

SAA Workshop

Copyright: The Archivist and the Law
William J. Maher

University of Illinois at Urbana-Champaign
Slide show and handouts: © William J. Maher 2010

DISCLAIMER: The instructor is not a lawyer, and is not offering legal advice. The materials provided with this workshop are not presented as legal advice but as an outline of key copyright concepts. You should familiarize yourself with copyright laws and recognize that it may be necessary for you to consult with your institutional legal counsel for advice or assistance in specific cases.

Objective

To familiarize you with core concepts of archival relevance in U.S. federal copyright law, provide a historical background to American copyright law, and encourage a user-centered approach to the administration of copyright in your repositories.

At the conclusion of the workshop, you should understand key concepts (e.g., author, work, exclusive rights, fair use, library and archival exemptions, copyright term, ownership and liabilities), appreciate the distinction from related aspects of law, and have the tools to pursue your own reading of copyright law to strengthen your ability to communicate with donors, users, and institutional legal counsel about copyright.

Conceptual Structure of the Workshop

S R E P L

- Scope of copyright
- Rules established by copyright
- Exceptions to the rules
- Penalties for violating the rules
- Loopholes to employ in archival operations

General Rules

- GR 1. Approach copyright decisions as matters of risk management.
- GR 2. U.S. Title 17 is the default template which can be "overwritten" by separate agreements or "licences" in most instances.
- GR 3 Focus is U.S. federal copyright law, not Canadian, French, or "international" law although these can have an effect in specialized instances.
- GR 4 Copyright law is essentially Format Neutral.

General Rules (continued)

GR 5 You cannot give what you do not own, you cannot receive what the donor does not own.

GR 6 Forget flow-charting.

GR 7. Caution: Other laws may apply.

GR 8. Only two possible answers to all copyright questions.

Definitions

copyright: A federal right owned by every author of original works to protect them from having others do five things with the work: 1) reproduction, 2) adaptation, 3) distribution to the public, 4) performance in public, 5) display in public.

patent: A grant by the federal government to an inventor of the right to exclude others from making, using or selling the invention. Utility patents cover the functional aspects of products and processes. Design patents cover ornamental design of a useful object. Plant patents cover new varieties of living plants.

Definitions (continued)

trademark: 1. A word, slogan, design, picture, or any other symbol used to identify and distinguish goods. 2. Any identifying symbol, including a word, design, or shape of a product or container, which qualifies for legal status as a trademark, service mark, collective mark, certification mark, trade name, or trade dress. Trademarks perform four functions: identification, source, quality, and/or advertising.

trade secret: Business information that is the subject of reasonable efforts to preserve confidentiality and has value because it is not generally known in the trade. Finding infringement requires demonstration that the information is valuable business information and that the defendant used improper means to obtain it.

Pop Quiz: Purpose of Copyright (Multiple Choice)

1. To ensure that authors and artists receive compensation for their creative works.
2. To provide the author/artist with the legal means to control how his/her work is presented, performed, and handled.
3. To protect the engine of America's economic survival.
4. To enable persons to secure ownership over ideas and discoveries.
5. To encourage the production of new works.
6. To ensure that one's creation of compilations of facts and other data is not taken and reproduced by others without due compensation.

The Constitutional Provision Respecting Copyright

The Congress shall have 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
(United States Constitution, Article I, Section 8)

§101 Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

The following definitions in § 101 are the ones that archivists need to remember:

- "Anonymous work"
- "Architectural work"
- "Audiovisual works"
- "Collective work"
- "Compilation"
- "Created"
- "Derivative work"
- "Display"
- "Literary works"
- "Motion pictures"
- "Perform" a work
- "Phonorecords"
- "Pictorial, graphic, and sculptural works"
- "Publication"
- "Publicly perform or display a work"
- "Registration"
- "Sound recordings"
- "Transmit"
- "Useful article"
- "Work of visual art"

§101 Definitions (continued)

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first 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. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

§101 Definitions (continued)

"work made for hire" is-

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for or as an atlas,

if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

For the purpose of the foregoing sentence, a "supplementary work" foregoing sentence, a "supplementary work" is a work . . .

§ 102. Subject matter of copyright

(a) Federal copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, 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.

§ 102. Subject matter of copyright (continued)

(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.

§ 103. Subject matter: Compilations and derivative works

- (a) copyrightable, but copyright protection does not extend to pre-existing material.
- (b) copyrightable material in a compilation or derivative work is only in that portion contributed by the author and it does not affect the copyright of the preexisting material.

§ 104. Subject matter: National origin

- (a) Unpublished Works protected under U.S. law regardless of nationality or domicile of the author.
- (b) Published Works if-
 - (1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or of a treaty party, or is a stateless person.
 - (2) the work is first published in the United States or in a foreign treaty party;
 - (3) the work is a sound recording that was first fixed in a treaty party;
 - (4) the work is a pictorial, graphic, or sculptural work that is incorporated in a building in the United States or a treaty party;
 - (5) the work is first published by the UN or by the Organization of American States;
 - (6) the work is covered by a Presidential proclamation.

§ 104A. Copyright in restored works (1993)

Restoration of copyright in foreign works that had entered the U.S. public domain because they had not met U.S. formalities.

(A) Copyright subsists in restored works, and vests automatically on the date of restoration.

(B) A restored work has the same term that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.

(b) Ownership of copyright in a restored copyright belongs initially to the author or initial rightsholder of the work as determined by the law of the source country of the work.

“Reliance Parties” may continue to exploit that derivative work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation.

§ 104A. Restored Works (definitions)

(6) “restored work” an original work of authorship that —

(A) is protected under subsection (a);

(B) is not in the public domain in its source country through expiration of term of protection;

(C) is in the public domain in the United States due to —

(i) noncompliance with formalities (e.g. failure of renewal, lack of proper notice);

(ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or

(iii) lack of national eligibility;

(D) “Date of restoration” is — a) January 1, 1996, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date, or b) date of adherence or proclamation, in the case of any other source country of the restored work.

ETC., ETC.

§ 105. Subject matter: U. S. Government works

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) 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;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

§ 106A. Visual Artists Rights (VARA 1990)

- ▶ (a) authors of works of visual art have rights:
 - to claim authorship of that work, and
 - to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
 - to prevent the use of his or her name as the author in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
 - to prevent any intentional distortion, mutilation, or other modification of that work; and
 - to prevent any destruction of a work of recognized stature.
 - any intentional or grossly negligent destruction of that work is a violation of § 106A rights.
- ▶ Scope-Only the author of a work of visual art has these rights, with exceptions re natural deterioration, conservation modifications, and do not apply to reproductions. Distinct from 106 exclusive copyrights.
- ▶ Duration: Apply only to works of visual art created on or after June 1, 1991. Endure only for the life of the author.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Fair Use Checklist
Copyright Advisory Office
Columbia University Libraries
Kenneth D. Crews, Director
<http://copyright.columbia.edu>

Name: _____
Institution: _____
Project: _____
Date: _____
Prepared by: _____

Purpose

Favoring Fair Use

- Teaching (including multiple copies for classroom use)
- Research
- Scholarship
- Nonprofit educational institution
- Criticism
- Comment
- News reporting
- Transformative or productive use (changes the work for new utility)
- Restricted access (to students or other appropriate group)
- Parody

Opposing Fair Use

- Commercial activity
- Profiting from the use
- Entertainment
- Bad-faith behavior
- Denying credit to original author

Nature

Favoring Fair Use

- Published work
- Factual or nonfiction based
- Important to favored educational objectives

Opposing Fair Use

- Unpublished work
- Highly creative work (art, music, novels, films, plays)
- Fiction

Amount

Favoring Fair Use

- Small quantity
- Portion used is not central or significant to entire work
- Amount is appropriate for favored educational purpose

Opposing Fair Use

- Large portion or whole work used
- Portion used is central to or “heart of the work”

Effect

Favoring Fair Use

- User owns lawfully purchased or acquired copy of original work
- One or few copies made
- No significant effect on the market or potential market for copyrighted work
- No similar product marketed by the copyright holder
- Lack of licensing mechanism

Opposing Fair Use

- Could replace sale of copyrighted work
- Significantly impairs market or potential market for copyrighted work or derivative
- Reasonably available licensing mechanism for use of the copyrighted work
- Affordable permission available for using work
- Numerous copies made
- You made it accessible on the Web or in other public forum
- Repeated or long-term use

Most recent revision: 051408

Fair Use Resources & Considerations

In addition to Crews, another good checklist site is North Carolina State University's Tutorial on "Using Copyrighted Works" <http://www.provost.ncsu.edu/copyright/use/index.php> and the link to its worksheet

www.northcarolina.edu/legal/sm/copyrightownership/Primer_Fair_Use_Worksheet_042209.pdf

"Good faith effort:" Suggestions for an exhaustive (if not exhausting) set of steps to follow:

- ★ Searching the Copyright Office Registry;
- ★ -Web searches using standard search engines (WATCH);
- ★ -Contacting publishing houses (if applicable);
- ★ -Contacting applicable libraries/museums/universities;
- ★ -Searching inheritance records or contact the estate administrator in cases where the copyright may have been inherited;
- ★ -Checking telephone directories for the author in the area where the author is likely to reside;
- ★ -Checking directories of artists, authors, etc.;
- ★ -Advertising in trade journals or national newspapers that are well-calculated to reach potential copyright holders.

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

§108 (a) Libraries and archives and their employees can make or distribute copies without infringing under several nested and interlocking conditions:

- (1) not for direct or indirect commercial advantage;
- (2) the collections of the library or archives are
 - (i) open to the public, or
 - (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
- (3) copies and copy equipment have a notice of copyright or a legend stating that the work may be protected by copyright.

§ 108. Library and archives exemptions (continued)

§108 (b) Library and archival rights allow three copies or phonorecords of an unpublished work made for purposes of preservation and security or for deposit for research use in another library or archives, if-

- (1) the library or archives currently holds the item; and
- (2) digital reproductions are not distributed digitally outside the premises of the library or archives.

§ 108. Library and archives exemptions (continued)

§108 (c) Libraries and archives can make three copies of published works duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, but only if:

- (1) an unused replacement cannot be obtained at a fair price; and
- (2) digital reproductions are not distributed digitally outside the premises of the library or archives.

"Obsolete" means the device necessary to render the work is no longer manufactured or is no longer reasonably available in the commercial marketplace.

§ 108. Library and archives exemptions (continued)

§108 (d) Copying for a user of one article or small portions of a work is allowed if

1. copy becomes the property of the user, library has no notice that the copy is for other than private study, and
2. library displays a notice or warning of copyright.

§ 108. Library and archives exemptions (continued)

§108 (e) Copying for a user of an entire work is allowable if the library or archives determines that the copy cannot be obtained at a fair price, if

1. copy becomes the property of the user, and library has no notice that the copy is for other than private study, and
2. library displays a notice or warning of copyright.

§ 108. Library and archives exemptions (continued)

§108 (f) Nothing in this section:

1. Imposes liabilities on libraries, archives, or their employees for the unsupervised use of reproducing equipment provided there is a notice on the equipment.
2. excuses a person who uses copy equipment or places copy orders if the copying exceeds fair use as provided by § 107.
3. limits reproduction and distribution by lending of a limited number of copies and excerpts of an audiovisual news program or
4. affects fair use rights, or any contractual obligations assumed at any time by the library or archives (i.e., licenses).

108. Library and archives exemptions (continued)

§108 (g) Library and archival rights apply to the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions, but not if the library or archives, or its employee-

- (1) has reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies of the same material
- (2) engages in systematic reproduction or distribution of single or multiple copies except for interlibrary arrangements not aimed aimed at substituting for purchase or subscription of a work.

§ 108. Library and archives exemptions (continued)

§ 108 (h)

(1) During the last 20 years of any term of copyright of a published work,

a library or archives may make and distribute facsimile or digital copies of such work, or portions thereof, for purposes of preservation, scholarship, or research.

(2) But the library must first determine that:

(A) the work is not subject to normal commercial exploitation;

(B) a copy or phonorecord of the work cannot be obtained at a reasonable price; or

(C) the copyright owner or its agent has not provided notice that either of the two preceding conditions applies.

(3) §108 (h) exemptions do not apply to any subsequent uses by users other than the library or archives.

§ 108. Library and archives exemptions (continued)

§ 108 (i) None of the § 108 library and archival rights in (d) and (e) [i.e. copying for users] apply to specific types of works:

musical,
pictorial,
graphic or sculptural,
motion pictures, or
other audiovisual works.

But § 108 (i) does allow:

copying of an audiovisual work dealing with news.

copying for preservation meeting criteria of § 108 subsections (b), (c), and (h).

copying of pictorial or graphic works that are illustrations within works being reproduced or distributed in copying for users (§ 108 d and e).

§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord [First Sale Doctrine]

- (a) The owner of a lawful copy or phonorecord is entitled to sell or otherwise dispose of that copy or phonorecord.
- (b) (1)(A) For sound recordings, computer programs, or musical works embodied in a sound recording, the owner of the particular copy or phonorecord may not rent, lease, or lend the copy or phonorecord, unless the owner is a nonprofit library or nonprofit educational institution, doing so for a nonprofit purposes and with a notice.
- (c) Notwithstanding the provisions of section 106(5), the owner of a particular copy may display that copy publicly, either directly or by projection of no more than one image at a time to viewers present at the place where the copy is located.
- (d) but this display privilege applies only if you are the owner of the work or have the copyright owner's permission (i.e., the public display right does not apply if you have the work on rent or loan)

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Not infringing:

- (1) performance or display of a lawfully made or acquired copy of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.
- (2) distance education transmissions except for nondramatic literary or musical works and limited portions of other works, or works designed for mediated instruction, and except for source copies not lawfully made, but several limits apply: (See “Conditions” and “Checklist” slides)
- (3) performance of a nondramatic literary or musical work or of a dramatic-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;
- (4) performance of a nondramatic literary or musical work without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, and admission charges.

§ 110 Exemptions (continued)

Not infringing:

- (5) to perform or display a work through home apparatus and in certain limited sized eating and drinking establishments.
- (6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural organization
- (7) performance in vending establishment where the sole purpose is to promote the retail sale of copies
- (8 & 9) performance directed to blind or handicapped
- (10) performances organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited. But this does not include social functions of any college or university fraternity or sorority unless held solely to raise funds for a specific charitable purpose.

§ 110 (2) Conditions for Distance Education Use

- ▶ the amount must be comparable to live classroom
- ▶ the work is not a textbook, course pack, or . . .
- ▶ the performance or display is at the direction of, the instructor
- ▶ the use is an integral part of a class session
- ▶ the class is regular systematic mediated instruction
- ▶ activity of a governmental body or an accredited nonprofit educational institution
- ▶ the display is directly related to teaching content of transmission
- ▶ the transmission is limited to the students in the class
- ▶ the transmitting body or institution has © policies
- ▶ the transmitting body uses technological measures to prevent retention of the work by recipients or further dissemination of the work
- ▶ does not interfere with technological measures used by copyright owners to prevent retention or dissemination

Checklist for Compliance with the TEACH Act

Name: _____ Date: _____ Project: _____

Institution: _____ Prepared by: _____

TEACH Act requirements that will likely fall within the duty of the *Instructor*:

- 1 The work to be transmitted may be any of the following:
 - A performance of a non-dramatic literary work; or
 - A performance of a non-dramatic musical work; or
 - A performance of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions"; or
 - A display in an amount comparable to that which is typically displayed in the course of a live classroom session.

- 2 The work to be transmitted may not be any of the following:
 - Marketed primarily for performance or display as part of a digitally transmitted mediated instructional activity; or
 - A textbook, coursepack, or other material in any media which is typically purchased or acquired by students for their independent use and retention.

- 3 Any permitted performance or display must be both:
 - Made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities of the educational institution; and
 - Directly related and of material assistance to the teaching content of the transmission.

- 4 The institution does not know or have reason to believe that the copy of the work to be transmitted was not lawfully made or acquired.

- 5 If the work to be used has to be converted from print or another analog version to digital format, then both:
 - The amount of the work converted is no greater than the amount that can lawfully be used for the course; and
 - There is no digital version of the work available to the institution or the digital version available to the institution has technological protection that prevents its lawful use for the course.

TEACH ACT requirements that will likely fall within the duty of the Institution:

- 6 The institution for which the work is transmitted is an accredited nonprofit educational institution.
- 7 The institution has instituted policies regarding copyright.
- 8 The institution has provided information materials to faculty, students, and relevant staff members that describe and promote US copyright laws.
- 9 The institution has provided notice to students that materials used in connection with the course may be subject to copyright protection.
- 10 The transmission of the content is made solely for students officially enrolled in the course for which the transmission is made.

TEACH Act requirements that will likely fall within the duty of the Information Technology Officials:

- 11 Technological measures have been taken to reasonably prevent both:
 - Retention of the work in accessible form by students for longer than the class session; and
 - Unauthorized further dissemination of the work in accessible form by such recipients to others.
- 12 The institution has not engaged in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent retention or dissemination of their works.
- 13 The work is stored on a system or network in a manner that is ordinarily not accessible to anyone other than anticipated recipients.
- 14 The copy of the work will only be maintained on the system or network in a manner ordinarily accessible for a period that is reasonably necessary to facilitate the transmissions for which it was made.
- 15 Any copies made for the purpose of transmitting the work are retained and solely used by the institution.

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

The exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work includes the right to reproduce the work in or on any kind of article, whether useful or otherwise, and it does not include any right to prevent photographs of *such articles* in connection with advertisements, commentaries, or news reports.

§106A rights apply regarding the removal or destruction of a qualifying work of visual art except in circumstances when the original artist cannot be contacted.

§ 114. Scope of exclusive rights in sound recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the exclusive rights of copying, derivative works, distribution, and digital transmission (i.e., § 106, (1), (2), (3), and (6) and do not include any right of performance under § 106(4).

(b) The exclusive rights of the owner of copyright in a sound recording do not extend to the making of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording do not apply to sound recordings included in educational television and radio programs.

(d-j) Complex provisions relevant to broadcasting.

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing. If a phonorecord has been distributed to the public, others may distribute it or make a musical arrangement by payment of a fee.

The royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger. (§115 c 2)

§ 120. Scope of exclusive rights in architectural works

(a) Pictorial Representations Permitted.-The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

(b) Alterations to and Destruction of Buildings.- Notwithstanding the provisions of section 106(2), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.

Chapter 2 Copyright Ownership and Transfer

§ 201. Ownership of copyright

- (a) Initial Ownership is in the author or authors of the work.
- (b) Works Made for Hire. -The employer or other person for whom the work was prepared is considered the author, and owns all rights unless there was a signed written instrument to the contrary. But rules vary pre/post 1978.
- (c) Contributions to Collective Works. -Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole. Copyright to each separate contribution belongs initially to the author of the contribution.

Unless there is an agreement to the contrary, the owner of copyright in the collective work has only the right to reproduce and distribute the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Is Someone an Employee?

(Community for Creative Non-Violence v. Reid, 490 U.S. 730 [1989])

For 1978 and later, under general common law of agency, consider the hiring party's right to control the manner and means by which the product is accomplished. And:

- 1) skill required;
- 2) source of the instrumentalities and tools;
- 3) location of the work;
- 4) duration of the relationship between the parties;
- 5) whether hiring party has right to assign additional projects to the hired party;
- 6) extent of hired party's discretion over when & how long to work;
- 7) method of payment;
- 8) hired party's role in hiring and paying assistants;
- 9) whether the work is part of the regular business of hiring party;
- 10) whether hiring party is in business;
- 11) provision of employee benefits; and
- 12) tax treatment of the hired party.

§ 201. Ownership of copyright.

(d) Transfer of Ownership.

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) The separate exclusive rights listed in § 106 can be subdivided, transferred, and owned separately.

§ 202 Distinct from ownership of material object.

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.

Transfer of ownership of any material object, including the copy or phonorecord in which the work is fixed, does not of itself convey any rights in the copyrighted work embodied in the object. Nor, does transfer of ownership of a copyright or of any exclusive rights convey property rights in any material object.

§ 203. Termination of transfers and licenses

(a) Conditions for Termination.-Except for works for hire, the transfer of any right under a copyright, **executed by the author** on or after January 1, 1978, otherwise than by will, may be terminated under the following conditions:

(1) By the author or, if the author is dead, by the person or persons who own more than ½ of the author's "termination interest."

(3) Termination must be done by written notice during a period of 5 years beginning 35 years from the grant; or if grant was for publication, then 35 years from the date of publication, or at the end of 40 years from the date of the grant, whichever is earlier.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary.

(b) Upon the effective date of termination, all rights that had been transferred revert to the author, authors, and other persons owning termination interests, with certain limitations.

§203: Rationale for Termination Rights: House Report

“The Problem in General. The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. sec. 24 [section 24 of the 1909 law]) should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.

Scope of the Provision. Instead of being automatic, as is theoretically the case under the present renewal provision, the termination of a transfer or license under section 203 would require the serving of an advance notice within specified time limits and under specified conditions.” (*House Report no. 94–1476; c.f.: National Law Journal, October 16, 2000, at C9.*)

§ 204. Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

(b) A certificate of acknowledgment is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if it is issued by person authorized to administer oaths.

§ 205. Recordation of transfers

(a) Conditions for Recordation. — Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if there is sworn certificate.

(b) Certificate of Recordation is issued upon receipt of the document and a fee.

(c) Recordation of a document in the Copyright Office gives constructive notice once if it is identified by the document and indexed by the Register of Copyrights, so that it would be revealed by a reasonable search.

Chapter 3 Duration of Copyright

§ 301. Preemption with respect to other laws

- (a) Common law rights and any rights under state statutes were abolished on January 1, 1978, and subsequently all copyright rights are governed exclusively by the federal copyright statute.
- (b) Except: common law or State law rights in material that is not within the subject matter of copyright; undertakings from before January 1, 1978; or landmarks, historic preservation, zoning, or building codes, re § 102(a)(8) architectural works.
- (c) Common law or state statutory rights of pre-Feb. 15, 1972 sound recordings not annulled or limited until Feb. 15, 2067.
- (d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.
- (e) Scope of Federal preemption is not affected by the adherence of the United States to the Berne Convention.
- (f)(1) After June 1, 1991, all visual rights equivalent to those in § 106A are governed exclusively by section 106A and section 113(d) and not by common or state law

§ 302. Duration: Works created on or after Jan. 1, 1978

- (a) In General.-Copyright subsists from a work's creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.
- (b) Joint Works (other than work for hire) copyright endures for 70 years after the death of the last surviving author.
- (c) Anonymous Works, Pseudonymous Works, and Works Made for Hire, copyright endures for a term of 95 years from the year of its first publication, or 120 years from the year of its creation, whichever expires first.
- (d) Records Relating to Death of Authors are maintained by the Copyright Office.
- (e) Presumption as to Author's Death.-95 years from the year of first publication of a work, or 120 years from the year of its creation, whichever expires first, provided that one obtains a certified report that the Copyright Office has no record that the author of the work is living, or died less than 70 years before.

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978

(a) Works created before January 1, 1978, but not already in the public domain or copyrighted are given a copyright of January 1, 1978 which endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

§ 304. Duration of copyright: Subsisting copyrights

(a) Copyrights in Their First Term on January 1, 1978.-

(1)

(A) Any copyright, still in its first term on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of- a posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or a work copyrighted by a corporate body, or a work for hire, the copyright can be renewed for the further term of 67 years.

(C) Any other copyrighted work (e.g., a contribution to a periodical) is entitled to a renewal and extension of the copyright of 67 years.

§ 304. Duration of Subsisting copyrights (continued)

(2)(A & B) At the expiration of the original term of copyright of those works in their first term as of January 1, 1978, the copyright shall endure for a renewed and extended further term of 67 years whether registered or not.

(3)(A & B) Renewal of 67 years for such works applies whether applied for or not.

(4) If there is no application to renew within 1 year of its expiration, previously authorized derivative works may continue.

(b) Copyrights in Their Renewal Term at the Time of the Effective Date of the Sonny Bono Copyright Term Extension Act. [Oct. 27, 1998] have a copyright term of 95 years from date copyright was originally secured.

(c) Transfers or licenses of copyrights in their first or renewal term on January 1, 1978, are for which there had been a termination prior to January 1, 1978 are subject to termination by those persons designated by § 203 and §304(c) at any time during a period of 5 years beginning at the end of 56 years from the date of copyright was originally secured, or beginning on January 1, 1978, whichever is later.

§ 305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.



Copyright Term and the Public Domain in the United States

1 January 2010¹

Never Published, Never Registered Works²

<i>Type of Work</i>	<i>Copyright Term</i>	<i>What was in the public domain in the U.S. as of 1 January 2010³</i>
Unpublished works	Life of the author + 70 years	Works from authors who died before 1940
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1890
Unpublished works when the death date of the author is not known ⁴	120 years from date of creation ⁵	Works created before 1890 ⁵

Works Registered or First Published in the U.S.

<i>Date of Publication⁶</i>	<i>Conditions⁷</i>	<i>Copyright Term³</i>
Before 1923	None	None. In the public domain due to copyright expiration
1923 through 1977	Published without a copyright notice	None. In the public domain due to failure to comply with required formalities
1978 to 1 March 1989	Published without notice, and without subsequent registration within 5 years	None. In the public domain due to failure to comply with required formalities

1978 to 1 March 1989	Published without notice, but with subsequent registration within 5 years	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1923 through 1963	Published with notice but copyright was not renewed ⁸	None. In the public domain due to copyright expiration
1923 through 1963	Published with notice and the copyright was renewed ⁸	95 years after publication date
1964 through 1977	Published with notice	95 years after publication date
1978 to 1 March 1989	Created after 1977 and published with notice	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1978 to 1 March 1989	Created before 1978 and first published with notice in the specified period	The greater of the term specified in the previous entry or 31 December 2047
From 1 March 1989 through 2002	Created after 1977	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
From 1 March 1989 through 2002	Created before 1978 and first published in this period	The greater of the term specified in the previous entry or 31 December 2047
After 2002	None	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
Anytime	Works prepared by an officer or employee of the United States Government as part of that person's official duties. ²¹	None. In the public domain in the United States (17 U.S.C. § 105)

Works First Published Outside the U.S. by Foreign Nationals or U.S. Citizens Living Abroad⁹

<i>Date of Publication</i>	<i>Conditions</i>	<i>Copyright Term in the United States</i>
Before 1923	None	In the public domain (But see first special case below)
Works Published Abroad Before 1978¹⁰		
1923 through 1977	Published without compliance with US formalities, and in the public domain in its source country as of 1 January 1996 (but see special cases) ²⁰	In the public domain
1923 through 1977	Published in compliance with all US formalities (i.e., notice, renewal) ¹¹	95 years after publication date
1923 through 1977	Solely published abroad, without compliance with US formalities or republication in the US, and not in the public domain in its home country as of 1 January 1996 (but see special cases)	95 years after publication date
1923 through 1977	Published in the US less than 30 days after publication abroad	Use the US publication chart to determine duration
1923 through 1977	Published in the US more than 30 days after publication abroad, without compliance with US formalities, and not in the public domain in its home country as of 1 January 1996 (but see special cases)	95 years after publication date
Works Published Abroad After 1 January 1978		
After 1 January 1978	Published without copyright notice, and in the public domain in its source country as of 1 January 1996 (but see special cases) ²⁰	In the public domain
After 1 January 1978	Published either with or without copyright notice, and not in the public domain in its home country as of 1 January 1996 (but see special cases)	70 years after death of author, or if work of corporate authorship, 95 years from publication
Special Cases		
1 July 1909 through 1978	In Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands ONLY. Published in a language other than English, and without subsequent republication with a copyright notice ¹²	Treat as an unpublished work until such date as first US-compliant publication occurred

Before 19 Aug. 1954	Published by a Laotian in Laos ¹⁸	In the public domain
Between 18 Aug. 1954 and 3 Dec. 1975	Published by a Laotian in Laos ¹⁸	Use the US publication chart to determine duration
Prior to 27 May 1973	Published by a national of Turkmenistan or Uzbekistan in either country ¹⁹	In the public domain
After 26 May 1973	Published by a national of Turkmenistan or Uzbekistan in either country ¹⁹	May be protected under the UCC
Anytime	Created by a resident of Afghanistan, Eritrea, Ethiopia, Iran, Iraq, or San Marino, and published in one of these countries ¹³	Not protected by US copyright law until they become party to bilateral or international copyright agreements
Anytime	Works whose copyright was once owned or administered by the Alien Property Custodian, and whose copyright, if restored, would as of January 1, 1996 , be owned by a government ¹⁴	Not protected by US copyright law
Anytime	If published in one of the following countries, the 1 January 1996 date given above is replaced by the date of the country's membership in the Berne Convention or the World Trade Organization, whichever is earlier: Andorra, Angola, Armenia, Bhutan, Cambodia, Comoros, Jordan, Korea, Democratic People's Republic, Micronesia, Montenegro, Nepal, Oman, Papua New Guinea, Qatar, Samoa, Saudi Arabia, Solomon Islands, Sudan, Syria, Tajikistan, Tonga, United Arab Emirates, Uzbekistan, Vietnam, Yemen	

Sound Recordings

(Note: The following information applies only to the sound recording itself, and not to any copyrights in underlying compositions or texts.)

Date of Fixation/Publication	Conditions	What was in the public domain in the U.S. as of 1 January 2010³
Unpublished Sound Recordings, Domestic and Foreign		
Prior to 15 Feb. 1972	Indeterminate	Subject to state common law protection. Enters the public domain on 15 Feb. 2067

After 15 Feb. 1972	Life of the author + 70 years. For unpublished anonymous and pseudonymous works and works made for hire (corporate authorship), 120 years from the date of fixation	Nothing. The soonest anything enters the public domain is 15 Feb. 2067
--------------------	---	--

Sound Recordings Published in the United States

<i>Date of Fixation/Publication</i>	<i>Conditions</i>	<i>What was in the public domain in the U.S. as of 1 January 2010³</i>
Fixed prior to 15 Feb. 1972	None	Subject to state statutory and/or common law protection. Fully enters the public domain on 15 Feb. 2067
15 Feb 1972 to 1978	Published without notice (i.e., year of publication, and name of copyright owner) ¹⁵	In the public domain
15 Feb. 1972 to 1978	Published with notice	95 years from publication. 2068 at the earliest
1978 to 1 March 1989	Published without notice, and without subsequent registration	In the public domain
1978 to 1 March 1989	Published with notice	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation. 2049 at the earliest
After 1 March 1989	None	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation. 2049 at the earliest

Sound Recordings Published Outside the United States

Prior to 1923	None	Subject to state statutory and/or common law protection. Fully enters the public domain on 15 Feb. 2067
1923 to 1 March 1989	In the public domain in its home country as of 1 Jan. 1996 or there was US publication within 30 days of the foreign publication (but see special	Subject to state common law protection. Enters the public domain

	cases)	on 15 Feb. 2067
1923 to 15 Feb. 1972	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication (but see special cases)	Enters public domain on 15 Feb. 2067
15 Feb. 1972 to 1978	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication (but see special cases)	95 years from date of publication. 2068 at the earliest
1978 to 1 March 1989	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication (but see special cases)	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation
After 1 March 1989	None	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation

Special Cases

Fixed at any time	Created by a resident of Afghanistan, Eritrea, Ethiopia, Iran, Iraq, or San Marino, and published in one of these countries ¹³	Not protected by US copyright law because they are not party to international copyright agreements
Fixed prior to 1996	Works whose copyright was once owned or administered by the Alien Property Custodian, and whose copyright, if restored, would as of 1 January 1996 be owned by a government ¹⁴	Not protected by US copyright law
Fixed at any time	<p>If fixed or solely published in one of the following countries, the 1 January 1996 date given above is replaced by the date of the country's membership in the Berne Convention or the World Trade Organization, whichever is earlier:</p> <p>Andorra, Angola, Armenia, Bhutan, Cambodia, Comoros, Jordan, Korea, Democratic People's Republic, Micronesia, Montenegro, Nepal, Oman, Papua New Guinea, Qatar, Samoa, Saudi Arabia, Solomon Islands, Sudan, Syria, Tajikistan, Tonga, United Arab Emirates, Uzbekistan,</p>	

Architectural Works¹⁶

(Note: Architectural plans and drawings may also be protected as textual/graphics works)

Date of Design	Date of Construction	Copyright Status
Prior to 1 Dec. 1990	Not constructed by 31 Dec. 2002	Protected only as plans or drawings
Prior to 1 Dec. 1990	Constructed by 1 Dec. 1990	Protected only as plans or drawings
Prior to 1 Dec. 1990	Constructed between 30 Nov. 1990 and 31 Dec. 2002	Building is protected for 70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation ¹⁷
From 1 Dec. 1990	Immaterial	Building is protected for 70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation ¹⁷

Notes

1. This chart was first published in Peter B. Hirtle, "Recent Changes To The Copyright Law: Copyright Term Extension," *Archival Outlook*, January/February 1999. This version is current as of 1 January 2010. The most recent version is found at <http://www.copyright.cornell.edu/resources/publicdomain.cfm>. The chart is based in part on Laura N. Gasaway's chart, "When Works Pass Into the Public Domain," at <<http://www.unc.edu/~uncclng/public-d.htm>>, and similar charts found in Marie C. Malara, *A Legal Primer On Managing Museum Collections* (Washington, D.C.: Smithsonian Institution Press, 1998): 155-156. A useful copyright duration chart by Mary Minow, organized by year, is found at <<http://www.librarylaw.com/DigitizationTable.htm>>. A "flow chart" for copyright duration is found at <<http://www.bromsun.com/practices/copyright-portfolio-development/flowchart.htm>>. See also Library of Congress Copyright Office. Circular 15a, *Duration of Copyright: Provisions of the Law Dealing with the Length of Copyright Protection* (Washington, D.C. : Library of Congress, 2004) <<http://www.copyright.gov/circs/circ15a.pdf>>. Further information on copyright duration is found in Chapter 3, "Duration and Ownership of Copyright," in *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums*, by Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon (Ithaca, NY: Cornell University Library, 2009) available for purchase at <http://bookstore.library.cornell.edu/> and as a free download at <http://ecommons.cornell.edu/handle/1813/14142>.
2. Treat unpublished works registered for copyright prior to 1978 as if they had been published in the US (though note that the only formality that applied was the requirement to renew copyright after 28 years). Unpublished works registered for copyright since 1978 can be considered as if they were an "Unpublished, Unregistered Work."
3. All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on the first of the year following the expiration of its copyright term. For example, a book published on 15 March 1923 will enter the public domain on 1 January 2019, not 16 March 2018 (1923+95=2018).

4. Unpublished works when the death date of the author is not known may still be copyrighted after 120 years, but certification from the Copyright Office that it has no record to indicate whether the person is living or died less than 70 years before is a complete defense to any action for infringement. See [17 U.S.C. § 302\(e\)](#).
5. Presumption as to the author's death requires a certified report from the Copyright Office that its records disclose nothing to indicate that the author of the work is living or died less than seventy years before.
6. "Publication" was not explicitly defined in the Copyright Law before 1976, but the 1909 Act indirectly indicated that publication was when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority.
7. Not all published works are copyrighted. Works prepared by an officer or employee of the United States Government as part of that person's official duties receive no copyright protection in the US. For much of the twentieth century, certain formalities had to be followed to secure copyright protection. For example, some books had to be printed in the United States to receive copyright protection, and failure to deposit copies of works with the Register of Copyright could result in the loss of copyright. The requirements that copies include a formal notice of copyright and that the copyright be renewed after twenty eight years were the most common conditions, and are specified in the chart.
8. A 1961 Copyright Office study found that fewer than 15% of all registered copyrights were renewed. For books, the figure was even lower: 7%. See Barbara Ringer, "Study No. 31: Renewal of Copyright" (1960), reprinted in Library of Congress Copyright Office. *Copyright law revision: Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, first [-second] session*. (Washington: U. S. Govt. Print. Off, 1961), p. 220. A good guide to investigating the copyright and renewal status of published work is Samuel Demas and Jennie L. Brogdon, "Determining Copyright Status for Preservation and Access: Defining Reasonable Effort," *Library Resources and Technical Services* 41:4 (October, 1997): 323-334. See also Library of Congress Copyright Office, [How to investigate the copyright status of a work. Circular 22](#). [Washington, D.C.: Library of Congress, Copyright Office, 2004]. The Online Books Page FAQ, especially "[How Can I Tell Whether a Book Can Go Online?](#)" and "[How Can I Tell Whether a Copyright Was Renewed?](#)", is also very helpful.
9. The following section on foreign publications draws extensively on Stephen Fishman, *The Public Domain: How to Find Copyright-free Writings, Music, Art & More*. (Berkeley: Nolo.com, 2004). It applies to works first published abroad and not subsequently published in the US within 30 days of the original foreign publication. Works that were simultaneously published abroad and in the US are treated as if they are American publications.
10. Foreign works published after 1923 are likely to be still under copyright in the US because of the Uruguay Round Agreements Act (URAA) modifying the General Agreement on Tariffs and Trade (GATT). The URAA restored copyright in foreign works that as of 1 January 1996 had fallen into the public domain in the US because of a failure to comply with US formalities. One of the authors of the work had to be a non-US citizen or resident, the work could not have been published in the US within 30 days after its publication abroad, and the work needed to still be in copyright in the country of publication. Such works have a copyright term equivalent to that of an American work that had followed all of the formalities. For more information, see Library of Congress Copyright Office, [Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act \(URAA\). Circular 38b](#). [Washington, D.C.: Library of Congress, Copyright Office, 2004].
11. US formalities include the requirement that a formal notice of copyright be included in the work; registration, renewal, and deposit of copies in the Copyright Office; and the manufacture of the work in the US.
12. The differing dates is a product of the question of controversial [Twin Books v. Walt Disney Co.](#) decision by the 9th Circuit Court of Appeals in 1996. The question at issue is the copyright status of a work only published in a foreign language outside of the United States and without a copyright notice. It had long been assumed that failure to comply with US formalities placed these works in the public domain in the US and, as such, were subject to copyright restoration under URAA (see note [10](#)). The court in *Twin Books*, however, concluded "publication without a

copyright notice in a foreign country did not put the work in the public domain in the United States." According to the court, these foreign publications were in effect "unpublished" in the US, and hence have the same copyright term as unpublished works. The decision has been harshly criticized in *Nimmer on Copyright*, the leading treatise on copyright, as being incompatible with previous decisions and the intent of Congress when it restored foreign copyrights. The Copyright Office as well ignores the *Twin Books* decision in its circular on restored copyrights. Nevertheless, the decision is currently applicable in all of the 9th Judicial Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam and the Northern Mariana Islands), and it may apply in the rest of the country.

13. See Library of Congress Copyright Office, [International Copyright Relations of the United States. Circular 38a](#). [Washington, D.C.: Library of Congress, Copyright Office, 2004].
14. See 63 Fed. Reg.19,287 (1998), Library of Congress Copyright Office, [Copyright Restoration of Works in Accordance With the Uruguay Round Agreements Act: List Identifying Copyrights Restored Under the Uruguay Round Agreements Act for Which Notices of Intent To Enforce Restored Copyrights Were Filed in the Copyright Office](#).
15. Copyright notice requirements for sound recordings are spelled out in the Copyright Office's Circular 3, "Copyright Notice," available at <http://www.copyright.gov/circs/circ03.html>. Here is the exact text:

The copyright notice for phonorecords embodying a sound recording is different from that for other works. Sound recordings are defined as "works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." Copyright in a sound recording protects the particular series of sounds fixed in the recording against unauthorized reproduction, revision, and distribution. This copyright is distinct from copyright of the musical, literary, or dramatic work that may be recorded on the phonorecord. Phonorecords may be records (such as LPs and 45s), audio tapes, cassettes, or disks. The notice should contain the following three elements appearing together on the phonorecord:

 1. The symbol ; and
 2. The year of first publication of the sound recording; and
 3. The name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. If the producer of the sound recording is named on the phonorecord label or container and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.
 4. Example: 2004 X.Y.Z. Records, Inc.
16. Architectural works are defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." Architectural works were expressly included in copyright by Title VII of Pub. L. 101-650.
17. What constitutes "publication" of a building is a very interesting question. As the Copyright Office has noted, "A work is considered published when underlying copies of the building design are distributed or made available public by sale or other transfer of ownership, or by rental. Construction of a building does not itself constitute publication registration, unless multiple copies are constructed." See its Circular 41, "Copyright Claims in Architectural Works," available at <http://www.copyright.gov/circs/circ41.html>.
18. On 19 August 1954, Laos signed the Universal Copyright Convention (UCC) affording its citizens copyright protection in the US. That treaty may have been abrogated on 3 Dec. 1975 by the new government. It has not signed any other multinational copyright convention.
19. Turkmenistan and Uzbekistan may have inherited UCC obligations and protections from the USSR, which joined the UCC on 27 May 1973. See Peter B. Maggs, "Post-Soviet Law: The Case of Intellectual Property Law," *The Harriman Institute Forum* 5, no. 3 (November 1991). They have not as yet, however, filed a "Notification of Succession" with the UCC. See http://portal.unesco.org/culture/en/ev.php-URL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html for signatories to the two UCC treaties.
20. If the source country's first adhered to either the Berne Treaty or the WTO after 1 January 1996, then the relevant date is the earliest date of

membership. Date of membership is tracked at http://en.wikipedia.org/wiki/list_of_parties_to_international_copyright_agreements

21. Contractors and grantees are not considered government employees. Generally they create works with copyright (though the government may own that copyright). See [CENDI Frequently asked Questions about Copyright: Issues Affecting the U.S. Government](#) . The public domain status of U.S. government works applies only in the U.S.

© 2004-10 Peter B. Hirtle. Last updated 4 January, 2010 . Use of this chart is governed by the Creative Commons [Attribution 3.0 License](#).

[Cornell Copyright Information Center](http://www.copyright.cornell.edu/) <<http://www.copyright.cornell.edu/>>

Chapter 4 Copyright Notice, Deposit, and Registration

§ 401. Notice of copyright: Visually perceptible copies

- (a) **General Provisions.**-Whenever a work protected under this title is published by authority of the copyright owner, a notice of copyright may be placed on publicly distributed copies.
- (b) **Form of Notice:** consists of the following three elements:
- (1) the symbol © (the letter C in a circle), or the word "Copyright", or the abbreviation "Copr."; and
 - (2) the year of first publication of the work;
 - (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.
- (c) **Position of Notice-** to give reasonable notice of © claim.
- (d) **Evidentiary Weight of Notice.**-If a notice of copyright appears, then a defendant in an infringement suit cannot claim innocent infringement except as provided in the last sentence of section 504(c)(2).

§ 402. Notice: Phonorecords of sound recordings

- (a) **General Provisions.**-Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed phonorecords of the sound recording.
- (b) **Form of Notice** consist of the following three elements:
- (1) the symbol [Ⓟ] (the letter P in a circle); and
 - (2) the year of first publication of the sound recording; and
 - (3) the name of the owner of copyright.
- (c) **Position of Notice** to give reasonable notice of the claim.
- (d) **Evidentiary Weight of Notice.**-Presence of a notice of copyright precludes and infringer claiming innocent infringement as a defense.

§ 405. Notice: Omission of notice on certain copies and phonorecords

(a) **Effect of Omission on Copyright.**-For copies distributed without notice before the effective date of the Berne Convention Implementation Act (BCIA) of 1988, the omission of the copyright notice does not invalidate the copyright if: 1) the notice was omitted from no more than a relatively small number of copies, 2) registration for the work has been made within 5 years after the publication without notice, or 3) the notice has been omitted contrary to copyright owner's intention.

(b) **Effect of Omission Innocent Infringers.**-Infringers of a copyright because the copyright notice had been omitted from copies distributed before 1988 BCIA incur no liability for actual or statutory damages under section 504.

(c) **Removal of Notice.**-Protection under this title is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly distributed copies or phonorecords.

§ 407. Deposit of copies or phonorecords for Library of Congress

(a) With certain exceptions, the owner of copyright of works published in the United States shall deposit, within three months after the date of such publication-

- (1) two complete copies of the best edition; or
- (2) if the work is a sound recording, two complete phonorecords of the best edition, and the accompanying visually perceptible material.

Deposit requirements are not conditions of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements.

(d) The Register of Copyrights may make written demand for the required deposit and may enforce a fine.

§ 408. Copyright registration in general

(a) Registration Permissive.- One may obtain registration of a copyright claim by delivering to the Copyright Office deposit copies and payment of a fee. Such registration is not a condition of copyright protection.

(b) The material deposited for registration shall include —
(1) in the case of an unpublished work, one complete copy or phonorecord [ETC.]

§ 409. Application for copyright registration

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include. . . .

§ 410. Registration of claim and issuance of certificate

The Register of Copyrights determines whether the material deposited actually constitutes copyrightable material.

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright. The evidentiary weight for later registrations is within the discretion of the court.

§ 411. Registration and civil infringement actions

(a) Except for an action brought for a violation of §106A rights, and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title. . . .

(b) effect/non-effect of inaccurate registration information.

(c) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under § 501, fully subject to the remedies provided by § 502 through § 506, and §510, if, the owner serves notice on the infringer at least 48 hours before such fixation and registers the work within three months after its first transmission. *N.B. notion of "before" fixation is understandable if think of live sporting events.*

§ 412. Registration as prerequisite to certain remedies for infringement

Except for §106A claims, no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for-

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Chapter 5 Copyright Infringement and Remedies

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner (§ 106) is an infringer of the copyright or right of the author. The term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement.

§ 502. Remedies for infringement: Injunctions

(a) Courts may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain an infringement .

(b) Such injunctions may be served anywhere in the United States, and they will be operative and enforceable.

§ 503. Remedies for infringement: Impounding and disposition of infringing articles

(a) At any time while an action is pending, the court may order the impounding of all copies or phonorecords claimed to have been made or used in the violation.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights.

§ 504. Remedies for infringement: Damages and profits

(a) In General.-Except as otherwise provided by this title, an infringer is liable for either-

- (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
- (2) statutory damages, as provided by subsection (c).

(c) Statutory Damages.-

- (1) Except for clause (2), the copyright owner may elect to recover, instead of actual damages and profits, an award of statutory damages. For all infringements involved in the action, with respect to any one work, those damages are not less than \$750 or more than \$30,000 as the court considers just.

CONTINUED!

§ 504. Remedies for infringement: Damages and profits (continued)

(C) (2) If it is proven that the infringement was willful, the court may increase the award of statutory damages to a sum of not more than \$150,000.

If the infringer proves that he or she was not aware that his or her acts constituted infringement, the court may reduce the award of statutory damages to a sum of not less than \$200.

The court shall remit [pardon or abate] statutory damages if the infringer had reasonable grounds to believe that the use of the copyrighted work was a fair use under section 107 provided that the infringer is an employee or agent of a nonprofit educational institution, library, or archives and public broadcasting entity.

ETC.

§ 505. Remedies: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

§ 506. Criminal offenses

(a) Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed: (A) for purposes of commercial advantage or private financial gain; (B) by the reproduction or distribution of works total value of more than \$1,000; or (C) by the distribution of a work being prepared for commercial distribution by making it available on a computer network . . .

(c-e) Fines can be imposed for: false notice of copyright; removal of copyright notice; and false representation in registration application.

(f) Rights of Attribution and Integrity.-Nothing in this section applies to infringement of the rights conferred by section 106A(a).

§ 507. Limitations on actions

(a) Criminal Proceedings. Action must be commenced within 5 years after the cause of action arose.

(b) Civil Actions.-Action must be commenced within 3 years after the claim accrued.

§ 511. Liability of States, instrumentalities of States, and State officials for infringement of copyright

States, state agencies and institutions, and their employees are not immune from suit in Federal Court for a violation of copyrights, and the same remedies are available: impoundment and disposition of infringing articles, actual damages, profits, statutory damages, and attorney's fees.

110th Congress Orphan Works Bills: H.R. 5889 & S. 2913

Would have added

§514 Limitation on remedies in cases involving orphan works.

Text available at:

[http://www.thomas.gov/cgi-bin/query/z?c110:H.R.5889:](http://www.thomas.gov/cgi-bin/query/z?c110:H.R.5889)

and:

[http://www.thomas.gov/cgi-bin/query/z?c110:S.2913:](http://www.thomas.gov/cgi-bin/query/z?c110:S.2913)

In the 2004/06 legislative session, the bill made it out of the subcommittee but hung up in the Judiciary committee following opposition by independent illustrators, photographers, and textile designers.

On September 26/27, 2008, the Senate passed, with amendment and referred it to the House Committee on the Judiciary.

<http://www.librarycopyrightalliance.org/orphan.htm>

Guidelines for while we wait:

<http://www.copyright.columbia.edu/orphan-works>

Chapter 12 Copyright Protection and Management Systems

§ 1201. Circumvention of copyright protection systems.

No person shall circumvent a technological measure that effectively controls access to a work protected under this title.

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.

Narrow exceptions exist in the cases of evaluation for library acquisition, computer program interoperability, encryption research, and security testing, but fair use purposes are not among the exceptions. Potential of §1201 enforceable locks on public domain works.

§ 1202. Integrity of copyright management information

False Copyright Management Information.-No person shall provide or distribute false copyright management information to conceal infringement. No person shall intentionally remove or alter any copyright management information or distribute, import for distribution, or publicly perform works, knowing that copyright management information has been removed or altered.

§ 1203. Civil remedies

Any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate U.S. district court for such violation. The court may grant injunctions; impound devices; may award damages; may allow the recovery of costs; may award reasonable attorney's fees; and may order modification or the destruction of any device.

Statutory damages are not less than \$200 or more than \$2,500 per act (but potentially not less than \$2,500 to \$25,000 for each violation of 1202). Repeat violators may face up to triple the amounts.

§ 1204. Criminal offenses and penalties

a) Any person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both, for the first offense; and shall be fined not more than \$1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

b) Limitation for Nonprofit Library, Archives, Educational Institution, or Public Broadcasting Entity. -Criminal offenses and penalties (Subsection a) shall not apply to a nonprofit library, archives, educational institution, or public broadcasting entity (as defined under section 118(g)).

“Bumps in the Night” and Zombies

- Title 17 may not be all we have to worry about in regard to copyright actions:
 - Uniform Computer Information Transactions Act (UCITA): an effort to establish uniform (state-to-state) rules for commercial transactions involving computer software. Aimed at making enforceable the contents of “click-on” contractual clauses that can override “exemption” rights within copyright law (e.g., fair use, library, and first sale). Passed only in two states. Appears to be dormant since 2005.
 - Hague Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Cases: aims to set rules for jurisdiction of disputes without harmonizing the substantive content of laws from Member States, and require enforcement of laws of one country by the courts of another country. If applied to copyright in libraries and archives could result in abridgement of fair use, first sale, etc.
 - Anti-Counterfeiting Trade Agreement (ACTA) focuses on counterfeit physical goods, but includes information technology and the internet and could well supersede existing exemptions in copyright law, e.g., fair use. Negotiated in secret.

A Deed of Gift Clause:

"To facilitate the research use of the Materials, the Donors hereby give and assign to the Donee those rights of copyright which the Donors have in the Materials as well as any rights of privacy and publicity in the materials which the Donor may hold. The Donee is hereby authorized to administer any copyright permissions related to the Materials."

ADDITION FOR A DEED INVOLVING A LIVING AUTHOR: "In return, Donee hereby grants to the Donor during his/her lifetime the right to use the Materials for any purpose, including publication. Donor and Donee shall, to the extent possible, inform each other of any major publications."

This is in addition to clauses such as: "title to the physical material shall pass to the Donee upon their delivery."

One might also ask the donors to transfer their rights of trademark, publicity, and privacy, if any, in the materials.

SOME USEFUL RESOURCES:

ALA Washington Office, issue briefs:

www.ala.org/ala/aboutala/offices/ogr/issuebriefs/index.cfm

(See "copyright" under Key Issues and Resources, Caution: ALA's URLs are subject to change.)

Electronic Frontier Foundation's page with links to issues regarding Anti-Counterfeiting Trade Agreement (ACTA): www.eff.org/issues/acta and [Public Knowledge's page](http://www.eff.org/issues/publicknowledge)

<http://www.publicknowledge.org/anti-counterfeiting-trade-agreement>

Access to Knowledge web guide from the Consumer Project on Technology:

www.cptech.org/a2k

CPT's Page on the Hague Conference on Private International Law's Proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: www.cptech.org/ecom/jurisdiction/hague.html

OCLC/RLG's *Well-intentioned practice for putting digitized collections of unpublished materials online,*

www.oclc.org/research/activities/rights/practice.pdf

Instructor's e-mail: w-maher@illinois.edu

Additional References:

- New York State Archives: Case Files of the Motion Picture Division: Application for Photocopies of Filmscripts
http://www.archives.nysed.gov/a/research/res_topics_film_form.shtml
- American Museum of Natural History Conditions of Use:
<http://diglib1.amnh.org/agreement.html>
- The Henry Ford [Museum] Photo Permission form and Rates:
<http://www.thehenryford.org/pdf/photo.pdf>
- Menzi L. Behrnd-Klodt, *Navigating Legal Issues in Archives*, (Chicago: Society of American Archivists, 2008).
- Gary Peterson and Trudy Huskamp Peterson, *Archives and Manuscripts: Law* (Chicago: SAA, 1985) available at:
<http://www.archivists.org/publications/epubs/Archives&Mss-Law.pdf>
- Peter B. Hirtle, Emily Hudson, Andrew T. Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums*, 2009 Soon to be available at \$39.95 via Amazon.com Now available as free download from:
<http://ecommons.library.cornell.edu/handle/1813/14142>