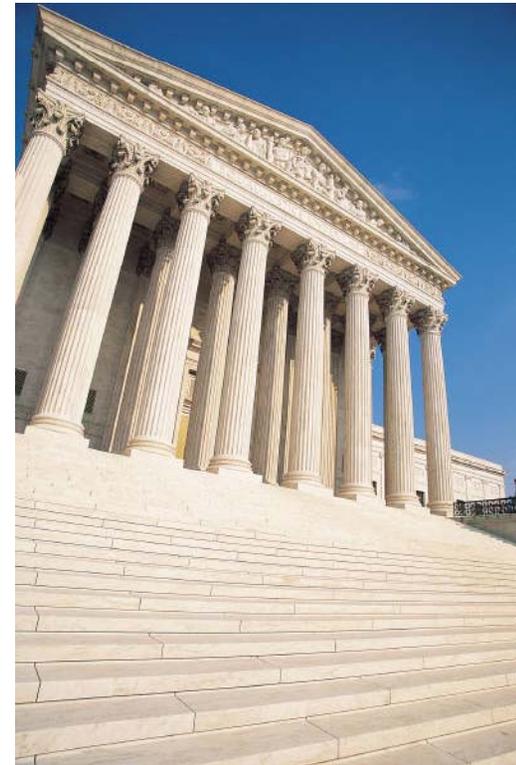
Direct Appeal

- ▶ Appeal as of right
- ▶ Court's role is limited
- ▶ The rule of law
- ▶ Deference to legislature
- ▶ Deference to trial court
- ▶ Process of an appeal
- ▶ Published/Unpublished decisions
- ▶ Concurring/Dissenting opinions



Certiorari to the Supreme Court

- ▶ Certiorari v. Appeal
- ▶ Denial of cert is not a decision on the merits
- ▶ Few cases reach the Supreme Court
- ▶ Process



Why Won't Lawyers Talk to Me?

Colo. R. Prof. Cond. 3.6(a):

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.



But some do...

- ▶ Colo. R. Prof. Cond. Rule 3.6(b) says a lawyer may state:
 - Claim, offense or defense, and, unless prohibited by law, the identity of involved people
 - Information in a public record
 - That an investigation is in progress
 - The scheduling or result of any step in litigation
 - A request for assistance in obtaining evidence
 - Certain warnings of danger (substantial harm likely)
 - In a criminal case: identity, residence, occupation, and family status of the accused; information necessary to aid in apprehension; fact, time, and place of arrest; and the identity of investigating and arresting officers and the length of the investigation

And...

Colo. R. Prof. Cond. 3.6(c):

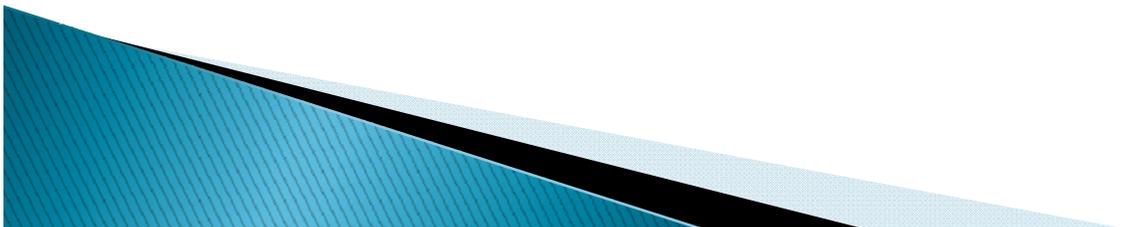
Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

COPYRIGHT ISSUES OF INTEREST TO JOURNALISTS



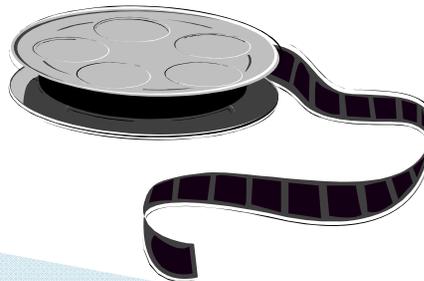
Subject Matter of Copyright

- ▶ Copyright protects:
 - Original works of authorship
 - Fixed in a tangible medium
 - Falling within one or more copyrightable material categories



What is Copyrightable?

- ▶ Literary works
- ▶ Musical works
- ▶ Dramatic works
- ▶ Pantomimes and choreographic works
- ▶ Pictorial, graphic, and sculptural works
- ▶ Motion pictures and other audiovisual works
- ▶ Sound recordings
- ▶ Architectural works



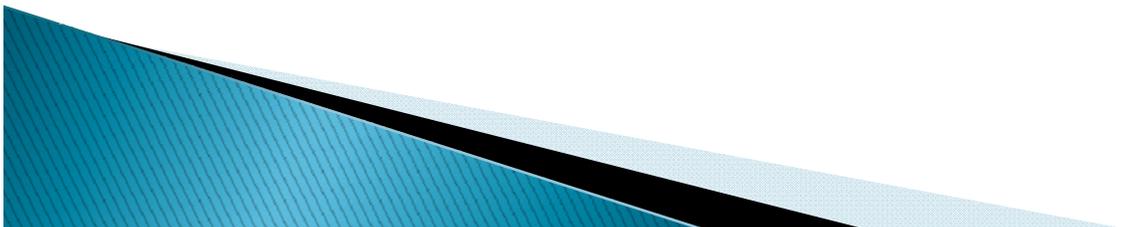
What is Not Copyrightable?

- ▶ Ideas
- ▶ Procedures
- ▶ Processes
- ▶ Systems
- ▶ Methods of operation
- ▶ Concepts
- ▶ Principles
- ▶ Discoveries



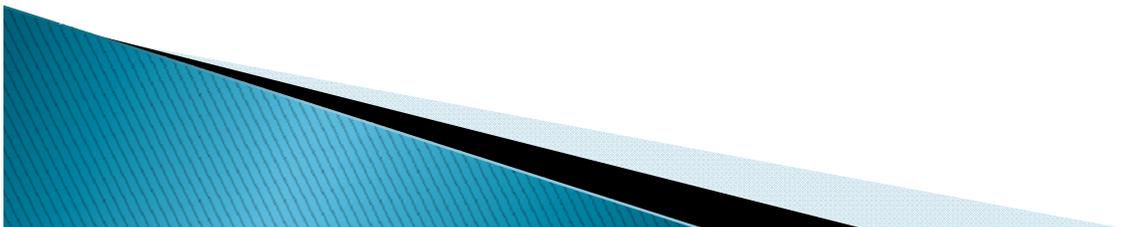
Other Limitations

- ▶ Titles, names, phrases, or slogans
- ▶ Works of the U.S. Government
- ▶ Basic plots, themes, and scenes that follow from certain plots
- ▶ Useful articles
- ▶ Common property (e.g., calendars, tape measures, rulers)
- ▶ Public domain



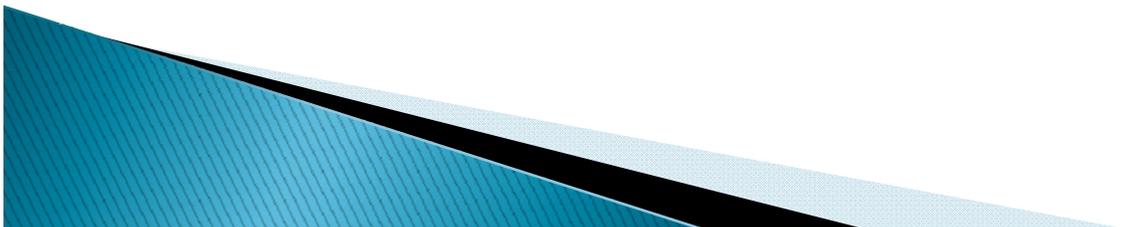
Exclusive Rights

- ▶ To reproduce the work
- ▶ To prepare derivative works
- ▶ To distribute copies
- ▶ To perform or display the work publicly
- ▶ To perform the work publicly by digital audio transmission



Copyright Ownership

- ▶ Vests in the person who creates the work
- ▶ *Except* “works made for hire”
 - Prepared by employee within scope of employment
 - Specially ordered or commissioned
- ▶ Ownership of copyright \neq ownership of the object in which the work is embedded



No Formalities are Required

A copyright owner:

- ▶ Need not register his or her work (except to sue)
- ▶ Need not post any kind of notice to get copyright protection
 - Labels like “© 2011 Owner” are optional for works published after 3/1/89
 - Posting such labels provides certain legal rights to owner

Infringement & Remedies

- ▶ What is infringement?
 - Without owner's permission
 - Violate one of exclusive rights
 - Innocent infringement or intent is no defense
- ▶ Access and substantial similarity
- ▶ Remedies
 - Injunctions
 - Actual damages and profits
 - Statutory damages (\$750–\$150,000 per work)
 - Attorney fees and costs



Defenses

- ▶ Not original
- ▶ “Scenes a faire”
- ▶ No access
- ▶ Independently created
- ▶ Fair use



Fair Use

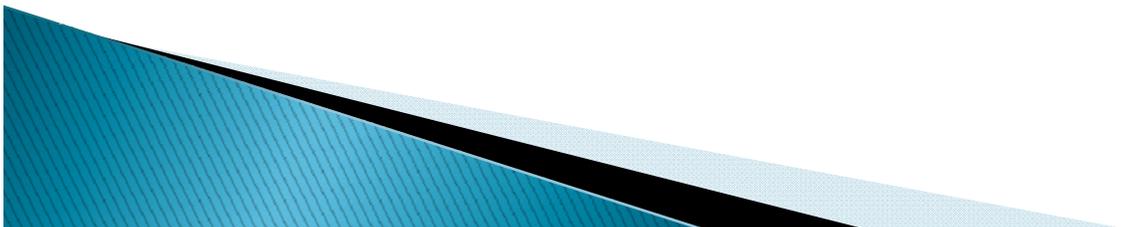
- ▶ “[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”
- ▶ Balances copyright owner’s rights with the public’s interest in the dissemination of information
- ▶ Factors to be considered
 - Purpose and character of use (e.g., commercial nature or nonprofit educational purposes)
 - Nature of the copyrighted work
 - Amount and substantiality of portion used
 - Effect on potential market for or value of work
- ▶ Highly factually-intensive analysis

Purpose & Character of Use

- ▶ Commercial v. Nonprofit
- ▶ Primary question is whether work is “transformative” (i.e., whether it adds something new to the original work)
- ▶ The more transformative, the less significance factors like commercialism will have
- ▶ Parodies (2 Live Crew’s parody of “Pretty Woman”)

Nature of the Work

- ▶ Creative v. Factual
- ▶ Published v. Unpublished (e.g., publication of excerpts of purloined copy of President Ford's unpublished memoirs was not fair use)



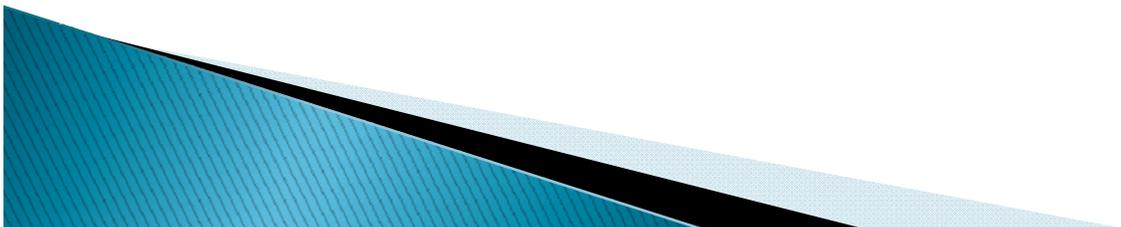
Amount & Substantiality of Copying

- ▶ Qualitative and quantitative analysis
- ▶ The more the copying, the less likely the fair use
- ▶ There is no “seven notes” rule



Effect on the Market

- ▶ The most critical factor in the fair use analysis
- ▶ Factors
 - Effect on consumer interest in the work
 - Does the use of the copyrighted work affect sales?
 - Is the unauthorized copy in markets that the copyright holder is in or may enter?



Myths About Fair Use

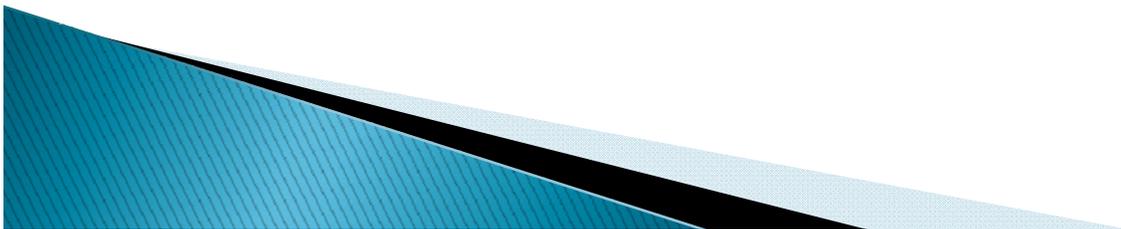
- ▶ Text, photographs, and other materials on the Internet are *not* “public domain” works available for all to use
- ▶ Material on the Internet may be protected even if it doesn’t have a “©” or similar label, and even if you don’t know the identity of the author
- ▶ Using material found on the Internet is not always “fair use”



Fair Use and News Reporting

- ▶ First Amendment concerns regarding the use of copyrighted materials are subsumed within the fair use analysis
- ▶ Reporting on a public event does not create an absolute First Amendment defense to a copyright infringement claim, although it is relevant to the fair use inquiry
- ▶ When an act of copying occurs in the course of political, social, or moral debate, the public interest in free expression is one factor favoring a finding of fair use

QUESTIONS?



THANK YOU!!!

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