Copyright

- **Copyright Protection for Code:**
  - *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204 (9th Cir. 1988).
  - *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994).
§ 102(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

- Selden was chief accountant to the treasurer of Hamilton County, Ohio and author of six "books" on a condensed ledger system of bookkeeping, containing forms for use with the system.

- W.C.M. Baker, auditor of Greene County, Ohio, also wrote books on a similar system of bookkeeping, using similar forms, which had greater commercial success.

- Selden's widow filed a copyright infringement suit against Baker, which she won in the district court.

- Had Baker copied Selden’s description, explanation, illustration, or depiction of a useful art (the bookkeeping system), or did he only copy the useful art or ideas themselves?
  - The U.S. Supreme Court held that in the absence of a patent, the useful art depicted in a work, along with its ideas, could be used and copied by anyone, even in directly competing works.
  - Any necessary incidents to implementing the art (e.g., blank forms illustrating use of the system) could likewise be used and copied by second comers without fear of copyright liability.
Lotus Dev. Corp. v. Borland Int'l
Lotus Dev. Corp. v. Borland Int'l

- Facts:
  - The Lotus 1-2-3 spreadsheet software had 469 commands arranged into more than 50 menus and submenus.
  - Macros enabled Lotus 1-2-3 users to automate routine command sequences with a single key-combination.
  - Borland's Quattro and Quattro Pro copied the words and structure of Lotus' menu command hierarchy (but not the underlying code) to ease user's learning curve and to make the command structure compatible with pre-existing macros.
  - Borland's "Key Reader" for macro-compatibility.
Lotus Dev. Corp. v. Borland Int'l

- Issue: Is the Lotus 1-2-3 menu command hierarchy copyrightable subject matter?
Lotus Dev. Corp. v. Borland Int'l

- Holding: [Quote § 102(b).] "We hold that the Lotus menu command hierarchy is an uncopyrightable "method of operation."

- The district court had held that the specific choice and arrangement of command terms constituted protectable expression.

- But the First Circuit says this question is irrelevant to whether the menu command hierarchy is a method of an operation.

- Compare VCR buttons and QWERTY keyboards.
Lotus Dev. Corp. v. Borland Int'l

- Questions:
  - Do you agree that a menu command hierarchy is an uncopyrightable "method of operation"?
  - What if the method of operation was more innovative, such as Apple's click-wheel interface on iPods; would you have a different view on the copyrightability of "methods of operation"?
Data East USA v. Epyx, Inc.
**Facts:**

- Each game has fourteen moves, both a one and a two-player option, and changing background scenes.

- Each game has forward and backward somersault moves and about-face moves; a squatting reverse punch wherein the heel is not on the ground; an upper-lunge punch; a back-foot sweep; a jumping sidekick and a low kick; and a walk-backwards position.

- Each game has 30-second countdown rounds; uses one referee who says "begin," "stop," "white," "red," which is depicted by a cartoon-style speech balloon; and has a provision for 100 bonus points per remaining second.
Data East USA v. Epyx, Inc.

- In any suit for copyright infringement, the plaintiff must establish
  - its *ownership* of a valid copyright, and
  - that the defendant *copied* the copyrighted work.

- The plaintiff may prove defendant's *copying* either by direct evidence or, as is most often the case, by showing that
  - (1) the defendant had *access* to the plaintiff's copyrighted work and
  - (2) that defendant's work is *substantially similar* to the plaintiff's copyrightable material.
Here the allegation was not copying of the underlying source code, but of the overall appearance, compilation, and sequence of the audio-visual display (i.e., the screen displays).

District court held that Epyx's game infringed Data East's copyright in Karate Champ.
Ninth Circuit's two-step test for the purposes of determining substantial similarity.

- First, an "extrinsic" test is used to determine whether two ideas are substantially similar. This is an objective test.
- Second, an "intrinsic" test is used to compare forms of expression. This is a subjective test which depends on the response of the ordinary reasonable person.

- Similarity of expression exists when the "total concept and feel of the works" is substantially similar.
- Analytic dissection of the dissimilarities is not appropriate.
**Data East USA v. Epyx, Inc.**

- **Holding:**
  - Ninth Circuit reversed, finding that the similar features resulted from either constraints inherent in the sport of karate or computer restraints, and these features necessarily followed from the idea of a martial arts karate combat game, or were inseparable from, indispensable to, or even standard treatment of the idea of the karate sport, and thus unprotectable.
Questions:

- Isn't this just a knock-off? Could we have a rule that recognized that the features of karate as a sport cannot be monopolized by any one game creator, but that the virtual identity of selection of the elements of tournament karate here is impermissible?
Apple Computer, Inc. v. Microsoft Corp.
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Facts:

- Apple released the Lisa and Macintosh computers, each with a graphical user interface ("GUI") containing windows, icons, and pull-down menus. Apple registered its copyright in the GUI as an audiovisual work.

- Microsoft released Windows 1.0 with a similar GUI and subsequently paid Apple for a license covering 1.0 and derivatives and including the right to sublicense.

- Microsoft subsequently released Windows 2.03 and 3.0 and HP (Microsoft's sublicensee) released NewWave 1.0 and 3.0, all with similar GUIs.
Apple Computer, Inc. v. Microsoft Corp.
Apple Computer, Inc. v. Microsoft Corp.
Apple Computer, Inc. v. Microsoft Corp.
Apple Computer, Inc. v. Microsoft Corp.
Apple Computer, Inc. v. Microsoft Corp.
Lisa OS 3
Apple Computer, Inc. v. Microsoft Corp.
Apple Computer, Inc. v. Microsoft Corp.
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- The district court had held that the only triable issue of fact was whether certain minor parts of the Windows interface were "virtually identical" to the Apple GUI. Apple appealed.

- Apple argued that the "total concept and feel" of its works should be compared with Microsoft's.
Apple Computer, Inc. v. Microsoft Corp.

- The Ninth Circuit concluded that given the limited number of ways that the basic ideas of a GUI can be expressed only "thin protection, against virtually identical copying, is appropriate."

- "Apple cannot get patent-like protection for the idea of a graphical user interface, or the idea of a desktop metaphor which concededly came from Xerox."
Five basic ideas embodied in the desktop metaphor:

- use of windows to display multiple images on the computer screen and to facilitate user interaction with the information contained in the windows;
- iconic representation of familiar objects from the office environment;
- manipulation of icons to convey instructions and to control operation of the computer;
- use of menus to store information or computer functions in a place that is convenient to reach, but saves screen space for other images; and
- opening and closing of objects as a means of retrieving, transferring and storing information.
Apple Computer, Inc. v. Microsoft Corp.

- "No copyright protection inheres in these ideas."
- "GUIs do graphically what a character-based interface, which requires a user to type in alphanumeric commands, does manually. Thus, the delete function is engaged by moving an icon on top of a trash can instead of hitting a "delete" key. In Apple's GUI, the ability to move icons to any part of the screen exemplifies an essentially functional process, indispensable to the idea of manipulating icons by a mouse."
Apple Computer, Inc. v. Microsoft Corp.

- "hardware constraints limit the number of ways to depict visually the movement of a window on the screen; because many computers do not have enough power to show the entire contents of the window as it is being moved, the illusion of movement must be shown by using the outline of a window or some similar feature. Design alternatives are further limited by the GUI's purpose of making interaction between the user and the computer more "user-friendly." These, and similar environmental and ergonomic factors which limit the range of possible expression in GUIs, properly inform the scope of copyright protection."
"We therefore hold that the district court properly identified the sources of similarity in Windows and NewWave, determined which were licensed, distinguished ideas from expression, and decided the scope of Apple's copyright by dissecting the unauthorized expression and filtering out unprotectable elements. Having correctly found that almost all the similarities spring either from the license or from basic ideas and their obvious expression, it correctly concluded that illicit copying could occur only if the works as a whole are virtually identical."
App
le Computer, Inc. v. Microsoft Corp.

Questions:

- If *Data East* had happened after *Apple v. Microsoft*, would there have been a different result in *Data East*?

- Are the two cases consistent or is the law developing over time?

- Is this the right result from a policy perspective if we want to encourage innovation and competition in the software industry?
Tetris Holding LLC v. XIO Interactive Inc.

- He did not see any money from the game's success until 1996.
- He co-founded The Tetris Company.
Tetris Holding LLC v. XIO Interactive Inc.

- XIO Interactive provides Mino, a multiplayer mobile device game that utilizes the rules and gameplay of Tetris.
- The Tetris Co. sued for copyright infringement, unfair competition, false designation of origin, and trade dress infringement.
What does Mino copy from Tetris?

- Source code?
- Graphics, colors, music, background?
- The word “mino”?
- The idea or concept behind Tetris?
- The “look and feel” of Tetris?
- The game-play or rules of Tetris?

Which, if any, of these are copyrightable?

- Does Mino copy those?