

Copyright Law

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Topics:

- Justifications for copyright law
- Introduction to working with basic copyright tools

Takeaways from DAY 1 ...

[1] Focus on problem solving, not issue spotting

[2] Problem solving in the style of copyright lawyers

[3] What are the problems that copyright is meant to solve ...

[a] Macro – how *ecologies* and *systems* of knowledge, information, and creativity are organized (public v private) – *Georgia v. P.R.O*

[b] Micro – how individual original *works of authorship* are produced, distributed, accessed, re-used – *Batmobile* case

[4] The range of solutions that copyright supplies ... and that might be supplied (better) (worse) by other (systems) (institutions) (practices)

Copyright as one regulatory device among many (actual) (possible) choices or strategies for addressing (social) goals:

Do nothing; allow copying (borrowing, adapting), and the (“free”) market will sort this out. In part, social norms will guide society to right / best outcomes. In part, authors/publishers might rely on “*ordinary*” *tort law* (i.e., unfair competition law) and/or “*ordinary*” *contract law* (i.e., voluntary private arrangements). In practice: copyright law “preempts” most state tort law; most state contract law co-exists with copyright.

Rely on other IP systems (trademark law, patent law, rights of publicity) to sort this out. In practice: © co-exists with these other systems.

Expect that technology solutions will keep parties and interests aligned. Cost / access to technology (e.g., book manufacturing, filmmaking, music production, software formats, encryption can be (expensive) barriers to entry and barriers to copying and therefore can help creators recoup investments and earn profits. In practice: these costs keep falling! Technology solutions tend to produce arms races.

Why, when, and how is copyright better? Worse?

The public policy CRITERIA typically offered to assess © as a solution:

[1] PROGRESS [the language of *incentives* to produce *more/better*]

Statute of Anne (England) (1710):

- “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned”

U.S. Constitution (1789) (Article I, section 8, clause 8):

- “Congress has the power ‘To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.’”

What does “progress” mean? “Progress” by whom? For whom?

- Who needs incentives or rewards (economic / legal) to be motivated to produce “intellectual” or “cultural” goods? What sorts of incentives are needed? When are they needed? Is copyright important because it supports investments/ careers for professional creators? For commercial firms (publishers, record labels, film studios, game developers)?
- What costs do these incentives impose on others?

Why, when, and how is copyright better? Worse?

The public policy CRITERIA typically offered to assess © as a solution:

[2] FAIR COMPETITION [the language of *capitalism*]

- Enforcing exclusive rights in copyright is a method of exempting copyright owners from certain sorts of market competition.
- When / how is that “right”? Not “right”?
- What kinds of “intellectual” competition – such as different versions of the same story, even identical versions of the same story – are good (welfare-promoting)? Harmful?
- Why and when are they good? Harmful?
- What other kinds of competition might matter?
- When and by whom should harmful competition be regulated?

Why, when, and how is copyright better? Worse?

The public policy CRITERIA typically offered to assess © as a solution:

[3] SELF-ACTUALIZATION [VIA EFFORT, EXPERTISE, EXPRESSION /FREE SPEECH] [the language of *labor, identity and autonomy*]

- Copyright might motivate individuals to create, might motivate people to distribute or make available things that they create, and might provide opportunities (via the idea/expression distinction, fair use, the public domain, and other access-reinforcing doctrines, including the First Amendment) to access, use, and enjoy creative works
- Cultural creation, circulation, preservation, and consumption are all ways of encouraging and recognizing development of individuals as ... consumers? citizens? autonomous, potentially self-aware and engaged individuals?
- What is the role of the state (the government) in encouraging the development of the self?
- What is the relationship between copyright (which regulates private activity) and the FA (which regulates government activity, such as enforcing copyright)?
- Is copyright needed even if people are motivated to do circulate culture for other, non-economic reasons? In what respects?

Why, when, and how is copyright better? Worse?

The public policy CRITERIA typically offered to assess © as a solution:

[4] COLLECTIVE DEVELOPMENT AND ENGAGEMENT [the language of *society and groups*]

- Copyright supports the creation of groups (“professional artists”), firms and organizations (“record labels,” “book publishers,” “software developers”), and larger institutions (“markets”) in which creative things (works) circulate, sometimes for money, sometimes freely, sometimes subject to informal customs or social norms.
- Those collectives are promoted and regulated by many sources of law, economics, politics, and cultural influence, well beyond copyright. What is copyright’s “lane”?
- As an established form of regulation of business (i.e., firms, in markets), what is copyright’s role relative to contract and commercial law, tort law, property law, antitrust law, privacy law?
- As a new form of regulation of day-to-day life (because of the rise of cheap consumer tech since the early 1980s), what is copyright’s role relative to ordinary expectations of non-creator citizens, who simply want to read – listen – watch – play?

The © solution, translated briefly into legal doctrine:

The elevator pitch version:

- Copyright law offers a **limited** set of **exclusive rights** to **authors/owners** as incentives to produce/distribute (intangible/immaterial) cultural goods (“**works of authorship**”), of types and in ways that make society and culture better (the Constitutional “**progress of science**”). Copyright’s legal and practical logic are principally *economic* and secondarily *creative* and/or *ethical/moral*.

Why ©?

- **The theory:** assumptions that exclusivity is needed to overcome “**free riding**” problems and offer **economic incentives** to authors and others in the form of prospects of fixed cost recovery, plus profits; the social / collective benefits of copyright (producing new or more creative goods) exceed its social / collective costs (difficulty / expense of accessing / borrowing from / building on prior goods)
- **The evidence, through history:** **there is little evidence that this economic logic actually works in practice;** © largely is a product of continuous efforts by publishers to obtain concentrated/monopoly profits over markets in cultural goods. *Cynical but true, even if “piracy” is, at times, real.*

Specific issues that recur:

- What sorts of works of authorship should be covered by ©? Excluded? Who “counts” as a © author?
- What limits should apply? When? Why? How?
- When / how should copyright law (courts/Congress/private action – i.e., private ordering) support / encourage “market” transactions in cultural goods (voluntary transfers/contracts/buying and selling/clearing rights/paying for permission)? Or – instead – when / how should the law prefer “non-market” uses (go ahead and use without prior permission or payment)?
- What are the “spillover” benefits and costs of cultural production? The benefits and costs of rules restricting circulation of cultural goods? Of readers, listeners ... and next gen creators.
- When / why is it better to use general standards? When to use detailed rules?

Into SOME DETAILS...

[1] Copyright as statutory, but with major policy/theory themes, including (primarily)

- Economic arguments (utilitarian / consequentialist)
- Justice / natural right arguments

[2] Copyright as structural, giving economic and legal power to

- Authors and owners
- Intermediaries
- Industries (organizations, companies, groups)
- Readers, listeners, users, and consumers

[3] Copyright as stories, metaphorical and analogical

- Why copyright here – in this instance? Why *not* ©?
- The *public domain* is a thing (?), a place (?), and a story!

Copyright Calisthenics

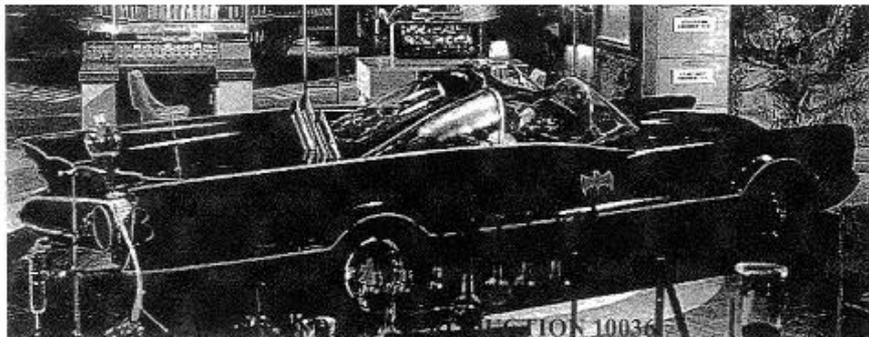


**MICRO: Thinking Work by Work
(individual plaintiff edition)**

***How do the stories change
when the context changes?***

APPENDIX A

Batmobile Depicted in the 1966 Television Series

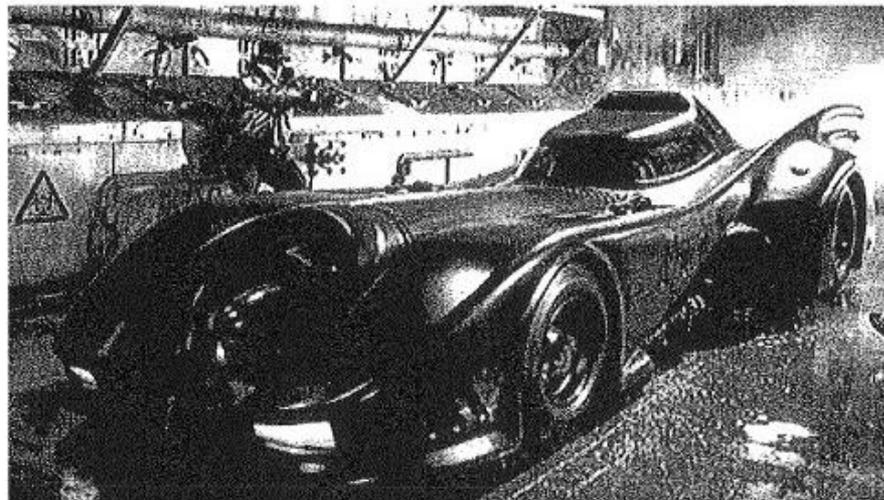


Towle Replica

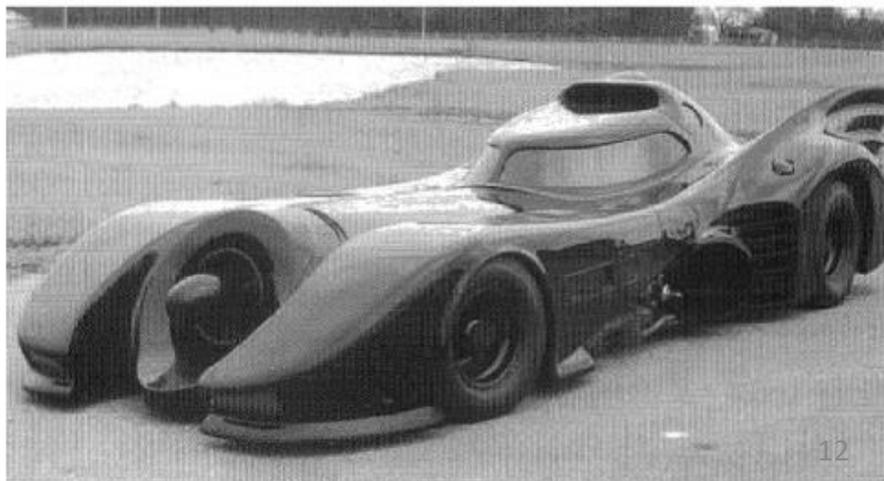


APPENDIX B

Batmobile Depicted in the 1989 Motion Picture



Towle Replica



Which one is the real Batmobile?

Does the answer depend on what DC Comics did?

On what the TV and film producers did?

On what the human artists at DC and/or ABC / Warner Bros. did?

Or

Does the answer depend on what *Towle* did?

On what *consumers* think?



Why or why not recognize a copyright in this case?

Copyright in *what*?

Who is the author of the “work of authorship,” and to whom should the copyright belong?

How does the answer solve a problem in the world?

Whose problem?

Who benefits from the answer?

Who bears the costs?





STAR TREK

AXANAR

U.S.S. Korolev Mesh by Tobias Richter • Nebula by Alf Rics • Composition by Sean P. Tourangeau

A Kickstarter film: "Prelude to Axanar"

Fan fiction:

Is this infringing appropriation?

Should Paramount have the legal power to stop production – or to license it (grant permission, on conditions)?

Or is this productive cultural development?



I bet you're gonna love this game :) Play with 3 million Players now!

Ad Content by Elvenar - Free Online Game

APRIL 28, 2016 7:13am PT by Eriq Gardner

'Star Trek' Lawsuit: The Debate Over Klingon Language Heats Up



Who owns the Klingon language? Does anyone own Klingon? Why / why not?

(real things v. created [creative] things)

Ideas, "facts," systems, standards

Creation, access, use, and reuse: why does any of this matter? To whom?

Auto-Detect ▾

Enter text or webpage URL here

0/5000

Translate

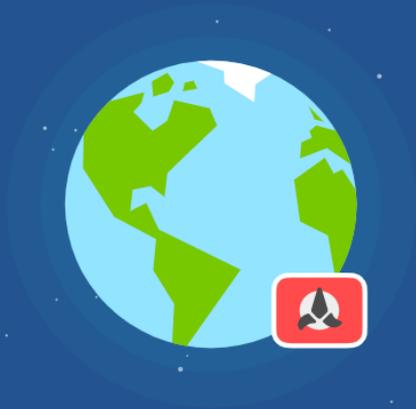


- English ▾
- | | | |
|-------------------------|------------------|--------------------|
| Afrikaans | Haitian Creole | Portuguese |
| Arabic | Hebrew | Querétaro Otomi |
| Bosnian (Latin) | Hindi | Romanian |
| Bulgarian | Hmong Daw | Russian |
| Cantonese (Traditional) | Hungarian | Samoan |
| Catalan | Indonesian | Serbian (Cyrillic) |
| Chinese Simplified | Italian | Serbian (Latin) |
| Chinese Traditional | Japanese | Slovak |
| Croatian | Kiswahili | Slovenian |
| Czech | Klingon | Spanish |
| Danish | Klingon (plqaD) | Swedish |
| Dutch | Korean | Tahitian |
| English | Latvian | Thai |
| Estonian | Lithuanian | Tongan |
| Fijian | Malagasy | Turkish |
| Filipino | Malay | Ukrainian |
| Finnish | Maltese | Urdu |
| French | Norwegian Bokmål | Vietnamese |
| German | Persian | Welsh |
| Greek | Polish | Yucatec Maya |

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START LEARNING

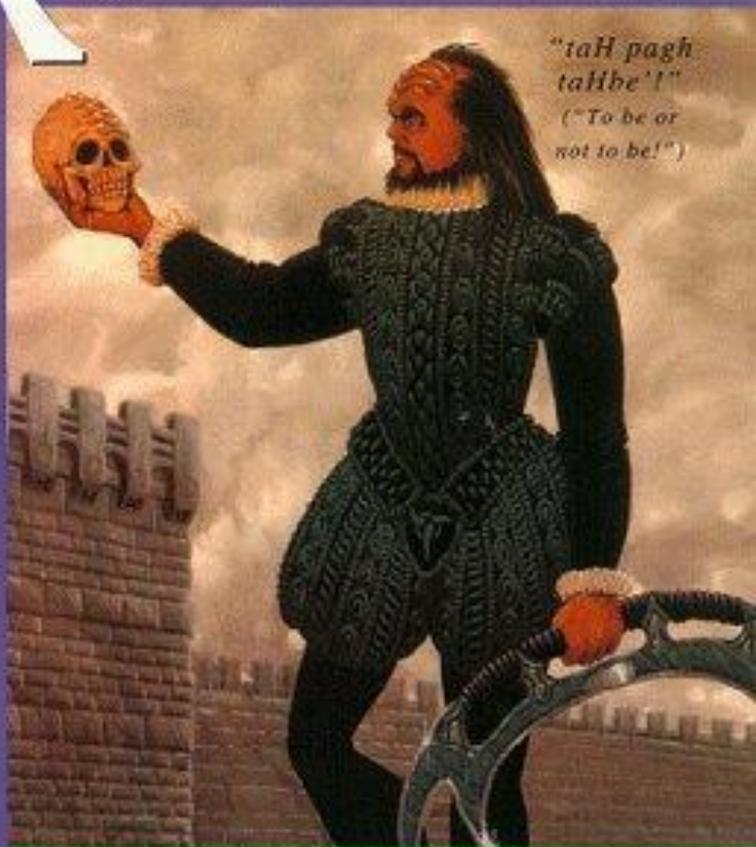
I ALREADY HAVE AN ACCOUNT



STAR TREK®

• THE •

KLINGON HAMLET™



*"taH pagh
tahbe'!"*
(*To be or
not to be!*)

The Restored Klingon Version—
Prepared by the Klingon Language Institute



THE NEW
FOLGER LIBRARY

S HAKESPEARE



HAMLET

EDITED BY BARBARA A. MOWAT AND PAUL WHEATON
ILLUSTRATED WITH MATERIAL IN THE FOLGER LIBRARY COLLECTIONS

WSP
WASHINGTON
SCHOOL PRESS
DRAMA
77367-9
\$1.99 U.S.
\$4.99 CAN.



Problem creating / problem solving:

(*Frasier*, broadcast 2002): Frasier's colleague avenges Frasier's unfriendliness by tricking Frasier into believing that Klingon is actually Hebrew. Frasier gives a Klingon blessing during his son's Bar Mitzvah.

Assume that different entities own rights to *Frasier* and to *Star Trek*. Should the *Frasier* producers have licensed the use of Klingon?



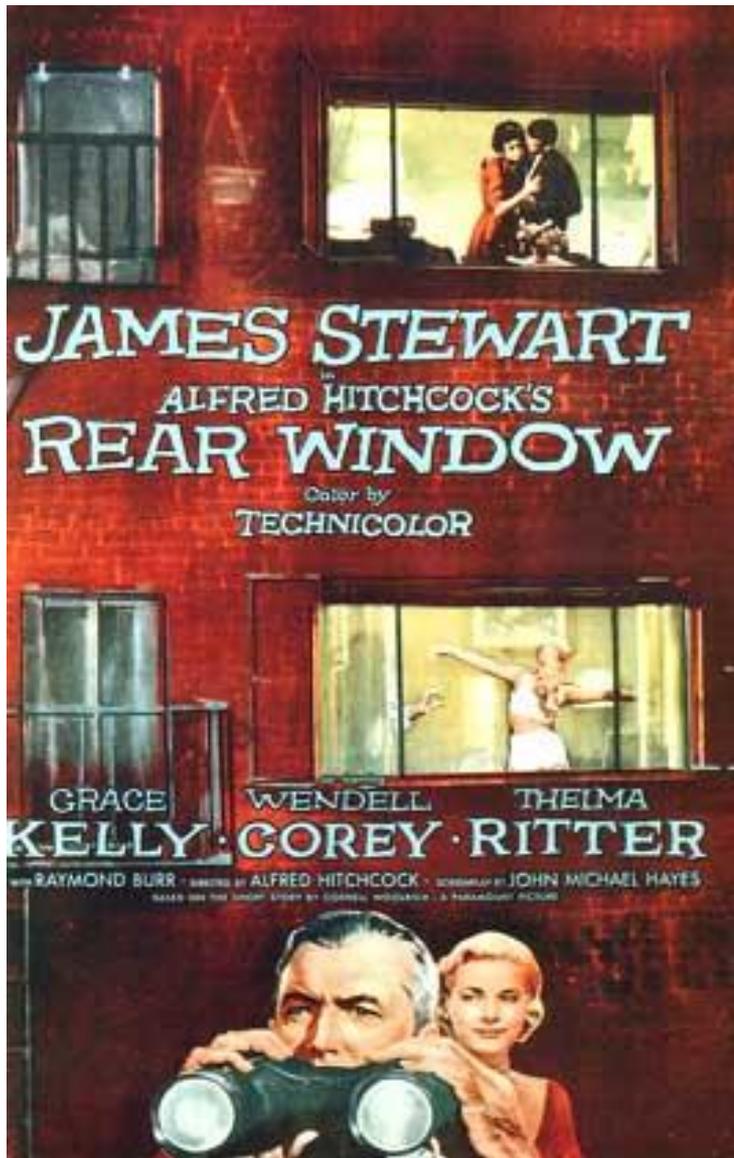
Start learning **HIGH VALYRIAN**

duolingo



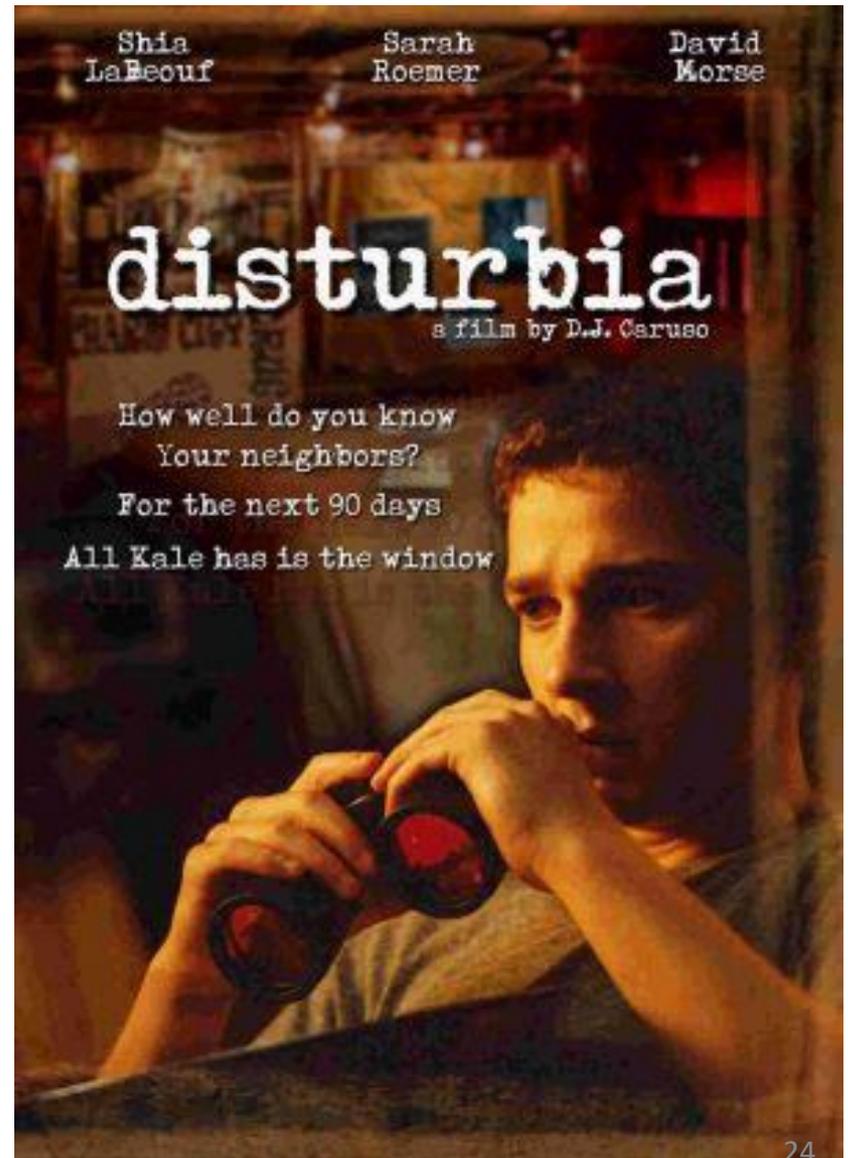
Copyright Calisthenics

Did the producers of *Disturbia* appropriate any “thing” that belonged to the producers of *Rear Window*? Did the defendants interfere with any protected interest of the plaintiff? Why? Why not?



(1954)

v.



(2007)

Copyright Calisthenics

Did the accused engage in improper appropriation – a/k/a infringement? Consider different “patterns of generality,” or “levels of abstraction.”

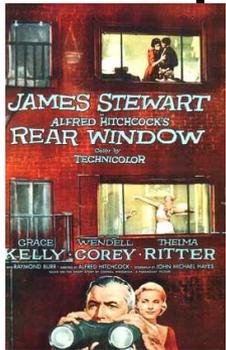
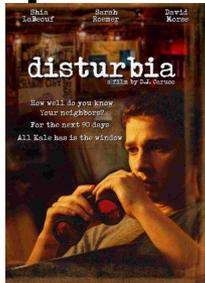
[1] Both are stories about voyeurism. **Is that the right level of abstraction? If so, the defendant infringed.**

[2] In both, a man trapped at home by circumstance happens to observe suspicious goings-on at neighbor’s place. The man’s romantic interests complicate matters. **Is that the right level of abstraction? If so, then the defendant infringed.**

[3] In both, a man victimized by an automobile accident uses binoculars to spy on creepy neighbor, whose comings and goings cast suspicion on otherwise normal behavior; blonde girlfriend is enlisted to investigate; in a chilling climax the neighbor is revealed to be a murderer and is arrested. **Is that the right level of abstraction? If so, the defendant infringed.**

[4] In the original, an older man immobilized with leg broken in auto racing accident uses binoculars to observe neighbors in a New York apartment complex; believes that a neighbor has murdered the neighbor’s wife; enlists glamorous girlfriend to investigate. The neighbor is arrested as he confronts the voyeur. In the update, a boy sentenced to house arrest after classroom outburst following father’s death in car accident uses binoculars to observe “normal” neighbor in suburban house-next-door and develops belief in neighbor’s murderous past. Neighbor kidnaps the boy’s mother; in a chilling climax, the boy and his girlfriend rescue the mother and kill the neighbor. **Is that the right level of abstraction? If so, then the defendant did not infringe.**

Idea



Expression

Copyright Calisthenics

Did the accused engage in improper appropriation – a/k/a infringement?

Consider the economic interests at stake.

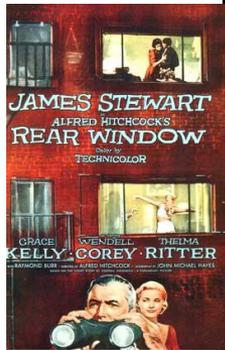
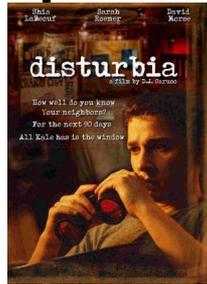
[1] The classic film “Rear Window” was adapted from a short story published in a 10-cent “Detective” magazine in 1942, titled “It Had to be Murder.” The author was Cornell Woolrich.

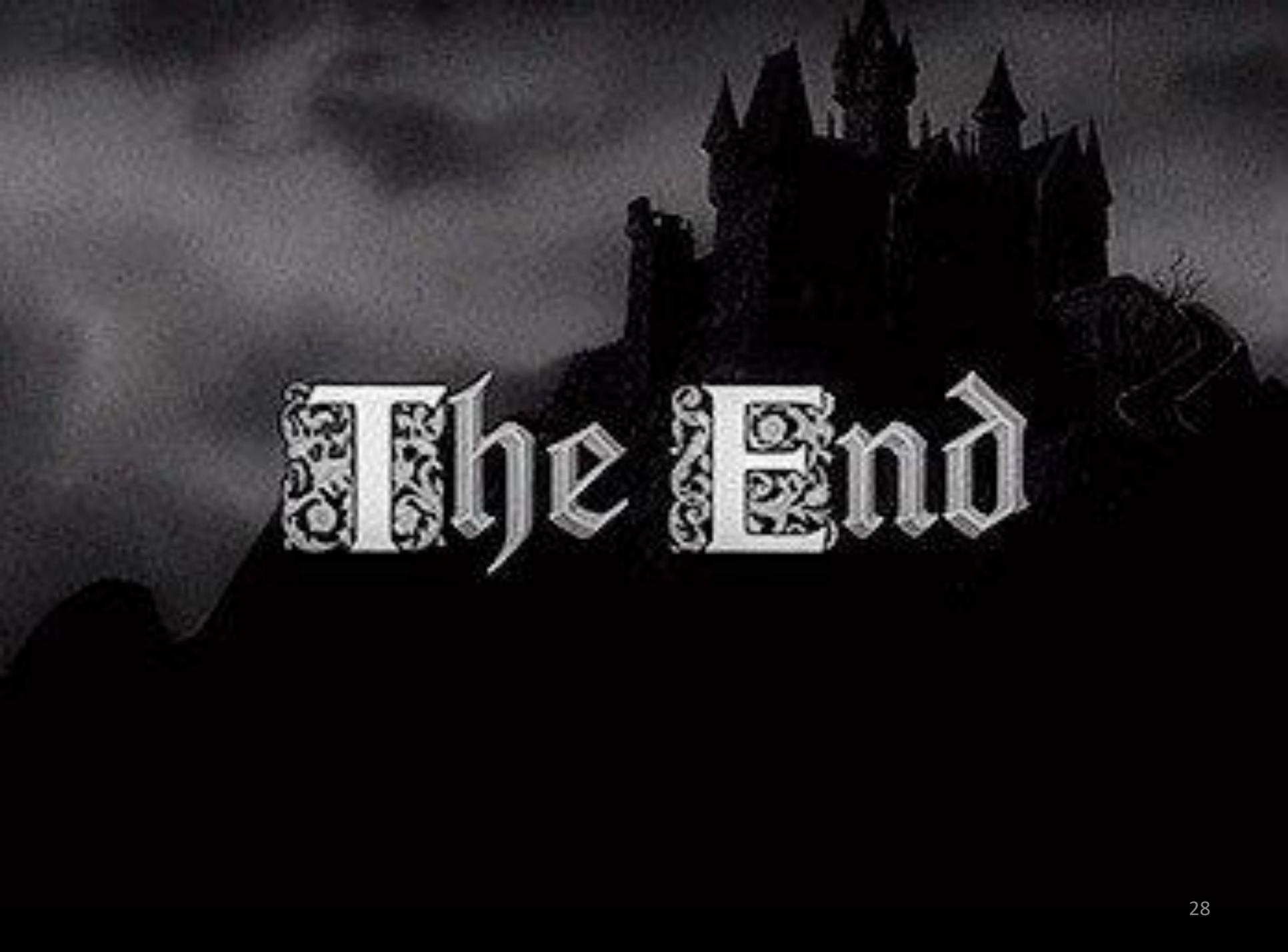
[2] Woolrich sold the right to adapt the story into a movie to Hitchcock and Jimmy Stewart, but he retained the copyright itself. The copyright is still in effect (both as of the date of production of “Disturbia,” and as of the present day). It is no longer owned by Woolrich’s heirs. It is now owned by a Hollywood agency whose business consists in part of licensing older copyrights for present purposes. (Is this a valid business model? Or a hold-up game?)

[3] Woolrich himself got a reasonable amount of money by selling the movie rights, but no movie profits; Stewart and Hitchcock made much more.

[4] Stewart and Hitchcock made a film that is regarded as one of the very best of the 20th century. They made significant creative contributions of their own, changing the story (adding the girlfriend character, played by Grace Kelly) as well as producing the visuals.

[5] **Did the release of *Disturbia* harm the legitimate economic interests of either the owners of the © in the short story, or the owners of the © in *Rear Window*?**





The End