

Copyright Law Basics

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IP Clause of U.S. Constitution

Article I § 8, cl. 8

The Congress shall have Power . . . To promote the
Progress of

Science and the useful Arts

by securing for **limited Times** to

Authors and Inventors

the **exclusive Right** to their respective

Writings and Discoveries

What Can Be Copyrighted?

Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 USC § 102(a)

What Does It Mean to Be Fixed?

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

17 USC § 101

What Does It Mean to Be Fixed?

How long is long enough to be perceived?

▶ “period of more than transitory duration”

Perceived by whom or what?

What Does It Mean to Be Original?

No definition of originality in the statute

Case law

- ▶ Owes its origin to the author
- ▶ “Some minimal degree of creativity” → something more than merely trivial

Negative Requirement

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.

17 USC § 102(b)

What Is Not Copyrightable

- (a)** Words and short phrases . . .; familiar symbols or designs; . . . mere listing of ingredients or contents;
- (b)** Ideas, plans, methods, systems, or devices . . .;
- (c)** Blank forms . . . which are designed for recording information . . .;
- (d)** Works consisting entirely of information that is common property containing no original authorship, . . .
- (e)** Typeface as typeface.

Copyright Office Regulation §202.1

Who Owns the Copyright?

Copyright in a work protected under this title vests initially in the author or authors of the work.

17 USC § 201(a)

What Is An Author?

- ▶ No statutory definition
- ▶ The person who produced the work from his/her “original intellectual conceptions” and exercised control

Joint Authorship - 17 USC § 101

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

17 USC § 101

- ▶ copyrightable whole
- ▶ 2+ authors
- ▶ each author contributes something ©able
- ▶ intent of both authors (at time of preparation)

Work for Hire - 2 Types

- ▶ A work prepared by an employee within the scope of employment or
- ▶ A specially commissioned work in one of 9 categories so long as parties expressly agree in writing

Subject Matter of Copyright Law

. . . Works of authorship include the following categories:

- 1) Literary works;
- 2) Musical works, including any accompanying words;
- 3) Dramatic works, including any accompanying music;
- 4) Pantomimes and choreographic works;
- 5) Pictorial, graphic, and sculptural works;
- 6) Motion pictures and other audiovisual works;
- 7) Sound recordings; and
- 8) Architectural works

What Does the Copyright Owner Get?

The exclusive rights to do and to authorize any of the following:

- ▶ to reproduce the copyrighted
- ▶ to prepare derivative works based upon the copyrighted work
- ▶ to distribute copies or phonorecords of the copyrighted work to the public
- ▶ to perform the copyrighted work publicly
- ▶ to display the copyrighted work publicly
- ▶ (for sound recordings) to perform the copyrighted work publicly by means of a digital audio transmission.

Tests/Exceptions for Different Rights

For example, to show unauthorized reproduction:

1. Copying in fact
 - ▶ Access
 - ▶ Sufficient copying and similarity
2. Substantial similarity

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1. Copying in fact
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 - ▶ Sufficient copying and similarity
2. Substantial similarity

But a defense is “independent creation”

See <https://www.youtube.com/watch?v=CDsaT9xj4A0>

Tests/Exceptions for Different Rights

Right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”

But an exception is the “first sale doctrine”

▶ See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351

Tests/Exceptions for Different Rights

Derivative work = “work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted”

- ▶ But if the work is significantly transformed, then the “fair use doctrine” may apply

Public Performance and Display

- ▶ Many statutory exceptions
- ▶ As regards **music**, complex statutory scheme
 - Compulsory licensing
 - Favors the songwriter over the performer
 - Relatively new rights for performers w/ digital transmissions
 - Administered by independent agencies

Formalities

- ▶ Rights vest at time of creation
- ▶ Required formalities changed over time
- ▶ At present, for new works:
 - Registration optional, but needed for lawsuit and timing important for determining damages
 - Deposit copies with U.S. Copyright Office at registration
- ▶ Need to know earlier requirements for older works

Duration

- ▶ Changed over time
- ▶ For works created after 1/1/78:
 - Life of author + 70 years or
 - WFH: 120 yrs from creation or 95 from publication (whichever less)
- ▶ Need to know earlier requirements for older works
- ▶ Rights can be licensed and assigned → but also terminated

Fair Use

- ▶ Not “It’s on the Internet”
- ▶ Four factors
 - Purpose and character of the use
 - Nature of the copyrighted work
 - Amount and substantiality of the portion used in relation to the copyrighted work as a whole
 - Effect of the use upon the potential market for or value of the copyrighted work

Secondary Infringement

▶ Vicarious liability

- “When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation . . .”

▶ Contributory infringement

- “One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another . . .”

Secondary Infringement and DMCA

- ▶ Digital Millennium Copyright Act
- ▶ Four “safe harbors” for “service providers”
- ▶ For example, safe harbor for hosting
 - Material stored at direction of user
 - No actual knowledge of infringement
 - Not receive a financial benefit where has right and ability to control
 - Upon notification of infringement, expeditiously remove
 - Have designated agent to receive notifications
 - Repeat infringer policy
 - Not interfere with *standard technical measures* used to protect ©ed works

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Thank you

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