

INTRODUCTION TO IP: COPYRIGHT LAW

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Prepared for the Mid-South Intellectual Property Institute—February 10, 2012

I. Introduction

A. High-Level Overview

B. Governing Law

1. Federal Law

- a. Constitution (art. I, § 8, cl. 8)
- b. Copyright Act (17 U.S.C. § 101 et seq.)

2. Limited State Law: federal preemption—§ 301

- a. Subject matter or activities not covered by federal copyright law, such as:
 - i. pre-1972 sound recordings (see footnote 1, p. 2)—§ 301(c)
 - ii. unfixed works (see II.A.2 below—“fixed”)—§ 301(b)(1)
- b. Certain state criminal statutes (e.g. anti-camcording laws)

3. Effects of International Treaties

II. Key Issues in Protection

A. Protected Subject Matter—§ 102

1. Original Works of Authorship

- a. Author’s own intellectual conception; not copied from elsewhere
- b. A modicum of creativity
- c. Excludes the following, regardless of how embodied within the work—§ 102(b):
 - i. facts & discoveries
 - ii. ideas
 - iii. processes, procedures, methods, etc.

2. Fixed in a Tangible Medium of Expression
 - a. Any medium will suffice, including only machine-readable, as long it allows perception of the work
 - b. Can exist for a relatively brief duration but must be more than merely transitory
3. Statutory Categories Include—§102(a):
 - a. Literary works
 - b. Musical works, including any accompanying words
 - c. Dramatic works, including any accompanying music
 - d. Pantomimes and choreographic works
 - e. Pictorial, graphic and sculptural works
 - f. Motion pictures and other audiovisual works
 - g. Sound recordings¹
 - h. Architectural works²
4. The “Thing” or the “Object” vs. the Copyright—§ 202
 - a. Transferring the object does not transfer ownership of copyright
 - b. Transferring the copyright does not transfer ownership of object

B. Authors—Nature of Authorship

1. Sole Authors—§§ 201(a), 201(d), 204
2. Joint Authors—§ 201(a), 201(d)
 - a. Two or more persons who prepare a work with:
 - i. the intent to join separate copyrightable contributions into a unitary whole; and

¹ Federal protection applies to sound recordings fixed on or after Feb. 15, 1972. See I.A.2.a if fixed before that date—state protection will apply (caution—this will potentially include recordings made before Jan. 1, 1923 and those published without notice). Copyright in a foreign sound recording fixed before Feb. 15, 1972 will require consideration of copyright restoration under § 104A as well as possible state law protection.

² If created on or after Dec. 1, 1990; also if unconstructed and embodied only in unpublished drawings on that date and then constructed before Dec. 31, 2002.

- ii. intent to be co-authors
 - b. Implications—co-ownership of undivided interest
- 3. Works Made for Hire—§ 101, 201(b)
 - a. Works prepared either:
 - i. by employees within the scope of employment; or
 - ii. pursuant to a commission or special order, but only if:
 - (a) the work falls within one of nine specific statutory categories (see § 101, definition of “work made for hire”);
 - and (b) the parties enter into a written agreement creating a “work made for hire.”
 - b. Implications
 - i. if applicable, employer/hiring party is the author, and human creator gains no rights
 - ii. independent contractors do not generally create works made for hire.

C. Duration of Copyright

- 1. Recent Works (created Jan. 1, 1978 or later)—§ 302
 - a. Begins upon creation/fixation
 - b. Sole or joint authors: lasts for author’s life plus 70 years (last surviving joint author)
 - c. Works for hire: lasts for 95 years measured from first publication or for 120 years measured from creation
 - d. If published between Jan. 1, 1978 and March 1, 1989: notice was required, with some opportunity to “cure” notice failures.
- 2. Works Published or Registered from Jan. 1, 1923 to Dec. 31, 1977—§ 304
 - a. Began upon registration or publication with notice
 - b. Lasts for potential term of 95 years
 - i. term is measured, technically, as a 28-year initial term plus a 67-year renewal term; but
 - ii. if the work was published or registered before 1964, a renewal application had to be filed at the end of the 28-year initial term in order to obtain the 67-year renewal term
 - iii. if the work was published 1964 or after, the “renewal” following the initial 28-year term has become automatic.

- c. Notice strictly required on published copies; without notice, the work was injected into the public domain (i.e., federal copyright never existed for that work).
- 3. Works Created Before Jan. 1, 1978 but Unpublished & Unregistered on that Date—§ 303
 - a. Federal rights began on Jan. 1, 1978
 - b. Term lasts for duration described in 1.a.-b. above, but with two potential extensions:
 - i. the minimum term duration extends through Dec. 31, 2002 (regardless of date of author’s death)
 - ii. if the work was published by Dec. 31, 2002, then the minimum term duration extends through Dec. 31, 2047 (again, regardless of date of author’s death)
- 4. Expiration Dates: all terms expire Dec. 31 of the calendar year—§ 305

III. Key Issues in Enforcement

A. Infringement: exercising one of the copyright owner’s exclusive rights—§ 501

- 1. Exclusive Rights
 - a. Reproduction in copies—§ 106(1)
 - i. nature of “copies”
 - ii. acts included (full and partial; literal and non-literal)
 - b. Preparation of derivative works—§ 106(2)
 - c. Distribution of copies to the public—§106(3)
 - i. acts included
 - ii. importation—§ 602
 - d. Public performance—§ 106(4)
 - i. works covered (limited for sound recordings, see § 106(6))
 - ii. acts included (direct and transmitted)
 - e. Public display—§ 106(5)
 - i. works covered (not architectural works)
 - ii. acts included (direct and transmitted)
- 2. Access: direct or circumstantial evidence
- 3. Substantial Similarity: full and partial; literal and nonliteral similarity

4. Registration: required to sue; not required to possess copyright—§ 411
 5. Moral Rights for Works of Visual Art—§ 106A
 - a. works covered (limited scope)
 - b. enforceable only by human authors (not applicable to works for hire; no transfers of moral rights)
 - c. acts included (attribution, integrity)
- B. Defenses
1. Specific Defenses/Exclusions (examples, not exhaustive list)
 - a. “First sale” doctrine—§ 109
 - i. distribution—§ 109(a)-(b)
 - ii. display—§ 109(c)
 - b. Face-to-face teaching (non-profit; performance/display)—§ 110(1)
 - c. Public performance of transmissions—§ 110(5)
 2. Fair Use (case-by-case analysis; four factors)—§ 107
 - a. Purpose and character of the use (including criticism, comment, news reporting, teaching, scholarship and research, among others)
 - b. Nature of the copyrighted work (e.g., creative or historical/factual)
 - c. Amount and substantiality of the portion used in relation to the copyrighted work as a whole (qualitative and quantitative)
 - d. Effect of the use upon the potential market for or value of the copyrighted work (includes original work’s market as well as licensing value and other derivative markets)
- C. Remedies—§§ 502-505; 412
1. Injunctive Relief: discretionary but generally available—§502
 2. Monetary Remedies
 - a. Actual damages and profits—§504(a) & (b)
 - i. harm to owner from infringing act
 - ii. plus profit of infringer attributable to infringement

- b. Statutory damages—§504(a) & (c)
 - i. alternative to actual damages/profits (owner’s option)
 - ii. only available if owner registered the work before the infringement (see § 412 for exceptions)
 - iii. range from \$750-\$30,000 per work in most cases
- c. Attorney’s fees—§505
 - i. discretionary award to the prevailing party
 - ii. not always awarded
 - iii. only available to owner if registered the work before the infringement (see § 412 for exceptions)
- 3. Seizure and Destruction—§503
 - a. Can include both goods and means of manufacture
 - b. Used in particular for blatant pirating/counterfeiting

IV. Conclusion—and a few links for more information

- A. U.S. Copyright Office: <http://copyright.gov> (Copyright Act & other information)
- B. American University, Washington College of Law, Program on Information Justice and Intellectual Property: <http://www.wcl.american.edu/pijip/go/research> (links to other organizations and information through “Links to Other IP Resources,” as well as to relevant sub-topics, e.g. “Fair Use and Public Media”)
- C. Stanford University Libraries, Copyright and Fair Use: <http://fairuse.stanford.edu/>