

Copyright Basics

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This summary merely highlights some of the basic rules and principles of copyright law and in doing so glosses over and in many instances omits consideration of myriad limitations, exceptions, interpretations, and refinements of the general rules.

I. Copyright defined

Congress is empowered by the Constitution “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.” United States Constitution Art. I, §8, cl. 8. Congress has exercised this power through protecting useful inventions and discoveries through patent law (35 U.S.C. Chs. 25-30 (2006)) and through protecting original works of authors through copyright law (17 U.S.C. (2006)). Congress has enacted laws for other forms of intellectual property including semiconductor masks (17 U.S.C. §§ 901-914(2006)), plant patents (35 U.S.C. Ch. 15 (2006)), design patents (35 U.S.C. Ch. 16 (2006)), boat hull protection (17 U.S.C. Ch. 13 (2006)), and trademarks (15 U.S.C. §§ 1051-1157 (2006)). Congressional power to enact some of these is granted by the copyrights and patent clause (e.g., semiconductor masks) while others are done under the power to regulate interstate commerce (e.g., trademarks).

Although, as noted above, there are many types of intellectual property and what are often referred to as “neighboring rights” (e.g., commercial exploitation of your likeness), the four main types of intellectual property are copyright, trademarks, patents, and trade secrets. Of these four, federal law exclusively regulates patents, almost exclusively regulates copyrights (there remains a vestigial area for states to regulate), and regulates trademarks largely coextensively with the states (though state regulation plays a decreasing role in trademark regulation in the modern economy). The fourth main category of intellectual property, trade secrets, remains almost entirely a matter of state law. *E.g.*, Uniform Trade Secrets Act, California Civil Code §§ 3426-2462.11.

The four main types of intellectual property can be briefly described and distinguished from one another as follows:

Copyright: protects original works of authorship in a great variety of forms including writings (like books and articles), audiovisual works, music, choreography, architecture, software, photographs, sculptures, maps, and more. Copyright protects the expression of the idea in a tangible medium of expression. It does not provide a right to prevent someone else from using the idea that is being expressed. You can prevent someone from copying your *particular expression* of a world in which machines have taken over (e.g., *The Matrix*, *Terminator*), but you cannot stop someone else from creating his or her own vision of what such world might be like.

Patent: protects novel, non-obvious inventions or discoveries of many types including chemicals (e.g., drugs), manufactures (machines and other useful articles including some computer hardware), and certain processes (e.g., how to cure rubber, but not ordinary recipes or formulas (how to bake chocolate chip cookies)).

Trademark: protects words and designs that serve to identify the source of goods and services (e.g., Coca Cola®, Google).

Included in this category are trademarks proper, trade names, service marks, service names, indicators of geographical origin, and the like. A related topic is domain name protection for Internet addresses.

Trade Secret: protects confidential, proprietary, valuable information such as customer lists, manufacturing processes, and certain formulas, like the formula for Coca Cola[®]. However, once the information is no longer secret, or if it has been discovered by reverse engineering, the trade secret protection is generally lost. Trade secret protection has property, tort, and contract foundations.

II. History

Copyright evolves with technological innovation. As new types of original works of authorship are created and as new methods of copying arise, copyright law adapts. In the past 150 years copyright has been expanded from primarily covering typical writings (like newspapers and books), maps, and sheet music, to include photographs, sound recordings (like CDs and MP3 files), movies, radio and television broadcasts, and software. It has had to meet challenges presented by photocopiers and all manner of electronic copying which have made copying and distribution of copies easier than ever before.

The US Copyright Act has been significantly reworked a number of times since it was first enacted in 1790. It was materially revised in 1831, 1870, 1909, and 1976. Since it came into force in 1978, the Copyright Act of 1976 has been amended repeatedly, often in significant ways, in response to several influences including primarily (1) technological change, (2) increasing international harmonization of copyright laws, and (3) lobbying for special treatment for certain types of intellectual property. Although most copyright issues today arise under the 1976 Act, 17 U.S.C. §§ 101 *et seq* (2000), as amended, the 1909 Act still matters with respect to many works created between 1923 and 1978, especially with respect to determining the existence of and the duration of the copyright.

III. Purpose, Policy, and Interpretation

In the United States copyright law is premised more on economic policies than on the natural law or moral rights underpinning of copyright in some of the world, especially Europe. The purpose of US copyright law is generally stated to be to promote progress through the creation and dissemination of certain kinds of works for the good of all society. This warrants emphasis: in the United States the ultimate purpose of copyright protection at all is the good of society; that is what the Constitution requires. The means used to achieve this goal is through statutes and regulations that provide economic incentives to create and distribute works primarily by granting a set of exclusive rights to authors for a limited, albeit long, time. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

Although the ultimate justification for copyright is that of promoting progress through increasing the store of knowledge and other works, at times this core purpose gets lost in the focus on the economic incentives; the means seems to swallow the purpose in the analysis of copyright issues by some courts and by many attorneys and copyright holders.

IV. How a work becomes copyrighted

Under the 1909 Act, a federal copyright did not attach to unpublished works (they were left to state level copyright law) and did require compliance with what are known as formalities: notice, registration, and deposit. Under the 1909 Act, a work in the United States a person could obtain a federal copyright (1) by publishing the work (2) registering the work with the copyright office; (3) depositing a copy (or copies) with the copyright office; and (4) giving the proper copyright notice.

Under the 1976 Act (came into effect in 1978) the requirement of publication was dropped, but the other formalities were retained, albeit in a more forgiving way. The formalities included giving notice of the claim of copyright, of who the owner is, and of the date of the work (e.g., affixing something like “© [or “Copyright” or “Copr.”] Steven D. Jamar 1986” to the work). See 17 U.S.C. §401; *Berne Convention for the Protection of Literary and Artistic Works* art. 5(2)(1886 as amended through 1979)(U.S. became a party in 1989); Berne Convention Implementation Act codified in 17 U.S.C. §§ 401-412. In addition, the copyright had to be registered with the copyright office and a copy of the work deposited there.

The formalities were dropped as a condition of obtaining copyright in 1989 when the U.S. finally came into compliance with the international copyright standards under the Berne Convention (the primary international copyright treaty). Thus one must take care in determining whether a work created in the United States before March 1, 1989 is copyrighted, because certain formalities were still required by the 1976 Copyright Act.

Today, copyright attaches to “original works of authorship” as soon as the work is “fixed in any tangible medium of expression” from which one can read or reproduce or communicate the work. 17 U.S.C. § 102(a). The author does not need to comply with any formalities for a copyright to attach to the work. For example, a computer video game can be communicated through a computer, speakers, and a monitor, and is deemed to be adequately fixed even though no one can “read” the underlying code embedded in the computer game chips. *Williams Electronics, Inc. v. Artic International, Inc.*, 685 F.2d 870 (3d Cir. 1982).

Although no formalities are required today for the copyright to attach to a new work, one should still investigate whether formalities have been followed. For works created before 1989, certain formalities may have been required as a prerequisite for the copyright to attach. Furthermore, the right to bring suit and to recover certain types of damages even today requires compliance with certain formalities for works created in the United States.

There are additional complexities relating to the recapture of copyright of certain foreign works (which often lost copyright protection in the United States because they did not comply with the U.S. formalities) as a result of amendments to the Copyright Act effective in 1996. 17 U.S.C. §104A.

V. Ownership, transfers and termination

Copyright owners are of four main types: sole author, joint authors, works-made-for-hire, and transferees. 17 U.S.C. §201 (2000).

A. Sole Authors

Sole authors are the easiest to handle under the copyright act. A natural person who creates a work that is not a work for hire and that is fixed in a tangible medium of expression has a copyright for the author's life plus 70 years under the current copyright act. The sole author can transfer the copyright, subject to a right to cancel the transfer and renegotiate the deal at 35 years. 2013 is the first year the 35 year expiration comes into effect for works under the 1976 act (1978 plus 35 is 2013). Works created before 1978 and foreign works are subject to somewhat different rules.

B. Joint Authors/Joint Ownership

Joint natural authors are like sole authors except that the term is for the life of the last to die plus 70 years and each author has ownership rights as a tenant in common. To be a joint author, the authors must have intended that their contributions be merged into a unitary work with inseparable parts or a unitary work even if the parts are separable but interdependent. An example of an interdependent work is a song with music and lyrics written by two different people: the song (lyrics and music) is a unitary work, but the lyrics and the music are separable. Joint authorship is a matter of intention; it does not happen by accident or by someone contributing something that gets put into the work unless there is an intention by the authors that they be joint authors. The law will infer intention in appropriate circumstances.

Joint ownership can also be created by an author giving or otherwise transferring the copyright to more than one person.

C. Works Made for Hire 17 U.S.C. §201(b)

In the United States, the copyright in a work made for hire resides not in the author, as it does in much of Europe and in much (but far from all) of the rest of world, but lies instead with the person who commissioned the work for certain types of works or the person who employs the person who created the work. Thus the copyright of an article written by a newspaper staff writer for the newspaper is held by the newspaper, not the actual writer. This results in the term of the copyright being 95 years from publication or 120 years from creation, whichever happens first. (Of course a similar but not identical result (one difference being the existence of the termination right at 35 years) could be obtained if, as part of an employment contract, the writer assigned the copyrights in all works to the employer as happens in the patent law. In patent law only natural persons can obtain patents. U.S. copyright law is the anomaly.)

There are two types of works for hire. The first is the work prepared by an employee acting within the scope of employment. Essentially the term "employer" is used as it is in agency law with the employee/independent contractor distinction being applied. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). (There is at least one anomaly in the law on this point at present: In general, works created within universities, especially artistic works and scholarly works, are generally treated as owned by the natural author, not the university, at least in the 7th Circuit. This matter is generally addressed by employment contracts and policies of universities without needing to rely on questionable court decisions. In the area of utilitarian computer software universities often take a different approach treating

them more like patents which universities generally require to be assigned to the university.)

The second type of work for hire is more complicated. It covers a work made typically outside an employer/employee relationship and instead involves an employer/independent contractor relationship. The independent contractor type of work made for hire must meet the following criteria:

1. It is specially ordered or commissioned; and
2. It falls within one (or more) of nine categories of works:
 - a. contribution to a collective work
 - b. part of a motion picture or other audiovisual work
 - c. a translation
 - d. a supplementary work
 - e. a compilation
 - f. an instructional text
 - g. a test
 - h. answer material for a test
 - i. an atlas; and
3. The parties have a signed agreement that the work is to be considered a work for hire.

Because of the specificity of what must be done to qualify as a work for hire, the person commissioning the work will often obtain an assignment of the copyright or a license to use the work even if the work would qualify as a work for hire. A frequent problem is that someone asserts a work is a work made for hire and the type of work is not one of the “magic” nine. For example, a report on corporate reorganization written by an outside consultant cannot be a work made for hire because such a report is not within one of the nine categories.

D. Transfers and Licenses 17 U.S.C. § 201(d)

A copyright can be sold or assigned. Less than all of the rights in the copyrighted work can be transferred, typically through licensing. Thus an author of book can separately license a publisher to publish the book in hardback; license another publisher to publish it in paperback; license a movie producer to create a movie; license another person to create a stage play; license a person to create a cartoon show; license someone else to publicly perform the work (e.g., reading passages); and so on. These rights can be of limited duration or might limit the number of copies, or the number and type of performances (for a play for example). Any or some or all of the exclusive rights can be separately licensed or combined in any sort of combination.

There are questions as to the extent to which a copyright holder can use a license to limit the rights which would otherwise exist under the copyright act. For example, can a copyright license require the licensee to give up rights to fair use or to display the single copy of the work received? To what extent will the federal

copyright purpose be frustrated by contract or other license provisions (governed by state law) and will such provisions be preempted? To what extent may licensing be used to circumvent the balance struck in provisions of the copyright law that were often premised on a sale (transfer of title) rather than a license (granting only rights to possess and use)? Many companies today attempt to limit the effect of the first sale doctrine and the fair use rights through licensing works rather than selling them. The extent to which such attempts should or will succeed is a matter of some dispute.

Several distinctions must be carefully tracked. First, a license generally grants a right to use the copyrighted material without a transfer of title. An assignment typically involves a transfer of either the copyright outright or of a particular copyright exclusive right which might be exploited. For example, the author of a stage play could assign the entire copyright to a publisher to exploit all the copyright rights. Or the author could assign a portion of the copyright to another to prepare a derivative audiovisual work to a movie producer for the full term of the copyright while retaining the other copyright rights. In such an assignment the author (original copyright holder) typically no longer has the right to exploit the copyright in the way that has been assigned to another. The copyright holder still would retain other rights and, for example, could grant to another the license to perform the stage play to a regional theater for a limited run of 30 shows and to any number of other groups to perform the show in a series of non-exclusive licenses.

The second distinction is that licenses are of two types: exclusive and non-exclusive. An exclusive license must be in writing and, as the name implies, gives the licensee the exclusive right to use the copyright in the way specified in the license. A non-exclusive license does not need to be in writing and gives the licensee the right to use the work as specified, but does not bar the copyright owner from concurrently licensing others to use the work. Mass-marketed software is licensed non-exclusively (though a court could find that the license in form is actually a sale in substance of a copy of the work instead of merely a license to possess and use the work).

The third distinction to be kept in mind is that the copyright in the work is separate from the ownership of the material embodiment (copy) of the work. 17 U.S.C. § 202. The author of a novel owns a copyright in the novel which is separate from the copy of the printed copy of the book. The author authorizes hard copies of the book to be made and distributed by sale to many people (hopefully very many people from the author's and publisher's perspectives) each of whom acquires ownership of the book, but not of the intellectual property right in the novel itself. Conversely, the sale of the copyright in the novel does not transfer any ownership of any physical embodiment of it, though it does transfer the right to make copies. With the advent of electronic books, the same distinction between the intellectual property in the novel and the electronic copy being made and distributed obtains but with one typical difference: the person acquiring the electronic copy of the novel probably only has a license to it use and possess it but does not acquire title to it. This could well limit the user's ability to resell or transfer (or sublicense) the single copy of the work to another. This anomaly has not yet been addressed by Congress to reflect the changes in the marketplace with respect to books, music, and film where soft copies are replacing hard copies.

This distinction gets trickier with respect to music and sound recordings. Sound recordings have many specialized provisions in the copyright act regulating the use by the owner of the sound recording (think CD or MP3 - the "physical embodiment"

or copy of the sound recording). The rights in the music are not co-extensive with the rights in the sound recording. The author and copyright owner of the music may have no rights or very limited rights with respect to the sound recording and vice versa.

In the computer industry some software companies have attempted to claim that even when they distribute the software on CDs or DVDs, they have not sold even a physical embodiment, but rather have simply licensed the possession and use of the software. The same argument is made with respect to how most software is distributed today-through downloading without the transfer of anything physical other than the physical changes to one's storage medium. While one has certainly received a copy of the software, it is typically a copy that one has a license to possess and use but not title to. There was no sale or transfer of title. (See UCC Article 2.) There are a host of issues that can arise from this license/sale distinction.

A joint owner may not unilaterally assign or transfer the entire copyright, though the joint owner may transfer through assignment the portion of the copyright he or she owns. Similarly, a joint owner may not unilaterally grant an exclusive license, but may unilaterally grant a non-exclusive license, subject to the duty to account for the benefit of the other owners for any proceeds.

Finally, the dual nature of a license as being a contract conveying a property right or a property license that attaches to the work can affect how it is viewed. In general a personal right based on contract would seem to stand on firmer ground than a general property right that is attached to each copy of the work under which the copyright holder seeks to limit the effect of copyright limitations like first sale doctrine. A publisher who included a notice in every book that it could not be resold would find that limitation held unenforceable under the first sale doctrine in §109.

E. Termination Right 17 U.S.C. §203

Because authors might not realize the full economic potential of a work when it is first licensed, they or their surviving spouse and children (or estate administrator if no spouse or child survives) have the non-derogable right to terminate the transfer, assignment, or license, between 35 and 40 years after the transfer is made. The provisions governing the termination right are detailed and must be followed with care. This right has just started to come into practical effect in 2013 (1978 plus 35 equals 2013).

VI. Copyright duration

The duration of a copyright depends most heavily on when the work was created in two respects. First, the date it was created affects whether it is under the 1909 or 1976 Act. Second, creation is often an important event from which one calculates the duration (the date of publication, if any, is the other critical date, especially for works created before 1978). Was it copyrighted under the 1909 law or did the copyright attach under the 1976 law? Copyrights last for such a long time that many works copyrighted under the 1909 law still are copyrighted.

A. Works created on or after January 1, 1978. 17 U.S.C. ch. 3 (2000)

For works authored by individuals, the term is the life of the author (or last-to-die author for jointly authored works) plus 70 years.

For works authored by corporations (works made for hire), or works for which the author is unknown (anonymous or pseudonymous works), the term is 95 years from publication or 120 years from creation, whichever expires first.

B. Works created before 1978

The basic term is 28 years plus a renewal term of 67 years for a total of 95 years. Today, renewal is automatic, but there are complexities involving renewal of older copyrights which may have passed into the public domain if not properly renewed before renewal became automatic.

In addition, just who may renew and whether renewal rights are assignable is a complicated issue beyond the scope of this primer on copyright. The point is, if you have a work created before 1978, the rules are more complex and you must examine them carefully to determine their applicability to the work at issue.

In general, works published in the United States before 1923 are in the public domain now. Works published in 1923 or later in the United States may or may not be in the public domain depending upon timing of renewals. For works published in 1923 for which all copyright formalities were complied with and which were properly renewed in 1951, the copyright will expire in 2018, unless the term is extended again. 17 U.S.C. ch. 3.

Note that the publication date and creation date need not be the same and that under the 1909 act publication is the triggering event for one needing to comply with copyright formalities and for duration.

VII. Copyrightable subject matter

Though we still speak of a work “being copyrighted” as if some affirmative act beyond creation of it had to be done to obtain a copyright, and we still use the term “copyrightable” to describe works to which copyright may attach, these usages are not technically accurate now since copyright attaches as soon as a work is fixed in a tangible medium of expression. So one no longer needs to do anything to have a copyright in a work other than create it in a fixed medium of expression. But talking about “copyrighting something” is still common and, provided such language is avoided in contracts and licenses, and provided the people using and hearing the language understand its imprecision, little harm comes of it. Furthermore, until 1989, the United States copyright law required compliance with formalities, though certain grace periods were available.

The copyright act protects works that are within copyrightable subject matter. 17 U.S.C. §§ 102-105 (2000). It primarily protects the expressive aspects of a work through protecting the intellectual property per se and through protecting some rights in the physical manifestation or embodiment of the intellectual property. See 17 U.S.C. §§ 202, 109. Each of the various types of works that are protected (e.g., literary works, audio visual works, and architectural works) may have a different set of rules concerning the scope of protection for that work. For example, one can take a picture of a building without infringing the architectural copyright (17 U.S.C. § 120), but a photograph of a two dimensional painting would infringe as being an unauthorized copy or derivative work. 17 U.S.C. § 106.

The Copyright Act identifies the following types of works as copyrightable. In theory the list is not exhaustive since copyright subject matter is said to “include” these, but in practice it presents a very good approximation of being complete (17 U.S.C. §102):

1. Literary works (e.g., books, poems, software code, newspapers, magazines);
2. Musical works (e.g., sheet music, charts, lyrics with the music, the music itself);
3. Sound recordings (e.g., cds, mp3s, tapes)(note that the protection for the sound recording is separate from and different from the protection for the music per se);
4. Dramatic works (e.g., plays including accompanying music);
5. Pantomimes and choreographic works (e.g., dance);
6. Pictorial, graphic, and sculptural works (e.g., paintings, photographs, sculptures, advertising art, maps);
7. Motion pictures and other audio-visual works (e.g., movies, television, music videos, video games);
8. Architectural works (e.g., the building itself and the architectural plans and drawings (which are also protected as literary works or pictorial works)).

For purposes of copyright, the quality of the work is irrelevant. Good or bad, high art or plebian, sparkling or pedestrian - all are equally the subject matter of copyright. Subjective judgments of quality are not relevant to whether a copyright can attach to the work. Even a legally obscene work, distribution of which could be banned since it is not protected as free speech under the Constitution, may have a copyright.

To have a copyright, a work must be in some sense original, but the threshold for originality is very low. It must possess “at least some minimal degree of creativity” or “possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.” *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 240, 245-46 (1991). The work must be original and not copied, but need not be novel in the sense required for patent. *Id.*; *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). A work can be much like a preexisting work, or even exactly like it and still be

entitled to a copyright provided it was not copied, but rather the second work originated independently with the second author.

Copyright protection also extends to derivative works and compilations. 17 U.S.C. § 103. A derivative work can itself receive a copyright if it is sufficiently original and creative, provided either (a) it is an authorized derivative work (e.g., a novelist who licenses someone to make the movie version of the novel), or (b) it is an otherwise lawful derivative work, e.g., a parody of an existing work, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (“Pretty Woman” song parody). (For a discussion of *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001), the copyright case involving *The Wind Done Gone* and *Gone with the Wind*, see <http://www.freedomforum.org/templates/document.asp?documentID=16230>.)

A compilation can have a copyright if the selection or organization of the items in it, as distinguished from the items themselves which comprise the compilation, have a modicum of originality, e.g., encyclopedias and cookbooks and “yellow pages” are copyrightable as compilations; regular phone directories generally are not. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 240, 245-46 (1991). Databases of non-copyrighted or non-copyrightable material may be copyrighted as compilations separate from the copyrights in the elements comprising the database (e.g., Westlaw).

Certain sorts of things are excluded from copyright protection including (17 U.S.C. § 102(b)):

Facts (e.g., historical facts, who scored a goal, phone numbers, news)

Ideas (e.g., the idea that every lawyer should know something about intellectual property is not protected, though a particular way of expressing it or explaining it probably is)

Procedures, processes, method of operation (e.g., recipes, the substance of an instruction manual)

Formulas (e.g., $E=mc^2$)

Titles of books (e.g., “Copyright Law”)

Catch phrases, slogans (e.g., “fair and balanced”) (though some of these may have trademark rights (though not “fair and balanced”))

Stock items or standard components also known as *scenes a faire* - character types (hard-boiled detective), plot devices (flashbacks), algorithms (how to do long division), musical notes, architectural elements (columns, beams, arches, literary genres, etc.

The most fundamental concept regarding copyrightable subject matter is the idea/expression dichotomy. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (*Abbie’s Irish Rose*) (Judge Learned Hand’s opinion in this case is a work of art itself). Indeed, the items in the immediately preceding list are largely implementations of this principle.

It is not always easy to distinguish protectable expression from the underlying unprotectable idea. Sometimes the two become merged. Under the doctrine of merger, the expression becomes merged with the idea and is not protectable. For example, when there are so few ways to express an idea or concept, or to implement an idea or concept, the expression or implementation is said to have merged with the idea; they are legally inseparable and not protectible. *Baker v. Selden*, 101 U.S. 99 (1879)(forms for accounting system described in book were held not copyrightable because they were merely implementations of the method).

The idea that “problems will be with us always” can be expressed in many ways. For example, the simple poem by Strickland Gillilan,

Fleas

Adam
Had'm

is but one way to make the point. (Gillilan actually named the poem “*Lines on the Antiquity of Microbes*” which artistically makes a nice contrast to the brevity of the poem although it tends to focus one’s attention toward the didactic meaning and away from the symbolic or deeper theme of the poem. The first known publication was in 1927. http://www.fun-with-words.com/shortest_poem.html.) This simple poem would have been copyrightable (and possibly was, but there is nothing to indicate that the copyright was renewed so it has expired), but the idea or ideas or themes it expresses are not.

Another concept used to define the scope of a copyright is the idea of thin versus strong protection. Sometimes a copyright is allowed, but the amount of protection given is very little. In such an instance the copyright is said to be thin. In such cases what is protected is often only literal or near-literal copying. That is, even a work which is very similar will be held not to infringe a thin copyright while such a similar work might be held to infringe as a copy if the work had a stronger or “heavier” or “broader” copyright. (As a mildly interesting semantic aside, we generally speak of “thin” or “strong” copyrights as the poles on the continuum, not “thin” or “thick” copyrights.) For example, the copyright in a database of law cases may be considered to be thin because the component works are in the public domain and the selection and organization are relatively constrained by external concerns such as dates, case names, court issuing the decision, and topics. On the other hand, a copyright in something more original, e.g., Spike Lee’s *Do the Right Thing* and Tolkein’s trilogy *The Lord of the Rings*, would be stronger since such works are closer to the core of what copyright is intended to protect, are more original, and since stronger protection will encourage, not discourage, creation of other works for these sorts of works. Strong copyright protection for a modestly original database will have the opposite effect of discouraging the creation of more of those sorts of (competing) works.

A final area of concern with respect to subject matter relates to utilitarian or functional pictorial, graphic, or sculptural works. In general a purely utilitarian graphic or sculptural work or useful article is not itself copyrightable. 17 U.S.C. § 101 (definition of “useful article”); §102(b). Thus a lamp or a chair or a table is not copyrightable in the normal course of events. But, if the utilitarian object contains copyrightable subject matter that is conceptually or physically separable from the utilitarian object, then it may be copyrighted. The most famous example in copyright

law concerns the Balinese dancer lamp. *Mazer v. Stein*, 347 U.S. 201 (1954). A schlock art sculpture of a Balinese dancer was drilled head to heel, put on a base with a pole sticking out of her head on which a light bulb and lampshade were placed. The sculpture is conceptually and physically separable from the lampness of the lamp and so it could be copyrighted.

Note that the functional/utilitarian concept is not codified in the copyright act except with respect to two and three dimensional works. Thus literary works, including quintessentially functional works like computer programs (especially operating systems, software utilities, word processing programs, spreadsheets, and accounting software, etc.), are not barred from copyrightability as functional works. The copyright act itself does not use the functional or utilitarian doctrine with respect to works other than pictorial, graphic or sculptural works, but courts may take note of it anyway to help define the scope of the copyright in the literary work. Functionality in some settings also relates to merger.

VIII. The rights of a copyright holder

The particular rights held by a copyright owner vary with the type of work. The for example, a right to perform applies to dramatic works, but not to sculptural works. Rights in music are different from rights in screenplays and the rights in the music proper are different from the rights in the sound recordings of that music. The copyright act grants rights in Sections 106 and 106A and then limits the scope of those rights through numerous special provisions (§§108-122) and one general provision (fair use - §107).

The six exclusive rights that attach to a copyright under 17 U.S.C. § 106 are:

1. Reproduction;
2. Preparation of derivative works;
3. Public distribution;
4. Public performance;
5. Public display;
6. Performance of sound recordings.

A. Reproduction

The core right is the right to control copying of the work. The copyright owner can in general prohibit others from reproducing the work in any form. The owner can reproduce the work or grant exclusive or non-exclusive licenses to others to reproduce the work. This is the right people most typically associate with copyright.

B. Preparation of derivative works

A derivative work is a work based on the underlying work in which the underlying work is transformed or adapted, often to a new medium. A copyright holder can license others to prepare derivative works or can prepare them him or herself or can choose not to license the preparation of derivative work. The derivative work can itself be copyrighted, but only

with respect to what is original about it and even then it is still dependent upon a license from the holder of the copyright in the underlying work or license substitute (e.g., parodic use).

The modern tie-ins of books, screenplays, movies, cartoons, action figures, and all forms of merchandizing provide revenue to some fortunate copyright holders because of this right.

C. Public distribution

The copyright owner not only can control the lawful making of copies, the owner can also control the distribution of them by sale, gift, license, or other transfer and by any means including electronic copies and distribution. However, with respect to sales, i.e., transfers of title, the right to control subsequent distribution of a lawfully acquired copy is limited by the first sale doctrine under §109.

D. Public performance

Plays, musical compositions, choreographed dances and the like are intended to be performed. In general, the copyright owner has the right to control the public performance of works. Exactly what constitutes a public performance as opposed to a private showing is an area with complex and detailed rules. Showing a DVD of “Malcolm X” to your family or a few friends is not a public performance, but charging admission to a few neighbors could be. See §§ 110-113.

With respect to musical compositions, the copyright holder has the right to control the first public performance of the work. Thereafter anyone can make and distribute a sound recording or can perform the work publicly upon paying the compulsory license fee. §115.

There are special rules with respect to a copyright in a sound recording, which needs to be distinguished from the copyright in the music itself. §114.

E. Public display

Many pictorial, graphic, and sculptural works, including photographs and most paintings, are made in single or limited editions. Many are mass marketed as posters and on T-shirts. The owner of the copyright in such works has certain rights with respect to the public display of the work. But the owner of the physical embodiment of the work (i.e., the photograph or the sculpture itself) has certain rights in that work as well. §109.

F. Performance right in sound recordings

Sound recordings are treated as a special kind of work with a number of particular rights and limitations attached to them. See §114. Radio stations and others can perform sound recordings for payment of a fee in a compulsory licensing arrangement analogous to that for the underlying musical composition. There are special rights relating to the digital transmission of sound recordings.

G. Moral Rights

In addition to these six rights, the US Copyright Act, as of the 1991 amendments to it, provides very limited “author’s rights” or “moral rights” in the works. 17 U.S.C. § 106A. For certain works the author has the right of attribution (having the author’s name connected with the work) and the right of integrity of the work (the right to prevent mutilation or distortion of the work in such a way that the author’s name or honor would be tarnished). There are no moral rights in works made for hire or in works sold in editions of more than 200 units.

The United States copyright law is primarily economically based whereas most of the world takes a more natural rights approach under which the rights derive from the act of creation itself, not from the economic incentives to do so. Thus US “authors’ rights” are anemic in comparison to those of most of the world.

H. Enforcement

Although in theory the enforcement mechanisms are not substantive rights, things like takedown notices; making illegal the circumvention of anti-copying protection schemes; and the exclusion of infringing material from importation can seem to operate as more than procedural rights to enforce the substantive rights. The substantive rights being protected in general by takedown notices and exclusion from importation are generally the reproduction and distribution rights. The anti-circumvention right seems procedural to some extent insofar as the anti-copying protections put on the copyright holder are done in service of the reproduction right. But they have direct substantive effects as well insofar as some copying is allowed by the copyright act and the anti-circumvention technology can bar the exercise of those user rights and this has the effect of expanding the copyright holder’s substantive rights. Thus the anti-circumvention provisions themselves operate as a kind of substantive right as well as procedural enforcement right.

IX. Limits on the rights of a copyright holder

The rights of a copyright holder are not unlimited. They are limited in time (albeit for a very long time compared to patent (20 years) or semiconductor masks (10 years)), and even the rights themselves have limits.

Even within the time during which the copyright attaches, the copyright holder cannot prohibit all uses of the work. People can use the work without permission provided the use comes within one of the particular exemptions or falls under the general exemption of fair use.

The Copyright Act contains numerous provisions limiting the reach of the exclusive rights. 17 U.S.C. §§ 107-122. Mention has already been made of certain limits on the rights of copyright holders in music, including their inability to prevent public performance of their works after the first performance. 17 U.S.C. §115. There are many, many such particular provisions in the code which govern certain aspects of the rights in some detail of libraries (§108), cable systems (§111 & §114), radio dissemination (§114), archiving digital works (§117), and much more. As a simple example, people can photograph architectural works without infringing the copyright in the architectural work itself. 17 U.S.C. §120.

A. Fair Use (17 U.S.C. §107)

People can use a copyrighted work without permission if the use qualifies as fair use. Use of a work for criticism, comment, news reporting, teaching, scholarship, and research are generally allowed, although each of them have limits in turn. One cannot reproduce an entire book which is in print and distribute it to one's students under the rubric "fair use." Whether a use qualifies as protected fair use depends on the particular facts and circumstances of the use. There is no use which will be presumed fair, though a number of uses, e.g., parody and use for news purposes are close to presumptively fair.

The Copyright Act identifies four factors to be used to determine fair use. 17 U.S.C. §107.

1. **Purpose and character of the use**, i.e., is the use for commercial gain, education, or other non-profit use? Commercial uses by users are less likely to be found to be fair use, with the important exception of parody.
2. **Nature of the copyrighted work**. Unpublished and published works are treated differently as are works generally considered scientific or factual, such as biographies or histories, as opposed to works of pure entertainment.
3. **The quantity and the substantiality or importance to the work of the portion taken or used**. The greater the amount of the work taken and the greater the importance of that portion to the work as a whole, the more likely the court is to find no fair use. Sometimes a very small part can be so much the essence of a work that taking just a small part could be considered not fair use. The use of this factor also varies tremendously from case to case and with the type of work involved.
4. **The effect of the use on the potential market for or the value of the copyrighted work**. This is often considered the most significant factor in determining fair use. Since US copyright law has an economic underpinning, tying fair use to the economic effects on the copyright holder makes some sense. But the lack of an adverse effect on the value of or market for the copyrighted work does not insulate the user from infringement.

B. First Sale Doctrine 17 U.S.C. § 109

The first sale doctrine addresses what the lawful owner of a copy of the work can do with it. The lawful owner of a copy can generally dispose of that copy by selling it, giving it away, or renting it out, for example. Hence libraries can loan books, second hand booksellers can buy and sell books, and video stores can rent movies and video games. For other kinds of works, like paintings and sculptures, the first sale doctrine permits the owner of the copy to display the work, even to the public, so museums and businesses do not need additional permission to display works they own.

The first sale doctrine has a number of complexities, two of which are the special provisions in the Copyright Act that prohibit the rental of sound recordings

(e.g., CDs) and computer software, even though such rentals would have been permitted under the first sale doctrine.

Sometimes copyright holders attempt to limit the effect of the first sale doctrine through licensing. For example, many computer software “shrinkwrap” licenses purport to limit the licensee from being able to resell or assign that license to another. Indeed, some software companies try to treat the transaction involving their products as licenses to use rather than as transfers of title of the copy itself. The first sale doctrine does not apply to situations where the title to the copy is not transferred.

The wholesale substitution of licensing for selling undermines the policies behind the first sale doctrine. Music in electronic form (e.g., iTunes) and electronic books are typically licensed with restrictions on alienation of the work licensed rather than sold. This generally means you cannot transfer your copy to someone else, unlike your power to do so with a hard copy of a book or sound recording.

X. Infringement

A. Direct Infringement

Someone who violates an exclusive right of the owner of the copyright, such as by copying or publicly performing without permission, infringes the copyright and is liable for certain statutory damages and actual compensatory damages. 17 U.S.C. § 501. The suit must be brought in federal court within three years of the infringement. 17 U.S.C. § 507 (b) (“No civil action shall be maintained . . . unless it is commenced within three years after the claim accrued.”).

In general, the courts have interpreted the copyright act statute of limitations as accruing on discovery rather than at the time the infringing activity occurred. A claim thus accrues when the copyright owner or other proper claimant learns of the infringement, or in the exercise of reasonable diligence should have learned of it. It does not accrue merely upon the act of infringement.

Certain types of infringement can be ongoing so the statute in effect never runs on bringing a claim. However, the statute may well run on barring recovery for infringements that occurred more than 3 years from the filing of suit. In addition, the statute may be tolled under limited equitable grounds such as fraudulent concealment or equitable estoppel.

The typical case of infringement involves copying without permission to do so. However, there are other rights in addition to the reproduction right such as the creation of derivative works and display and performance rights. There are many special provisions for sound recordings and performances. The details of those sorts of materials are beyond the scope of this basic introduction. Suffice to say here that distinctions are made on the basis of whether something is publicly performed or performed (or played) in private as well as on other grounds.

To make the case for infringement in a reproduction case one need prove only (1) a valid copyright (and that it was registered in some cases) and (2) illegal copying. Not all copying is illegal. Some is permitted as fair use, for example. Or one might copy an idea. Or one might copy aspects of the expression that are scenes a faire or

that are compelled by externalities (especially in software cases). So copying includes a requirement both of copying in fact, and that the copying is “illicit” or illegal.

Proving copying in fact is not always easy. The infringer may admit copying, but in the absence of such an admission or other direct evidence of copying (e.g., a witness to say “I saw him copying it”), the infringement must be proven by inferences from circumstantial evidence.

To prove the circumstantial case of copying, the copyright holder must prove (1) that the infringer had access to the work, and (2) that from the point of view of a potential target audience, the works are substantially similar. Where the copying is exact or literal, i.e., copying the exact item line by line or note by note or sound by sound, the case is quite simple. An exact copy is, of course substantially similar. The inference is strengthened because for works of any complexity, length, or creativity, the likelihood of two people creating the exact same thing is very remote. Electronic copying of mp3s or software in general is of this type as is the use of photocopiers to reproduce articles, parts of books, comics, and pictures. If the copying is exact, then practically speaking, nothing more need be proven. The access and the copying can be inferred from the exactness of the copy under a doctrine called “striking similarity.”

Cases involving non-literal copying are more difficult conceptually and practically. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (everyone interested in copyright should read this exquisitely written opinion by Judge Learned Hand). Non-literal copying cases range from movies with the same plot to computer programs that work the same though the code is different, *Computer Associates International, Inc., v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1997), to graphic arts in which the “look and feel” is the same, though the content is different. *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (SDNY 1987) (*New Yorker* Cover copied for *Moscow on the Hudson* movie poster). Deciding whether the putatively infringing work is substantially similar to the first work is difficult and involves the application of complex legal tests by the court and by the jury. As in negligence cases, the decisions in this area are very fact-specific.

Copying is not the only form of infringement. Any of the rights can be infringed. For example, unauthorized public performance of a play, public performance of music without paying the compulsory license fee, and unauthorized showings of audio visual works or playing of sound recordings for the public all would infringe copyright.

There are a variety of special rules for the various types of works. For example, under the 1998 Digital Millennium Copyright Act, certain technologies used to circumvent technological limits on copying, e.g., the uncopyability of DVDs, were banned. Manipulation of electronic copyright management information, or copyright signatures, if you will, are also protected against modification. For certain entities, like Internet service providers, limited protections against liability are provided through “notice and takedown” prerequisites to making a claim. 17 U.S.C. § 512.

B. Third Party Infringement

Much of the action in recent years has been in the area of third party infringement including third party liability for actions of others. Oftentimes simple

agency rules will work to hold third parties liable under the doctrine of respondeat superior.

Of greater interest and concern is the doctrine of contributory infringement. Under contributory infringement if one party materially and intentionally contributes to another's infringing activity, that party can be held liable as a contributory infringer. Under the recent *Grokster* case the U.S. Supreme Court held that someone who makes a product that the manufacturer knows can be used for infringement and which derives much of its economic value from its use in supporting infringing can be liable as a contributory infringer.

XI. Remedies

The copyright owner may recover compensatory damages and restitutionary damages (the ill-gotten profits of the infringer) 17 U.S.C. §§ 504(a)(1), 504(b), or statutory damages 17 U.S.C. §§ 504(a)(2), 504(c), and costs including attorneys fees.

In cases where the compensatory and restitutionary damages are difficult to prove or where the claimant thinks statutory damages might be more, the copyright holder can elect to pursue statutory damages instead of actual damages. 17 U.S.C. §§ 504(a)(2), 504(c). Awards can range from \$200 to \$150,000 for each work infringed. Note that the awards are for the work infringed, not for each instance of infringement of a particular work.

Often the copyright owner's more valuable remedy is injunctive relief. 17 U.S.C. § 502. Impoundment of the infringing articles is also available. 17 U.S.C. § 503.

In addition, the government can bring a criminal action. 17 U.S.C. § 506.

There are special remedies such as takedown notices and anti-circumvention rights that are increasingly important. Remedies provided in licenses (losing the license to possess and use; losing access to online providers; and so on) are also increasingly important substitutes and additions to the statutory balance worked out with respect to remedies.

XII. Federal Preemption

The copyright act preempts state law which would grant equivalent rights and the Constitution's Supremacy Clause would cause state law that conflicts with the Copyright Act to be preempted. Consequently, for most matters, copyright is primarily a matter of federal statutory law. Nonetheless, some state-based claims of similar type such as publicity or rights in unfixed works, such as live unfixed performances, can be regulated by states. Furthermore, licenses and contracts are a matter of state law and can play a large role in how rights are handled.

XIII. Ongoing interesting or thorny issues

1. Database protection
2. Handling of emerging and rapidly evolving technologies in general.
3. Free speech and copyright
4. Religious freedom and copyright of religious materials

5. International enforcement
6. Enforcement problems such as using ISPs to enforce copyright
7. Licensing provisions undermining the copyright act's balancing of the rights of copyright holders and users
8. The scope of the public domain in general