

Problem Set 1

*Instruction: We will discuss this problem set on the first day of class. You do **NOT** need to turn in the answer. Although I cannot erase from your memory what you have learnt in other intellectual property classes and in the IP-conscious Cardozo community, please do this problem without reading any outside materials. There is **NO** right or wrong answer.*

Mickeymania is a newly independent state in an island in the middle of Pacific Ocean. Rumors had it that the early inhabitants of Mickeymania belonged to five Internet startups that collapsed after the recent dot-com crash. Shortly after Mickeymania was founded, the country passed Free the Mouse Act, limiting the duration of copyright protection to fourteen years. The Act applies retroactively to all works that were created and published before the passage of the Act. To increase awareness of this new Act, the government conducted a large-scale promotional campaign, which gave out “Free the Mouse” bumperstickers free-of-charge.

One day, Crazy4Mickey, a citizen of Mickeymania, met Cornelius Fletch, a professor of English literature at Columbia University, in Cyberchess, an online game community. After beating Fletch continuously for 5 games of chess, Crazy4Mickey told Fletch her secret—*Chesslines* and *Chessnotes*. *Chesslines* and *Chessnotes* are two companion series written and edited by Russian chess players in the late 1960s and early 1970s. The series are only available in Russian and have not been translated until recently by a former Russian programmer Mickey Sklyarov, who now lives in Mickeymania.

Crazy4Mickey immediately offered Fletch the latest issue of *Chesslines* via ICQ, an instant messenger. Fletch was amazed at how the series has converted the difficult game of Chess to a level where even novice players can understand. He offered Crazy4Mickey money to buy the other issues, but Crazy4Mickey declined. “All the *Chesslines* and *Chessnotes* are in the public domain, and I give them out all the time,” Crazy4Mickey said. He added, “You are probably the 1000th person who receives this issue. It is a shame that copyright monopolists charge people money for these materials. If you want more copies, you can download them directly from chesstella—a gnutella-based file-sharing service.”

To thank Crazy4Mickey, Fletch offered him the manuscript of his forthcoming book, *Our Forgotten Past: Copyright in 18th Century America*. At the end of the book was a 300-page appendix documenting the number of British and French authors who had lobbied for stronger foreign copyright protection in the United States in the eighteenth and nineteenth centuries. The information collected in the appendix came from two CD-ROMs, which Fletch accidentally found in the box of used CD-ROMs his son purchased on Ebay. Although Fletch’s book has been scheduled to be published in spring 2002 by Conglomerate Publishing, one of the three largest book publishers in the world, the publishing house is nine months behind its current production schedule.

This March, Fletch did an interview on *The 18th Century French Historian*, a scholarly journal for historians doing research on eighteenth-century France. A couple of weeks ago, Conglomerate Publishing received a letter from an attorney citing infringement of copyright and database rights of her client. The letter alleged that Fletch and Conglomerate Publishing have used without authorization a database designed and produced by Professor Pierre Pontificus, a noted French history professor who has now retired to Vienna. The letter also explained how the CD-ROMs containing the database were stolen from Pontificus’ house in Paris two years ago while he was on vacation in Switzerland.

Meanwhile, Conglomerate Publishing learnt from Fletch about *Chesslines* and *Chessnotes*, the English translation rights in which the publishing house has acquired from a Russian publisher at the beginning of this year. The Vice President was shocked when Fletch told him about chesstella. Conglomerate Publishing has made plans to publish the English version of *Chesslines* and *Chessnotes* in ten bound volumes, the first of which will appear in spring 2003.

As an expert in international copyright law, you are retained by Conglomerate Publishing to advise the publishing house on the following issues:

1. In a lawsuit against Crazy4Mickey litigated in a U.S. court over the alleged infringement of copyright in *Chesslines* and *Chessnotes*, what law would the U.S. court apply? Does it matter if Crazy4Mickey uses its own Internet service provider, which abides by Mickeymania law? Would Conglomerate Publishing have a stronger case if all ISPs in Mickeymania access information through central servers in Australia and Canada? Would the court apply different laws to determine the questions of copyright ownership and that of copyright infringement? Would Conglomerate Publishing prevail on the lawsuit? What defenses, if any, does Crazy4Mickey have? Would the outcome of the case be different if the case is litigated in Mickeymania?
2. In a lawsuit by Professor Pontificus against Fletch and Conglomerate Publishing, what law would the U.S. court apply? Would Conglomerate Publishing be subject to the EU Database Directive, which protects databases against unauthorized extraction and reutilization for a term of fifteen years regardless of their eligibility for copyright protection. Under the Directive, database is defined as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.” Does it matter that the U.S. Supreme Court has held in *Feist* that a compilation does not warrant copyright protection unless information is selected, coordinated, or arranged in an original manner. (In *Feist*, the U.S. Supreme Court denied copyright protection to the white pages of a telephone directory.)
3. If Conglomerate Publishing prevails in the lawsuit in the United States, can Professor Pontificus sue Conglomerate Publishing again in France under French database and copyright laws? (Conglomerate Publishing has offices and subsidiaries in France and has invested \$50 million Euros to establish Conglool!, the self-proclaimed “ultimate web portal.” Conglool! is recently sued by Yahoo! for trademark infringement and dilution.)
4. After learning about chesstella, Conglomerate Publishing sent a field research team to Mickeymania to examine the extent of copyright piracy in the area. To its disappointment, the team found that 99% of the books, computer software, and audiovisual products in Mickeymania were infringing under American law. The team also found that 43% of all infringing products were published by Conglomerate Publishing and its subsidiaries. Frustrated by the extent of piracy in Mickeymania, Conglomerate Publishing is considering lobbying the U.S. government for actions to protect its products. What type of actions would you advise your client to lobby the government for? Trade sanctions? Tariffs? Subsidies to U.S. publishing industries? Bilateral agreements? International treaties?
5. Based on your advice, Conglomerate Publishing succeeded in lobbying the U.S. government to approach Mickeymania on its behalf. After much diplomatic effort, Mickeymania agreed to extend copyright protection from fourteen years to life of the author plus ninety years in exchange for US\$5 billion of financial assistance that will be used to develop a local copyright industry. Three months after the new copyright amendments enter into effect, piracy remains rampant. In a new report, Conglomerate Publishing found that more than 80% of all books, computer software, and audiovisual products are infringing. What causes such massive copyright piracy? What are the possible remedies?