Introduction to Copyright Law and its Neighbors: Law 410
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I. Overview

A. The Skeleton of this (or any) Intellectual Property Regime

(Questions to ask or dimensions to probe of any body of law arguably establishing a regime of intellectual property)

References below to:

- A section number, e.g., § 107, refers to 17 U.S.C. (the Copyright Act of the U.S.)
- Basics refers to the U.S. Copyright Office publication of that name.

1. What type of intellectual product or creative activity is covered (and excluded)?

[For copyright's answers, see WP I.A.2.a., WP I.A.2.c. and Basics [4] ]

2. What must be done to establish initial entitlement?

   Originating and realizing -- How new/different must the intellectual product be, how completely and in what form must it be realized? [For copyright's answers, see WP I.A.2.a. and Basics [6] ]

   Competing claims -- how are competing claims to the same intellectual product resolved? [For copyright's answers, see WP I.A.8.]

   Formal requirements (including notice in some particular form) -- what formal steps must be completed to secure entitlement? [For copyright's answers, see WP I.A.2.a., WP I.A.5. and Basics [8] ]

   Mechanism for recognizing and validating -- how does the originator know that the entitlement has been granted (knowing both that others cannot appropriate and that the originator's distribution does not infringe on the entitlement of someone else)? [For copyright's answers, see WP I.A.2.a., WP I.A.8. and Basics [12] ]

Course Intro 1
Effect of institutional context on who holds what rights -- the effect of employment, collaborative or cumulative work, on entitlement? [For copyright's answers, see WP I.A.3, and Basics [2]]

3. Content of entitlement

Infringement -- What activities by others are an infringement on the entitlement (equal, similar, copied) (same market, different markets/forms)? [For copyright's answers, see WP I.A.6., WP I.A.7., WP I.A.8, and Basics [1]]

Remedies -- What relief can the entitlement holder claim against infringers, financial and other? Are there criminal penalties for infringement? [For copyright's answers, see WP I.A.8.e., WP I.A.8.f. and WP I.A.8.g.]

Duration [For copyright's (recently altered) answers, see Basics [9]]

Transferability (whether/how) -- during the creator's lifetime, at death -- divisibility [For copyright's answers, see WP I.A.3.a., WP I.A.3.b, and Basics [10]]

4. Loss of entitlement

Use -- Must the entitlement be used to be kept? [For copyright's answers, see WP I.A.8.g.]

Filing or other formalities -- Are there formality failures that can cause its loss? [For copyright's answers, see WP I.A.5, and Basics [12]]

Abuse of right, etc. -- Other ways of losing? [For copyright's answers, see WP I.A.8.g.]

5. Federalism questions

Where does this body of intellectual property fit in the federal-state matrix? [For copyright's answers, see WP I.A.1, and WP I.A.2.b.]

6. International law questions

To what extent and upon taking what steps is the intellectual property entitlement enforceable internationally? [For copyright's answers, see WP I.A.9, and Basics [11]]
U.S. Copyright Office, Copyright Basics (Circular 1)

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Copyright is a form of protection provided by the laws of the United States (title 17, U.S. Code) to the authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the 1976 Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

- **To reproduce** the work in copies or phonorecords;
- To prepare **derivative works** based upon the work;
- **To distribute copies or phonorecords** of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- **To perform the work publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- **To display the copyrighted work publicly**, 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; and
- In the case of **sound recordings**, to perform the work publicly by means of a digital audio transmission.

In addition, certain authors of works of visual art have the rights of attribution and integrity as described in section 106A of the 1976 Copyright Act. For further information, request Circular 40, “Copyright Registration for Works of the Visual Arts.”

It is illegal for anyone to violate any of the rights provided by the copyright law to the owner of copyright. These rights, however, are not unlimited in scope. Sections 107 through 121 of the 1976 Copyright Act establish limitations on these rights. In some cases, these limitations are specified exemptions from copyright liability. One major limitation is the doctrine of "fair use," which is given a statutory basis in section 107 of the 1976 Copyright Act. In other instances, the limitation takes the form of a "compulsory license" under which certain limited uses of copyrighted works are permitted upon payment of specified royalties and compliance with statutory conditions. For further information about the limitations of any of these rights, consult the copyright law or write to the Copyright Office.
[2] WHO CAN CLAIM COPYRIGHT

Copyright protection subsists from the time the work is created in fixed form. The copyright in the work of authorship immediately becomes the property of the author who created the work. Only the author or those deriving their rights through the author can rightfully claim copyright.

In the case of works made for hire, the employer and not the employee is considered to be the author. Section 101 of the copyright law defines a "work made for hire" as:

- (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
  - a part of a motion picture or other audiovisual work
  - a translation
  - a supplementary work
  - a compilation
  - an instructional text
  - a test
  - answer material for a test
  - 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....

The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary.

Copyright in each separate contribution to a periodical or other collective work is distinct from copyright in the collective work as a whole and vests initially with the author of the contribution.

Two General Principles

- Mere ownership of a book, manuscript, painting, or any other copy or phonorecord does not give the possessor the copyright. The law provides that transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright.
- Minors may claim copyright, but state laws may regulate the business dealings involving copyrights owned by minors. For information on relevant state laws, consult an attorney.
COPYRIGHT AND NATIONAL ORIGIN OF THE WORK

Copyright protection is available for all unpublished works, regardless of the nationality or domicile of the author.

Published works are eligible for copyright protection in the United States if *any* one of the following conditions is met:

- On the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party,* or is a stateless person wherever that person may be domiciled; or

* A treaty party is a country or intergovernmental organization other than the United States that is a party to an international agreement.

- The work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party. For purposes of this condition, a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be; or
- The work is a sound recording that was first fixed in a treaty party; or
- The work is a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party; or
- The work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or
- The work is a foreign work that was in the public domain in the United States prior to 1996 and its copyright was restored under the Uruguay Round Agreements Act (URAA). Request Circular 38b, "Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act (URAA-GATT)," for further information.
- The work comes within the scope of a Presidential proclamation.
[4] WHAT WORKS ARE PROTECTED?

Copyright protects "original works of authorship" that are fixed in a tangible form of expression. The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device. Copyrightable works 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
8. architectural works

These categories should be viewed broadly. For example, computer programs and most "compilations" may be registered as "literary works"; maps and architectural plans may be registered as "pictorial, graphic, and sculptural works."

[5] WHAT IS NOT PROTECTED BY COPYRIGHT?

Several categories of material are generally not eligible for federal copyright protection. These include among others:

- Works that have not been fixed in a tangible form of expression (for example, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded)
- Titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration
- Works consisting entirely of information that is common property and containing no original authorship (for example: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources)
Copyright Secured Automatically upon Creation

The way in which copyright protection is secured is frequently misunderstood. No publication or registration or other action in the Copyright Office is required to secure copyright. (See following Note.) There are, however, certain definite advantages to registration. See "Copyright Registration."

Copyright is secured automatically when the work is created, and a work is "created" when it is fixed in a copy or phonorecord for the first time. "Copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm. "Phonorecords" are material objects embodying fixations of sounds (excluding, by statutory definition, motion picture soundtracks), such as cassette tapes, CDs, or LPs. Thus, for example, a song (the "work") can be fixed in sheet music ("copies") or in phonograph disks ("phonorecords"), or both.

If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date.

[7] PUBLICATION

Publication is no longer the key to obtaining federal copyright as it was under the Copyright Act of 1909. However, publication remains important to copyright owners.

The 1976 Copyright Act defines publication as follows:

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication.

NOTE: Before 1978, federal copyright was generally secured by the act of publication with notice of copyright, assuming compliance with all other relevant statutory conditions. U. S. works in the public domain on January 1, 1978, (for example, works published without satisfying all conditions for securing federal copyright under the Copyright Act of 1909) remain in the public domain under the 1976 Copyright Act.
Certain foreign works originally published without notice had their copyrights restored under the Uruguay Round Agreements Act (URAA). Request Circular 38b and see the "Notice of Copyright" section of this publication for further information.

Federal copyright could also be secured before 1978 by the act of registration in the case of certain unpublished works and works eligible for ad interim copyright. The 1976 Copyright Act automatically extends to full term (section 304 sets the term) copyright for all works, including those subject to ad interim copyright if ad interim registration has been made on or before June 30, 1978.

A further discussion of the definition of "publication" can be found in the legislative history of the 1976 Copyright Act. The legislative reports define "to the public" as distribution to persons under no explicit or implicit restrictions with respect to disclosure of the contents. The reports state that the definition makes it clear that the sale of phonorecords constitutes publication of the underlying work, for example, the musical, dramatic, or literary work embodied in a phonorecord. The reports also state that it is clear that any form of dissemination in which the material object does not change hands, for example, performances or displays on television, is not a publication no matter how many people are exposed to the work. However, when copies or phonorecords are offered for sale or lease to a group of wholesalers, broadcasters, or motion picture theaters, publication does take place if the purpose is further distribution, public performance, or public display.

Publication is an important concept in the copyright law for several reasons:

- Works that are published in the United States are subject to mandatory deposit with the Library of Congress. See discussion on "Mandatory Deposit for Works Published in the United States."
- Publication of a work can affect the limitations on the exclusive rights of the copyright owner that are set forth in sections 107 through 121 of the law.
- The year of publication may determine the duration of copyright protection for anonymous and pseudonymous works (when the author's identity is not revealed in the records of the Copyright Office) and for works made for hire.
- Deposit requirements for registration of published works differ from those for registration of unpublished works. See discussion on "Registration Procedures."
- When a work is published, it may bear a notice of copyright to identify the year of publication and the name of the copyright owner and to inform the public that the work is protected by copyright. Copies of works published before March 1, 1989, must bear the notice or risk loss of copyright protection. See discussion on "Notice of Copyright" below.
[8] NOTICE OF COPYRIGHT

The use of a copyright notice is no longer required under U. S. law, although it is often beneficial. Because prior law did contain such a requirement, however, the use of notice is still relevant to the copyright status of older works.

Notice was required under the 1976 Copyright Act. This requirement was eliminated when the United States adhered to the Berne Convention, effective March 1, 1989. Although works published without notice before that date could have entered the public domain in the United States, the Uruguay Round Agreements Act (URAA) restores copyright in certain foreign works originally published without notice. For further information about copyright amendments in the URAA, request Circular 38b.

The Copyright Office does not take a position on whether copies of works first published with notice before March 1, 1989, which are distributed on or after March 1, 1989, must bear the copyright notice.

Use of the notice may be important because it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication. Furthermore, in the event that a work is infringed, if a proper notice of copyright appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in section 504(c)(2) of the copyright law. Innocent infringement occurs when the infringer did not realize that the work was protected.

The use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office.

Form of Notice for Visually Perceptible Copies

The notice for visually perceptible copies should contain all 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. In the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying textual matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful article; and

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.
The "C in a circle" notice is used only on "visually perceptible copies." Certain kinds of works--for example, musical, dramatic, and literary works--may be fixed not in "copies" but by means of sound in an audio recording. Since audio recordings such as audio tapes and phonograph disks are "phonorecords" and not "copies," the "C in a circle" notice is not used to indicate protection of the underlying musical, dramatic, or literary work that is recorded.

Form of Notice for Phonorecords of Sound Recordings*

* Sound recordings are defined in the law 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." Common examples include recordings of music, drama, or lectures. A sound recording is not the same as a phonorecord. A phonorecord is the physical object in which works of authorship are embodied. The word "phonorecord" includes cassette tapes, CDs, LPs, 45 r. p. m. disks, as well as other formats.

The notice for phonorecords embodying a sound recording should contain all 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** 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.

Example: © 2002 A. B. C. Records Inc.

**NOTE:** Since questions may arise from the use of variant forms of the notice, you may wish to seek legal advice before using any form of the notice other than those given here.

Position of Notice

The copyright notice should be affixed to copies or phonorecords in such a way as to "give reasonable notice of the claim of copyright." The three elements of the notice...
should ordinarily appear together on the copies or phonorecords or on the phonorecord label or container. The Copyright Office has issued regulations concerning the form and position of the copyright notice in the Code of Federal Regulations (37 CFR Section 201.20). For more information, request Circular 3, "Copyright Notice."

Publications Incorporating U. S. Government Works

Works by the U. S. Government are not eligible for U. S. copyright protection. For works published on and after March 1, 1989, the previous notice requirement for works consisting primarily of one or more U. S. Government works has been eliminated. However, use of a notice on such a work will defeat a claim of innocent infringement as previously described provided the notice also includes a statement that identifies either those portions of the work in which copyright is claimed or those portions that constitute U. S. Government material.

Example: © 2002 Jane Brown. Copyright claimed in Chapters 7-10, exclusive of U. S. Government maps

Copies of works published before March 1, 1989, that consist primarily of one or more works of the U. S. Government should have a notice and the identifying statement.

Unpublished Works

The author or copyright owner may wish to place a copyright notice on any unpublished copies or phonorecords that leave his or her control.

Example: Unpublished work © 2002 Jane Doe

Omission of the Notice and Errors in Notice

The 1976 Copyright Act attempted to ameliorate the strict consequences of failure to include notice under prior law. It contained provisions that set out specific corrective steps to cure omissions or certain errors in notice. Under these provisions, an applicant had 5 years after publication to cure omission of notice or certain errors. Although these provisions are technically still in the law, their impact has been limited by the amendment making notice optional for all works published on and after March 1, 1989. For further information, request Circular 3, "Copyright Notice."

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[9] HOW LONG COPYRIGHT PROTECTION ENDURES

Works Originally Created on or after January 1, 1978

A work that is created (fixed in tangible form for the first time) on or after January 1, 1978, is automatically protected from the moment of its creation and is ordinarily given a term enduring for the author's life plus an additional 70 years after the author's death. In the case of "a joint work prepared by two or more authors who did not work for hire," the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.

Works Originally Created before January 1, 1978, But Not Published or Registered by That Date

These works have been automatically brought under the statute and are now given federal copyright protection. The duration of copyright in these works will generally be computed in the same way as for works created on or after January 1, 1978: the life-plus-70 or 95/120-year terms will apply to them as well. The law provides that in no case will the term of copyright for works in this category expire before December 31, 2002, and for works published on or before December 31, 2002, the term of copyright will not expire before December 31, 2047.

Works Originally Created and Published or Registered before January 1, 1978

Under the law in effect before 1978, copyright was secured either on the date a work was published with a copyright notice or on the date of registration if the work was registered in unpublished form. In either case, the copyright endured for a first term of 28 years from the date it was secured. During the last (28th) year of the first term, the copyright was eligible for renewal. The Copyright Act of 1976 extended the renewal term from 28 to 47 years for copyrights that were subsisting on January 1, 1978, or for pre-1978 copyrights restored under the Uruguay Round Agreements Act (URAA), making these works eligible for a total term of protection of 75 years. Public Law 105-298, enacted on October 27, 1998, further extended the renewal term of copyrights still subsisting on that date by an additional 20 years, providing for a renewal term of 67 years and a total term of protection of 95 years.

Public Law 102-307, enacted on June 26, 1992, amended the 1976 Copyright Act to provide for automatic renewal of the term of copyrights secured between January 1,
1964, and December 31, 1977. Although the renewal term is automatically provided, the Copyright Office does not issue a renewal certificate for these works unless a renewal application and fee are received and registered in the Copyright Office.

Public Law 102-307 makes renewal registration optional. Thus, filing for renewal registration is no longer required in order to extend the original 28-year copyright term to the full 95 years. However, some benefits accrue from making a renewal registration during the 28th year of the original term.

For more detailed information on renewal of copyright and the copyright term, request Circular 15, "Renewal of Copyright"; Circular 15a, "Duration of Copyright"; and Circular 15t, "Extension of Copyright Terms."

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[10] TRANSFER OF COPYRIGHT

Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred, but the transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. Transfer of a right on a nonexclusive basis does not require a written agreement.

A copyright may also be conveyed by operation of law and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

Copyright is a personal property right, and it is subject to the various state laws and regulations that govern the ownership, inheritance, or transfer of personal property as well as terms of contracts or conduct of business. For information about relevant state laws, consult an attorney.

Transfers of copyright are normally made by contract. The Copyright Office does not have any forms for such transfers. The law does provide for the recordation in the Copyright Office of transfers of copyright ownership. Although recordation is not required to make a valid transfer between the parties, it does provide certain legal advantages and may be required to validate the transfer as against third parties. For information on recordation of transfers and other documents related to copyright, request Circular 12, "Recordation of Transfers and Other Documents."

Termination of Transfers

Under the previous law, the copyright in a work reverted to the author, if living, or if the author was not living, to other specified beneficiaries, provided a renewal claim was registered in the 28th year of the original term.* The present law drops the renewal feature except for works already in the first term of statutory protection when the present
law took effect. Instead, the present law permits termination of a grant of rights after 35 years under certain conditions by serving written notice on the transferee within specified time limits.

*The copyright in works eligible for renewal on or after June 26, 1992, will vest in the name of the renewal claimant on the effective date of any renewal registration made during the 28th year of the original term. Otherwise, the renewal copyright will vest in the party entitled to claim renewal as of December 31st of the 28th year.

For works already under statutory copyright protection before 1978, the present law provides a similar right of termination covering the newly added years that extended the former maximum term of the copyright from 56 to 95 years. For further information, request Circulars 15a and 15t.


There is no such thing as an "international copyright" that will automatically protect an author's writings throughout the entire world. Protection against unauthorized use in a particular country depends, basically, on the national laws of that country. However, most countries do offer protection to foreign works under certain conditions, and these conditions have been greatly simplified by international copyright treaties and conventions. For further information and a list of countries that maintain copyright relations with the United States, request Circular 38a, "International Copyright Relations of the United States."

[12] COPYRIGHT REGISTRATION

In general, copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. However, registration is not a condition of copyright protection. Even though registration is not a requirement for protection, the copyright law provides several inducements or advantages to encourage copyright owners to make registration. Among these advantages are the following:

- Registration establishes a public record of the copyright claim.
- Before an infringement suit may be filed in court, registration is necessary for works of U. S. origin.
- If made before or within 5 years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate.
• If registration is made within 3 months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.

• Registration allows the owner of the copyright to record the registration with the U.S. Customs Service for protection against the importation of infringing copies. For additional information, request Publication No. 563 "How to Protect Your Intellectual Property Right," from: U.S. Customs Service, P.O. Box 7404, Washington, D.C. 20044. See the U.S. Customs Service Website at www.customs.gov for online publications.

Registration may be made at any time within the life of the copyright. Unlike the law before 1978, when a work has been registered in unpublished form, it is not necessary to make another registration when the work becomes published, although the copyright owner may register the published edition, if desired.

[13] REGISTRATION PROCEDURES

Original Registration

To register a work, send the following three elements in the same envelope or package to:

Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

1. A properly completed application form.
2. A nonrefundable filing fee of $30 for each application.

3. A nonreturnable deposit of the work being registered. The deposit requirements vary in particular situations. The general requirements follow. Also note the information under "Special Deposit Requirements."

NOTE: Copyright Office fees are subject to change. For current fees, please check the Copyright Office Website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000.
• If the work was first published in the United States on or after January 1, 1978, two complete copies or phonorecords of the best edition.
• If the work was first published in the United States before January 1, 1978, two complete copies or phonorecords of the work as first published.
• If the work was first published outside the United States, one complete copy or phonorecord of the work as first published.
• If sending multiple works, all applications, deposits, and fees should be sent in the same package. If possible, applications should be attached to the appropriate deposit. Whenever possible, number each package (e.g., 1 of 3, 2 of 4) to facilitate processing.

What Happens if the Three Elements Are Not Received Together

Applications and fees received without appropriate copies, phonorecords, or identifying material will not be processed and ordinarily will be returned. Unpublished deposits without applications or fees ordinarily will be returned, also. In most cases, published deposits received without applications and fees can be immediately transferred to the collections of the Library of Congress. This practice is in accordance with section 408 of the law, which provides that the published deposit required for the collections of the Library of Congress may be used for registration only if the deposit is "accompanied by the prescribed application and fee...."

After the deposit is received and transferred to another service unit of the Library for its collections or other disposition, it is no longer available to the Copyright Office. If you wish to register the work, you must deposit additional copies or phonorecords with your application and fee.

Renewal Registration

To register a renewal, send:

1. A properly completed application Form RE and, if necessary, Form RE Addendum, and
2. A nonrefundable filing fee of $60 without Addendum; $90 with Addendum for each application. (See Note above.) Each Addendum form must be accompanied by a deposit representing the work being reviewed. See Circular 15, "Renewal of Copyright."
NOTE: Complete the application form using black ink pen or type. You may photocopy blank application forms. However, photocopied forms submitted to the Copyright Office must be clear, legible, on a good grade of 8-1/2-inch by 11-inch white paper suitable for automatic feeding through a photocopier. The forms should be printed, preferably in black ink, head-to-head so that when you turn the sheet over, the top of page 2 is directly behind the top of page 1. Forms not meeting these requirements may be returned resulting in delayed registration.

Special Deposit Requirements

Special deposit requirements exist for many types of works. The following are prominent examples of exceptions to the general deposit requirements:

- If the work is a motion picture, the deposit requirement is one complete copy of the unpublished or published motion picture and a separate written description of its contents, such as a continuity, press book, or synopsis.
- If the work is a literary, dramatic, or musical work published only in a phonorecord, the deposit requirement is one complete phonorecord.
- If the work is an unpublished or published computer program, the deposit requirement is one visually perceptible copy in source code of the first 25 and last 25 pages of the program. For a program of fewer than 50 pages, the deposit is a copy of the entire program. For more information on computer program registration, including deposits for revised programs and provisions for trade secrets, request Circular 61, "Copyright Registration for Computer Programs."
- If the work is in a CD-ROM format, the deposit requirement is one complete copy of the material, that is, the CD-ROM, the operating software, and any manual(s) accompanying it. If registration is sought for the computer program on the CD-ROM, the deposit should also include a printout of the first 25 and last 25 pages of source code for the program.

In the case of works reproduced in three-dimensional copies, identifying material such as photographs or drawings is ordinarily required. Other examples of special deposit requirements (by no means an exhaustive list) include many works of the visual arts such as greeting cards, toys, fabrics, oversized materials (request Circular 40a, "Deposit Requirements for Registration of Claims to Copyright in Visual Arts Material"); video games and other machine-readable audiovisual works (request Circular 61); automated databases (request Circular 65, "Copyright Registration for Automated Databases"); and contributions to collective works. For information about deposit requirements for group registration of serials, request Circular 62, "Copyright Registration for Serials."

If you are unsure of the deposit requirement for your work, write or call the Copyright Office and describe the work you wish to register.
Unpublished Collections

Under the following conditions, a work may be registered in unpublished form as a "collection," with one application form and one fee:

- The elements of the collection are assembled in an orderly form;
- The combined elements bear a single title identifying the collection as a whole;
- The copyright claimant in all the elements and in the collection as a whole is the same; and
- All the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.

An unpublished collection is not indexed under the individual titles of the contents but under the title of the collection.

NOTE: A Library of Congress Control Number is different from a copyright registration number. The Cataloging in Publication (CIP) Division of the Library of Congress is responsible for assigning LC Control Numbers and is operationally separate from the Copyright Office. A book may be registered in or deposited with the Copyright Office but not necessarily cataloged and added to the Library's collections. For information about obtaining an LC Control Number, see the following homepage: http://pcn.loc.gov/pcn. For information on International Standard Book Numbering (ISBN), write to: ISBN, R. R. Bowker, 630 Central Ave., New Providence, NJ 07974. Call (877) 310-7333. For further information and to apply online, see www.isbn.org. For information on International Standard Serial Numbering (ISSN), write to: Library of Congress, National Serials Data Program, Serial Record Division, Washington, D.C. 20540-4160. Call (202) 707-6452. Or obtain information from www.loc.gov/issn.

[14] EFFECTIVE DATE OF REGISTRATION

A copyright registration is effective on the date the Copyright Office receives all the required elements in acceptable form, regardless of how long it then takes to process the application and mail the certificate of registration. The time the Copyright Office requires to process an application varies, depending on the amount of material the Office is receiving.

If you apply for copyright registration, you will not receive an acknowledgment that your application has been received (the Office receives more than 600,000 applications annually), but you can expect:
• A letter or a telephone call from a Copyright Office staff member if further information is needed or
• A certificate of registration indicating that the work has been registered, or if the application cannot be accepted, a letter explaining why it has been rejected.

Requests to have certificates available for pickup in the Public Information Office or to have certificates sent by Federal Express or another mail service cannot be honored.

If you want to know the date that the Copyright Office receives your material, send it by registered or certified mail and request a return receipt.

[15] CORRECTIONS AND AMPLIFICATIONS OF EXISTING REGISTRATIONS

To correct an error in a copyright registration or to amplify the information given in a registration, file a supplementary registration form--Form CA--with the Copyright Office. The filing fee is $100. (See Note above.) The information in a supplementary registration augments but does not supersede that contained in the earlier registration. Note also that a supplementary registration is not a substitute for an original registration, for a renewal registration, or for recording a transfer of ownership. For further information about supplementary registration, request Circular 8, "Supplementary Copyright Registration."

[16] MANDATORY DEPOSIT FOR WORKS PUBLISHED IN THE UNITED STATES

Although a copyright registration is not required, the Copyright Act establishes a mandatory deposit requirement for works published in the United States. See the definition of "publication." In general, the owner of copyright or the owner of the exclusive right of publication in the work has a legal obligation to deposit in the Copyright Office, within 3 months of publication in the United States, two copies (or in the case of sound recordings, two phonorecords) for the use of the Library of Congress. Failure to make the deposit can result in fines and other penalties but does not affect copyright protection.

Certain categories of works are exempt entirely from the mandatory deposit requirements, and the obligation is reduced for certain other categories. For further information about mandatory deposit, request Circular 7d, "Mandatory Deposit of Copies or Phonorecords for the Library of Congress."
[17] USE OF MANDATORY DEPOSIT TO SATISFY REGISTRATION REQUIREMENTS

For works published in the United States, the copyright law contains a provision under which a single deposit can be made to satisfy both the deposit requirements for the Library and the registration requirements. In order to have this dual effect, the copies or phonorecords must be accompanied by the prescribed application form and filing fee.

[18] WHO MAY FILE AN APPLICATION FORM?

The following persons are legally entitled to submit an application form:

- **The author.** This is either the person who actually created the work or, if the work was made for hire, the employer or other person for whom the work was prepared.
- **The copyright claimant.** The copyright claimant is defined in Copyright Office regulations as either the author of the work or a person or organization that has obtained ownership of all the rights under the copyright initially belonging to the author. This category includes a person or organization who has obtained by contract the right to claim legal title to the copyright in an application for copyright registration.
- **The owner of exclusive right(s).** Under the law, any of the exclusive rights that make up a copyright and any subdivision of them can be transferred and owned separately, even though the transfer may be limited in time or place of effect. The term "copyright owner" with respect to any one of the exclusive rights contained in a copyright refers to the owner of that particular right. Any owner of an exclusive right may apply for registration of a claim in the work.
- **The duly authorized agent** of such author, other copyright claimant, or owner of exclusive right(s). Any person authorized to act on behalf of the author, other copyright claimant, or owner of exclusive rights may apply for registration.

There is no requirement that applications be prepared or filed by an attorney.
[19] APPLICATION FORMS

For Original Registration

**Form PA:** for published and unpublished works of the performing arts (musical and dramatic works, pantomimes and choreographic works, motion pictures and other audiovisual works)

**Form SE:** for serials, works issued or intended to be issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely (periodicals, newspapers, magazines, newsletters, annuals, journals, etc.)

**Form SR:** for published and unpublished sound recordings

**Form TX:** for published and unpublished nondramatic literary works

**Form VA:** for published and unpublished works of the visual arts (pictorial, graphic, and sculptural works, including architectural works)

**Form G/DN:** a specialized form to register a complete month's issues of a daily newspaper when certain conditions are met

**Short Form/SE and Form SE/GROUP:** specialized SE forms for use when certain requirements are met

**Short Forms TX, PA, and VA:** short versions of applications for original registration. For further information about using the short forms, request publication SL-7.

**Form GATT and Form GATT/GRP:** specialized forms to register a claim in a work or group of related works in which U. S. copyright was restored under the 1994 Uruguay Round Agreements Act (URAA). For further information, request Circular 38b.

For Renewal Registration

**Form RE:** for claims to renew copyright in works copyrighted under the law in effect through December 31, 1977 (1909 Copyright Act) and registered during the initial 28-year copyright term

**Form RE Addendum:** accompanies Form RE for claims to renew copyright in works copyrighted under the 1909 Copyright Act but never registered during their initial 28-year copyright term
For Corrections and Amplifications

**Form CA:** for supplementary registration to correct or amplify information given in the Copyright Office record of an earlier registration

For a Group of Contributions to Periodicals

**Form GR/CP:** an adjunct application to be used for registration of a group of contributions to periodicals in addition to an application **Form TX, PA, or VA**

How to Obtain Application Forms

See "For Further Information."

You must have **Adobe Acrobat Reader®** installed on your computer to view and print the forms accessed on the Internet. Adobe Acrobat Reader may be downloaded free from Adobe Systems Incorporated through links from the same Internet site from which the forms are available.

Print forms head to head (top of page 2 is directly behind the top of page 1) on a single piece of good quality, 8-1/2-inch by 11-inch white paper. To achieve the best quality copies of the application forms, use a laser printer.

[20] FILL-IN FORMS AVAILABLE

All Copyright Office forms are available on the Copyright Office Website in fill-in version. Go to [www.copyright.gov/forms](http://www.copyright.gov/forms) and follow the instructions. The fill-in forms allow you to enter information while the form is displayed on the screen by an Adobe Acrobat Reader product. You may then print the completed form and mail it to the Copyright Office. Fill-in forms provide a clean, sharp printout for your records and for filing with the Copyright Office.

[21] FEES

All remittances should be in the form of drafts, that is, checks, money orders, or bank drafts, payable to: **Register of Copyrights.** Do not send cash. Drafts must be redeemable without service or exchange fee through a U. S. institution, must be payable in U. S. dollars, and must be imprinted with American Banking Association routing numbers. International Money Orders and Postal Money Orders that are negotiable only at a post office are not acceptable.
If a check received in payment of the filing fee is returned to the Copyright Office as uncollectible, the Copyright Office will cancel the registration and will notify the remitter.

The filing fee for processing an original, supplementary, or renewal claim is nonrefundable, whether or not copyright registration is ultimately made.

**Do not send cash.** The Copyright Office cannot assume any responsibility for the loss of currency sent in payment of copyright fees. For further information, request Circular 4, "Copyright Fees."

**Certain Fees and Services May Be Charged to a Credit Card**

Some fees may be charged by telephone and in person in the office. Others may only be charged in person in the office. Credit card payments are generally authorized only for services that do not require filing of applications or other materials. An exception is made for fees related to items that are hand-carried into the Public Information Office.

**Certifications and Documents Section:** These fees may be charged in person in the office or by phone: additional certificates; copies of documents and deposits; searching, locating and retrieving deposits; certifications; and expedited processing.

**Public Information Office:** These fees may only be charged in person in the office, not by phone: standard registration request forms; special handling requests for all standard registration requests; requests for services provided by the Certifications and Documents Section when the request is accompanied by a request for special handling; search requests for which a fee estimate has been provided; additional fee for each claim using the same deposit; full term retention fees; appeal fees; Secure Test processing fee; short fee payments when accompanied by a Remittance Due Notice; in-process retrieval fees; and online service providers fees.

**Reference and Bibliography Section:** Requests for searches on a regular or expedited basis can be charged to a credit card by phone.

**Records Maintenance Unit:** Computer time on COINS, printing from the Optical Disk, and photocopying can be charged in person in the office.

**Fiscal Control Section:** Deposit Accounts maintained by the Fiscal Control Section may be replenished by credit card. See Circular 5, "How to Open and Maintain a Deposit Account in the Copyright Office."

NIE recordations and claims filed on Forms GATT and GATT/GRP may be paid by credit card if the card number is included in a separate letter that accompanies the form.
NOTE: Copyright Office fees are subject to change. For current fees, please check the Copyright Office Website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000.

[22] SEARCH OF COPYRIGHT OFFICE RECORDS

The records of the Copyright Office are open for inspection and searching by the public. Moreover, on request, the Copyright Office will search its records for you at the statutory hourly rate of $75 for each hour or fraction of an hour. (See Note above.) For information on searching the Office records concerning the copyright status or ownership of a work, request Circular 22, "How to Investigate the Copyright Status of a Work," and Circular 23, "The Copyright Card Catalog and the Online Files of the Copyright Office."

Copyright Office records in machine-readable form cataloged from January 1, 1978, to the present, including registration and renewal information and recorded documents, are now available for searching from the Copyright Office website at www.copyright.gov.

[23] FOR FURTHER INFORMATION

Information via the Internet: Circulars, announcements, regulations, other related materials, and all copyright application forms are available from the Copyright Office Website at www.copyright.gov.

Information by fax: Circulars and other information (but not application forms) are available from Fax-on-Demand at (202) 707-2600.

Information by telephone: For general information about copyright, call the Copyright Public Information Office at (202) 707-3000. The TTY number is (202) 707-6737. Information specialists are on duty from 8:30 a.m. to 5:00 p.m. Monday through Friday, eastern time, except federal holidays. Recorded information is available 24 hours a day. Or, if you know which application forms and circulars you want, request them from the Forms and Publications Hotline at (202) 707-9100 24 hours a day. Leave a recorded message.

Information by regular mail: Write to:
The Copyright Office provides a free electronic mailing list, NewsNet, that issues periodic email messages on the subject of copyright. The messages alert subscribers to hearings, deadlines for comments, new and proposed regulations, new publications, and other copyright-related subjects of interest. NewsNet is not an interactive discussion group. To subscribe, send a message to LISTSERV@LOC.GOV. In the body of the message say: SUBSCRIBE USCOPYRIGHT. or fill in the subscription form online at www.copyright.gov/newsnet You will receive a standard welcoming message indicating that your subscription to NewsNet has been accepted.

The Copyright Public Information Office is open to the public 8:30 a.m. to 5:00 p.m. Monday through Friday, eastern time, except federal holidays. The office is located in the Library of Congress, James Madison Memorial Building, Room 401, at 101 Independence Avenue, S.E., Washington, D.C., near the Capitol South Metro stop. Information specialists are available to answer questions, provide circulars, and accept applications for registration. Access for disabled individuals is at the front door on Independence Avenue, S.E.

The Copyright Office is not permitted to give legal advice. If information or guidance is needed on matters such as disputes over the ownership of a copyright, suits against possible infringers, the procedure for getting a work published, or the method of obtaining royalty payments, it may be necessary to consult an attorney.

Library of Congress
Copyright Office
101 Independence Avenue, S. E.
Washington, D.C. 20559-6000

www.copyright.gov

Rev: December 2000

Format Note:

This electronic version has been altered slightly from the original printed text for presentation on the World Wide Web. For a copy of the original circular, consult the
I. Law - A. Copyright

1. Purpose of Copyright Law

The Constitution of the United States provides that Congress has the 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." [1] The framers of the Constitution did not discuss this clause at any length prior to or after its adoption. [2] The purpose of the clause was described in the Federalist Papers by James Madison:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. [3]
The Constitution outlines both the goal that Congress may try to achieve (to promote the progress of science and useful arts) and the means by which they may accomplish it (by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries). The Supreme Court has often spoken about the purpose of copyright:

[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.

We have often recognized the monopoly privileges that Congress has authorized, while "intended to motivate the creative activity of authors and inventors by the provision of a special reward," are limited in nature and must ultimately serve the public good.

The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right in their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.

The economic philosophy behind the [Constitutional] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors . . . . Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Copyright is intended to increase and not to impede the harvest of knowledge . . . . [T]he scheme established by the Copyright Act . . . foster[s] the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.

The copyright law, like the patent statutes, makes reward to the owner a secondary consideration . . . . It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.

Copyright is "intended definitely to grant valuable, enforceable rights to authors . . . to afford greater encouragement to the production of literary works of lasting benefit to the world." The purpose is not to reward the author, but the law does so to achieve its ultimate purpose -- "to induce release to the public of the products of his creative genius." The "immediate effect" of the copyright law is that authors receive a "fair return for [their] creative labor"; however, the "ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Congress also interpreted the clause when it enacted the Copyright Act of 1909:
The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings . . . . [13]

By granting authors exclusive rights, the authors receive the benefit of economic rewards and the public receives the benefit of literature, music and other creative works that might not otherwise be created or disseminated. The public also benefits from the limited scope and duration of the rights granted.[14] The free flow of ideas is promoted by the denial of protection for facts and ideas.[15] The granting of exclusive rights to the author "does not preclude others from using the ideas or information revealed by the author's work."[16]

While copyright law "ultimately serves the purpose of enriching the general public through access to creative works,"[17] copyright law imposes no obligation upon copyright owners to make their works available. While it is hoped that the potential economic benefits to doing so will induce them, copyright owners are not obligated to provide access to their works -- either during the term of protection or after. Hence, unpublished works never distributed to the public are granted as much (if not more) protection as published works. However, once an author publishes a work, copies of the work must be deposited with the Library of Congress for the benefit of the public.

2. Subject Matter and Scope of Protection

a. Eligibility for Protection

The subject matter eligible for protection under the Copyright Act is set forth in Section 102(a):

Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[20]

From this provision, the courts have derived three basic requirements for copyright protection -- originality, creativity and fixation.[21]

The requirements of originality and creativity are derived from the statutory qualification that copyright protection extends only to "original works of authorship."[22] To be original, a work merely must be one of independent creation -- i.e., not copied from another. There is no requirement that the work be novel (as in patent law), unique or ingenious. To be creative, there must only be a modicum of creativity. The level required is exceedingly low; "even a slight amount will suffice."[23]

The final requirement for copyright protection is fixation in a tangible medium of expression. Protection attaches automatically to an eligible work of authorship the moment the work is sufficiently fixed.[24] A work is fixed "when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[25]
Congress provided considerable room for technological advances in the area of fixation by noting that the method of fixation in copies or phonorecords may be "now known or later developed." The Copyright Act divides the possible media for fixation into "copies" and "phonorecords":

"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.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

According to the House Report accompanying the Copyright Act of 1976, Congress intended the terms "copies" and "phonorecords" to "comprise all of the material objects in which copyrightable works are capable of being fixed.

The form of the fixation and the manner, method or medium used are virtually unlimited. A work may be fixed in "words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia"; may be embodied in a physical object in "written, printed, photographic, sculptural, punched, magnetic, or any other stable form"; and may be capable of perception either "directly or by means of any machine or device 'now known or later developed.'"

In digital form, a work is generally recorded (fixed) as a sequence of binary digits (zeros and ones) using media specific encoding. This fits within the House Report's list of permissible manners of fixation. Virtually all works also will be fixed in acceptable material objects -- i.e., copies or phonorecords. For instance, floppy disks, compact discs (CDs), CD-ROMs, optical disks, compact discs-interactive (CD-Is), digital tape, and other digital storage devices are all stable forms in which works may be fixed and from which works may be perceived, reproduced or communicated by means of a machine or device.

A transmission, in and of itself, is not a fixation. While a transmission may result in a fixation, a work is not fixed by virtue of the transmission alone. The Copyright Act provides that a work "consisting of sounds, images, or both, that are being transmitted" meets the fixation requirement "if a fixation of the work is being made simultaneously with its transmission." To obtain protection for a work under this "simultaneous fixation" provision, the simultaneous fixation of the transmitted work must itself qualify as a sufficient fixation.

A simultaneous fixation (or any other fixation) meets the requirements if its embodiment in a copy or phonorecord is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Works are not sufficiently fixed if they are "purely evanescent or transient" in nature, such as those projected briefly on a screen, shown electronically on a television or cathode ray tube, or captured momentarily in the 'memory' of a computer. Electronic network transmissions from one computer to another, such as e-mail, may only reside on
each computer in RAM (random access memory), but that has been found to be sufficient fixation.\textsuperscript{136}

\textit{b. Published and Unpublished Works}

Historically, the concept of publication has been a major underpinning of copyright law. Under the dual system of protection which existed until the 1976 Copyright Act took effect, unpublished works were generally protected under state law. Published works, on the other hand, were protected under Federal copyright law.\textsuperscript{137} On the effective date of the 1976 Act, Federal copyright protection became available for unpublished as well as published works.\textsuperscript{138} The concept of publication thus lost its "all-embracing importance" as the threshold to Federal statutory protection.\textsuperscript{127}

However, while the importance of publication has been reduced through amendment to the law (\textit{e.g.}, granting Federal protection to unpublished works and removing the notice requirement for published works), the status of a work as either published or unpublished still has significance under the Copyright Act. For example:

- only works that are published in the United States are subject to mandatory deposit in the Library of Congress;\textsuperscript{40}
- deposit requirements for registration with the Copyright Office differ depending on whether a work is published or unpublished;\textsuperscript{41}
- the scope of the fair use defense may be narrower for unpublished works;\textsuperscript{42}
- unpublished works are eligible for protection without regard to the nationality or domicile of the author;\textsuperscript{41}
- published works must bear a copyright notice if published before March 1, 1989;\textsuperscript{44} and
- certain limitations on the exclusive rights of a copyright owner are applicable only to published works.\textsuperscript{45}

The Copyright Act provides a definition of "publication" to draw the line between published and unpublished works:

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.\textsuperscript{46}

The definition uses the language of Section 106 describing the exclusive right of distribution, and was intended to make clear that "any form of dissemination in which a material object does not change hands -- performances or displays on television, for example -- is not a publication no matter how many people are exposed to the work."\textsuperscript{47} It also makes clear that the distribution must be "to the public."\textsuperscript{48} In general, the definition continues principles that had evolved through case law under previous copyright laws,\textsuperscript{49} including the doctrine of limited publication.\textsuperscript{50} The doctrine was developed by courts to save works from losing copyright protection when copies of the work were only distributed to a restricted number of people and for a restricted purpose without a
Those works would not be considered distributed to the public (i.e., published) and, therefore, not subject to the notice requirement. Although the notice requirement has been eliminated, and thus the most critical justification for the doctrine, the few cases dealing with publication since 1989 suggest that courts will continue to apply the doctrine of limited publication.\footnote{51}

c. Works Not Protected

Certain works and subject matter are expressly excluded from protection under the Copyright Act,\footnote{53} regardless of their originality, creativity and fixation. Titles, names, short phrases, and slogans generally do not enjoy copyright protection under the Copyright Act. Other material ineligible for copyright protection includes the utilitarian elements of industrial designs;\footnote{54} familiar symbols or designs; simple geometrical shapes; mere variations of typographic ornamentation, lettering or coloring; and common works considered public property, such as standard calendars, height and weight charts, and tape measures and rulers.

Copyright protection also does not 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 even if it meets the criteria for protection.\footnote{52} Thus, although a magazine article on how to tune a car engine is protected by copyright, that protection extends only to the expression of the ideas, facts and procedures in the article, not the ideas, facts and procedures themselves, no matter how creative or original they may be. Anyone may "use" the ideas, facts and procedures in the article to tune an engine -- or to write another article on the same subject. What may not be taken is the expression used by the original author to describe or explain those ideas, facts and procedures.\footnote{56}

Copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original -- for example . . . facts or materials in the public domain -- as long as such use does not unfairly appropriate the author's original contributions.\footnote{57}

This idea/expression dichotomy "assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."\footnote{58} Although it "may seem unfair that much of the fruit of the [author's] labor may be used by others without compensation," it is "a constitutional requirement" -- the "means by which copyright advances the progress of science and art."\footnote{59}

As a matter of law, copyright protection generally is not extended under the Copyright Act to works of the U.S. Government.\footnote{60} Therefore, nearly all works of the U.S. Government -- including this Report -- may be reproduced, distributed, adapted, publicly performed and publicly displayed without infringement liability in the United States under its copyright laws.\footnote{61} While the Copyright Act leaves most works created by the U.S. Government unprotected under U.S. copyright laws, Congress did not intend for the section to have any effect on the protection of U.S. government works abroad.\footnote{62}

d. Categories of Protectible Works

The Copyright Act enumerates eight broad categories of protectible subject matter:
(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.

**Literary Works**

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, films, tapes, disks, or cards, in which they are embodied.

Literary works include computer programs, articles, novels, directories, computer databases, essays, catalogs, poetry, dictionaries, encyclopedias, and other reference materials.

**Musical Works**

A musical work consists of the musical notes and lyrics (if any) in a musical composition. A musical work may be fixed in any form, such as a piece of sheet music or a compact disc. Musical works may be "dramatic," i.e., written as a part of a musical or other dramatic work, or "nondramatic," i.e., an individual, free-standing composition.

**Dramatic Works**

Generally, a dramatic work is one in which a series of events is presented to the audience by characters through dialogue and action as the events happen, such as in a play.

**Pantomimes and Choreographic Works**

This category was first added to the list of protectible subject matter in 1976. While pantomimes and choreographic works, such as dances, can be fixed in a series of drawings or notations, they are usually fixed on film or videotape.
Pictorial, Graphic and Sculptural Works

[P]ictorial and graphic works...include:

[T]wo-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.\[71\]

A work of art which is incorporated into the design of a useful article, but which can stand by itself as art work separate from the useful article, is copyrightable, but the design of the useful article is not.\[72\]

Motion Pictures and other Audiovisual Works

The Copyright Act provides definitions of "audiovisual works" and the subcategory "motion pictures":

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.\[73\]

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.\[74\]

The House Report notes that the key to the subcategory "motion pictures" is the conveyance of the impression of motion, and that such an impression is not required to qualify as an audiovisual work.\[75\]

Sound Recordings

A "sound recording" is the work that results from the fixation of sounds, including those that are musical or spoken.\[76\] When those sounds are included in an audiovisual work, such as a music video, they are considered part of the audiovisual work rather than a sound recording.\[77\]

Architectural Works

An "architectural work" is "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings."\[78\] It includes the overall form as well as the "arrangement and composition of spaces and elements" in the design of the building.\[79\]
Compilations and Derivative Works

A compilation is "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[80] Directories, databases, magazines and anthologies are types of compilations.

A derivative work is a work "based upon" one or more preexisting works.[81] A derivative work is created when one or more preexisting works is "recast, transformed, or adapted" into a new work, such as when a novel is used as the basis of a movie or when a drawing is transformed into a sculpture.[82] Translations, musical arrangements and abridgments are types of derivative works.

The Copyright Act makes clear that the subject matter of copyright specified in Section 102 (literary works, musical works, sound recordings, etc.) includes compilations and derivative works.[83] The copyright in a derivative work or compilation, however, extends only to the contribution of the author of the derivative work or compilation (the compiler), and does not affect the copyright protection granted to the preexisting material.[84] Protection for an individual musical work, for instance, is not reduced, enlarged, shortened or extended if the work is included in a collection, such as a medley of songs.

Moreover, copyright in a compilation or derivative work does not imply any exclusive right in the preexisting material employed in the compilation or derivative work.[85] The copyright in a compilation, for example, is limited to the original selection or arrangement of the facts or other elements compiled; protection for the compilation in no way extends to the facts or elements.[86] Copyright protection is not granted simply for the hard work that may be involved in compiling facts. The Supreme Court struck down the doctrine that had protected such efforts, known as the "sweat of the brow" or "industrial collection" theory.[87]

"Multimedia" Works

Increasingly, works from different categories are fixed in a single tangible medium of expression.[88] . . .

A prefatory note may be warranted because of the manner in which these terms are used in the context of copyright law. The terms "multimedia" and "mixed media" are, in fact, misnomers. In these works, it is the types or categories of works that are "multiple" or "mixed" -- not the types of media. The very premise of a so-called "multimedia" work is that it combines several different elements or types of works (e.g., text (literary works), sound (sound recordings), still images (pictorial works), and moving images (audiovisual works)) into a single medium (e.g., a CD-ROM) -- not multiple media.[89] However, in recognition of the prevalent use of the term, this Report refers to this type of work as a "multimedia" work.
Multimedia works are not categorized separately under the Copyright Act; nor are they explicitly included in any of the eight enumerated categories. While most current multimedia works would be considered compilations, that classification does not resolve the issue of subject matter categorization.

Despite the fact that the Copyright Act enumerates eight categories of works, works that do not fit into any of the categories may, nevertheless, be protected. The list of protectible works in Section 102 is intended to be illustrative rather than inclusive. The House Report explains that the categories of works "do not necessarily exhaust the scope of 'original works of authorship' that the [Copyright Act] is intended to protect." However, absent the addition of a new category, a work that does not fit into one of the enumerated categories is, in a sense, in a copyright no-man's land.

Under the current law, the categorization of a work holds a great deal of significance under the Copyright Act. For instance, two of the exclusive rights granted in Section 106 apply only to certain categories of works. In addition, many of the limitations on rights in Sections 108 through [122] are not applicable to all types of works. Therefore, categorization of multimedia and other new types of works is an important issue.

Generally, multimedia works include two or more of the following preexisting elements: text (literary works), computer programs (literary works), music (musical works and sound recordings), still images (pictorial and graphic works) and moving images (audiovisual works). The definition of "literary works" begins with the phrase "works, other than audiovisual works . . . ." Therefore, a reasonable interpretation may be that text and computer programs that would otherwise be categorized as literary works may be considered part of an audiovisual work if included in a work of that type. Such is also the case with sound recordings. A music video is not categorized as both a sound recording and an audiovisual work; it is categorized as an audiovisual work.

Audiovisual works also include still images -- at least related ones. Therefore, in many instances, a multimedia work may be considered -- as a whole -- an audiovisual work. The legislative history makes clear that a work in one category may contain works in other categories.

3. Copyright Ownership

Copyright ownership in a work initially vests in the author of the work. If the work is a "joint work" (a work with two or more authors), the authors are co-owners of the copyright in the work.

Under certain circumstances, the copyright in a work is not granted to the actual preparer of the work. In the case of "works made for hire," the employer of the preparer or the person for whom the work was prepared is considered the "author" for purposes of the Copyright Act. There are two types of works made for hire -- those prepared by an employee and those prepared by an independent contractor by special order or commission. The copyright in a work prepared by an employee within the scope of employment vests in the employer, and the employer is the author. The copyright in a work specially ordered or commissioned vests in the person for whom the work was
prepared if the work falls into one of nine specified categories and if the parties expressly agree in writing that the work will be considered a work made for hire.\[105\]

Copyright ownership entitles the copyright owner to:

- exercise the exclusive rights granted under Section 106;
- authorize others to exercise any of those exclusive rights; and
- prevent others from exercising any of those exclusive rights.

An important distinction to understand is the difference between ownership of a *copyright* in a work and ownership of a *copy* of a work. Ownership of a copy -- the material object in which a copyrighted work is embodied (e.g., a book, CD or videocassette) -- carries with it no interest in the copyright.\[106\]

Ownership of a copyright, or 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 first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.\[107\]

Ownership, possession or any other attachment to or relationship with a copy of a copyrighted work (including obtaining access to it through a computer network or other service) does not entitle one to exercise any of the exclusive rights of the copyright owner (e.g., to reproduce it or to perform it publicly).

**a. Transfer of Ownership**

Copyright ownership, or ownership of any of the exclusive rights (in whole or in part), may be transferred to one or more persons.\[108\] A transfer of rights must be in writing and must be signed by the transferor.\[109\] A transfer may occur through an assignment, exclusive license, mortgage, "or any other conveyance, alienation, or hypothecation" of a copyright or any of the exclusive rights.\[110\] A transfer of copyright ownership may be limited in time or in place, but it must be an exclusive transfer of whatever right or rights are involved (i.e., nonexclusive licenses are not considered transfers of ownership).\[111\] Any of the exclusive rights in the work\[112\] may be separately transferred and owned, and the owner of a particular right is considered the "copyright owner" with respect to that right.\[113\]

In the case of any copyrighted work other than a "work made for hire," all transfers of copyright ownership (as well as all nonexclusive licenses) executed by the author of the work may be terminated by the author 35 years after the transfer.\[114\] This right to terminate, intended to protect authors, cannot be waived by contract or other agreement.\[115\] However, termination is not automatic; an author must assert his or her termination rights and comply with certain statutory requirements to regain copyright ownership.\[116\]
b. Licensing

The exclusive rights of a copyright owner may be licensed on an exclusive basis (i.e., copyright ownership in one or more rights is transferred by the copyright owner) or on a nonexclusive basis (i.e., the copyright owner retains ownership of the copyright and may grant similar licenses to others). A nonexclusive licensee is not a copyright owner and thus does not have standing to sue for any infringement of the copyright in the work by others. Unlike exclusive licenses, nonexclusive licenses need not be in writing.

4. Term of Protection

[NOTE: Copyright terms of protection have been extended since the White Paper was published. See Sony Bono Copyright Term Extention Act, P.L. 105-298. Current term lengths are in brackets.]

Generally, a copyrighted work is protected for the length of the author's life plus another 70 years. In the case of joint works, copyright protection is granted for the length of the life of the last surviving joint author plus another 70 years. Works made for hire, as well as anonymous and pseudonymous works, are protected for a term of either 95 years from the year of first publication or 120 years from the year of creation, whichever is shorter. When the term of protection for a copyrighted work expires, the work falls into the "public domain."

5. Notice, Deposit and Registration

Prior to the United States accession to the Berne Convention and the concomitant amendments to the Copyright Act, a copyright notice was required on all publicly distributed copies or phonorecords of works. Omission of the notice could result in the loss of copyright protection for the work. However, in 1989, the use of a copyright notice became permissive rather than required. Section 401(a) of the Copyright Act provides:

Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright . . . may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

If a copyright notice is used, it generally must consist of three elements:

- the letter "C" in a circle (©) or the word "Copyright" or the abbreviation "Copr." (in the case of sound recordings embodied in phonorecords, the letter "P" in a circle);
- the year of first publication of the work; and
- the name of the owner of copyright in the work.

As a general rule, two copies of a published work must be deposited in the Copyright Office within three months of publication for the benefit of the Library of Congress. The Register of Copyrights may exempt categories of works from the deposit
requirements. The Register may also require only one copy of the work or allow alternative forms of deposit.  Although required by the Copyright Act, the deposit of copies is not a prerequisite to or condition of copyright protection. Failure to deposit copies of a work after a written demand by the Register of Copyrights, however, generally results in the imposition of a fine.

Registration with the Copyright Office is permissive, rather than mandatory. It is not a prerequisite to the grant of exclusive rights. It is, however, generally a prerequisite to the enforcement of those rights in court. The copyright owner of a work (or the owner of any of the exclusive rights) may register the copyright in the work by depositing with the Copyright Office a completed application form, registration fee and a copy or copies of the work. The deposit requirement under the Act may be fulfilled through the registration procedures.

Although not required, registration may be advisable. A certificate of copyright registration constitutes prima facie evidence of the validity of the copyright and the facts stated in the certificate, if registration is made within five years of first publication. In addition, certain remedies are available in infringement suits only if registration is made prior to the date of the infringement or within three months of first publication. . . .

6. Exclusive Rights

The Copyright Act grants copyright owners certain exclusive rights that, together, comprise the bundle of rights known as copyright. (Limitations on the exclusive rights and infringement of the rights are discussed in subsequent sections. The fact that a particular use of a copyrighted work is said to implicate one or more of the rights, therefore, does not necessarily mean that such use is an infringement or unlawful.)

The exclusive rights of the copyright owner include --

(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; and

(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.
a. The Right to Reproduce the Work

The fundamental right to reproduce copyrighted works in copies and phonorecords has been implicated in innumerable transactions. For example, when a computer user accesses a document resident on another computer, the image on the user's screen exists under contemporary technology -- only by virtue of the copy that is reproduced in the user's computer memory.

b. The Right to Prepare Derivative Works

The copyright law grants copyright owners the right to control the abridgment, adaptation, translation, revision or other "transformation" of their works. A user who modifies -- by annotating, editing, translating or otherwise significantly changing -- the contents of a downloaded file creates a derivative work. Derivative works may also be created by transforming a work, such as an audiovisual work, into an interactive work.

c. The Right to Distribute Copies

The right to distribute legitimate copies of works is substantially circumscribed by the "first sale" doctrine:

Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

This means that the copyright owner generally has only the right to authorize or prohibit the initial distribution of a particular lawful copy of a copyrighted work. It is important to understand, however, that the distribution of an unlawfully made (i.e., infringing) copy will subject any distributor to liability for infringement.

d. The Right to Perform the Work Publicly

The public performance right is available to all types of "performable" works -- literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works -- with the exception of sound recordings. [NOTE: The public performance right in sound recordings by means of digital transmission is retained. See 17 U.S.C. § 106(6)].

A distinction must be made between transmissions of copies of works and transmissions of performances or displays of works. When a copy of a work is transmitted over wires, fiber optics, satellite signals or other modes in digital form so that it may be captured in a user's computer, without the capability of simultaneous "rendering" or "showing," it has rather clearly not been performed. Thus, for example, a file comprising the digitized version of a motion picture might be transferred from a copyright owner to an end user via the Internet without the public performance right being implicated. When, however, the motion picture is "rendered" -- by showing its images in sequence -- so that
users with the requisite hardware and software might watch it *with or without copying the performance*, then, under the current law, a "performance" has occurred.

The "public" nature of a performance -- which brings it within the scope of copyright -- is sufficiently broadly defined to apply to multiple individual viewers who may watch a work being performed in a variety of locations at several different times. . . .

*e. The Right to Display the Work Publicly*

. . . .To display a work means to "show a copy of it, either directly or by means of a . . . television image, or any other device or process . . . ."

A display is "public" on the same terms as a performance is "public". . . .

7. **Limitations on Exclusive Rights**

The copyright law provides a number of exceptions to the "exclusive" rights of copyright owners. The Copyright Act specifies that certain uses of copyrighted works are outside the control of the copyright owner. While many regard these exceptions as rights of users, they are, as a technical matter, outright exemptions from liability or affirmative defenses to what would otherwise be acts of infringement.

*a. Fair Use*

The most significant and, perhaps, murky of the limitations on a copyright owner's exclusive rights is the doctrine of fair use. Fair use is an affirmative defense to an action for copyright infringement. It is potentially available with respect to all manners of unauthorized use of all types of works in all media. When it exists, the user is not required to seek permission from the copyright owner or to pay a license fee for the use.

The doctrine of fair use is rooted in some 200 years of judicial decisions. The most common example of fair use is when a user incorporates some portion of a pre-existing work into a new work of authorship. For example, a quotation from a book or play by a reviewer, or the incidental capturing of copyrighted music in a segment of a television news broadcast is fair use. In the recent *Campbell* case, the Supreme Court expressly accepted the proposition that such "transformative" uses are more favored in fair use analyses than uses that amount to little more than verbatim copying. As one moves away from such transformative uses into the area of uses that -- for practical purposes -- compete with the copyright owner's exploitation of the work, the analysis becomes more difficult (as the number of litigated cases grows).

Before examining the doctrine developed by the courts, it is useful to examine the statutory language concerning fair use. Section 107 of the Copyright Act provides:

> 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 [sic], 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.\[149\]

The language may usefully be divided into two parts: the first sentence, which is largely tautological ("fair use . . is not an infringement of copyright"), and the analysis required by the second sentence. The recitation of assorted uses in the middle of the first sentence has been held neither to prevent a fair use analysis from being applied to other "unlisted" uses nor to create a presumption that the listed uses are fair.\[150\] It does, however, provide some guidance on the types of activities which might be considered fair use.

The core of Section 107 is the second sentence, in which Congress elaborates a test similar to that articulated by Justice Story more than 150 years ago.\[151\] It is clear that courts must evaluate all four factors in determining whether a particular use is fair, but may also take into account unenumerated "extra" factors, when appropriate.

. . . .

**Fair Use Guidelines for Libraries and Educational Institutions**

The fair use, library copying and educational use provisions of the current copyright law have been the subject of four sets of "guidelines" for libraries and educational institutions, to which contending parties agreed, that are enshrined at various places in the legislative history.\[152\] The result has been, in certain circumstances, a quantitative gloss on the construction of fair use and library copying privileges. For instance, the classroom guidelines generally permit the copying, for educational purposes, of short extracts of works, provided that the copying is spontaneously done or requested by the instructor (and the copies are neither used nor re-made repeatedly over time).\[153\]

. . . .

**b. Library Exemptions**

[**NOTE**: Similar exemptions for libraries and educational users have been granted for the removal of copyright management information under the Digital Millenium Copyright Act. See 17 U.S.C. § 1201].

Section 108 of the Copyright Act provides that in certain circumstances and under certain conditions it is not an infringement of copyright for a library or archives, or its employees acting within the scope of their employment,\[154\] to reproduce or distribute one copy or
phonorecord of a work under circumstances that would typically not amount to fair use. The conditions of the library exemption are that (1) the reproduction or distribution must be made without any purpose of direct or indirect commercial advantage; (2) the collections of the library must be open to the public or available not only to researchers affiliated with the library, but also to other persons doing research in a specialized field; (3) the reproduction or distribution of the work must include a notice of copyright; and (4) a specific exemption in subsections (b) through (g) of Section 108 applies.

The exemptions granted under Section 108 extend only to isolated and unrelated reproduction of a single copy or phonorecord of the same material on separate occasions, and do not apply to (1) musical works; (2) pictorial, graphic, or sculptural works; or (3) motion pictures or other audiovisual works, except news programs.

The circumstances under which a library may reproduce or distribute a copyrighted work without infringement liability include:

**Archival Copies**

A library may reproduce and distribute a copy or phonorecord of an unpublished work reproduced in facsimile form if the sole purpose is preservation and security, and if the copy or phonorecord reproduced is currently in the collection of the library. The House Report notes that this right "would extend to any type of work, including photographs, motion pictures and sound recordings." However, the copy or phonorecord made must be in "facsimile form." A library may "make photocopies of manuscripts by microfilm or electrostatic process, but [may] not reproduce the work in 'machine-readable' language for storage in an information system." Thus, this exemption does not allow for preservation in electronic or digital form.

**Replacement Copies**

A library may reproduce a published work duplicated in facsimile form solely for the purpose of replacing a copy or phonorecord that is damaged, deteriorated, lost or stolen, if the library has, after reasonable efforts, determined that an unused replacement cannot be obtained at a fair price. Again, the copy or phonorecord made must be in "facsimile form." The exemption does not allow for replacement of a published work by reproduction in digital form (at least when the original copy of the published work was not in digital form).

**Articles and Short Excerpts for Users**

A library may make and distribute a copy of one article or other contribution to a copyrighted collection or periodical issue, or a copy or phonorecord of a small part of any other copyrighted work at the request of a user, subject to two conditions. First, the copy or phonorecord must become the property of the user, and the library or archives must have no notice that the copy or phonorecord will be used for any purpose other than private study, scholarship, or research. Second, the library or archives must prominently display a warning of copyright at the place where orders are accepted and on its order form.
Out-of-Print Works for Scholarly Purposes

A library may make and distribute a copy or phonorecord of an entire work if it has determined that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, subject to two additional conditions. First, the copy or phonorecord must become the property of the user, and the library or archives must have no notice that the copy or phonorecord will be used for any purpose other than private study, scholarship, or research. Second, the library or archives must prominently display a warning of copyright at the place where orders are accepted and on its order form.

News Programs

A library may reproduce and distribute by lending a limited number of copies of an audiovisual news program.

Interlibrary Loan

The Copyright Act allows a library to make single copies of copyrighted works and to enter into interlibrary arrangements, but prohibits copying "in such aggregate quantities as to substitute for a subscription to or purchase of [a copyrighted] work." CONTU offered its offices to the interested parties -- copyright owners, educators and libraries -- to develop guidelines to interpret the quoted phrase. The parties were successful in defining when such copying for the purpose of "borrowing" was not done in such aggregate quantities as to substitute for the subscription to or purchase of a work. These so-called CONTU Guidelines were later included in the Conference Report on the Copyright Act of 1976. The guidelines provide that a library may "borrow" not more than five copies per year of articles from the most recent five years of any journal title.

c. First Sale Doctrine

A fundamental tenet of copyright law, and another limitation on the exclusive rights, is the "first sale doctrine," which prevents an owner of copyright in a work from controlling subsequent transfers of copies of that work. Once the copyright owner transfers ownership of a particular copy (a material object) embodying a copyrighted work, the copyright owner's exclusive right to distribute copies of the work is "extinguished" with respect only to that particular copy.

Section 109(a) of the Copyright Act provides:

Notwithstanding the provisions of section 106(3) [which grants copyright owners the exclusive right to distribute copies or phonorecords of a work], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

This limitation on the copyright owner's distribution right allows wholesalers who buy books to distribute those copies to retailers and retailers to sell them to consumers and
consumers to give them to friends and friends to sell them in garage sales and so on -- all without the permission of (or payment to) the copyright owner of the work.

The first sale doctrine allows the owner of a particular copy of a work to dispose of possession of that copy in any way -- for example, by selling it, leasing it, loaning it or giving it away. However, there is an exception to this exemption with respect to two types of works -- computer programs and sound recordings. The owner of a particular copy of a computer program or a particular phonorecord of a sound recording may not rent, lease or lend that copy or phonorecord for the purpose of direct or indirect commercial advantage. These exceptions were enacted because of the ease with which reproductions of those works can be made at a lower cost than the original with minimum degradation in quality.

This provision of the first sale doctrine limits only the copyright owner's distribution right; it in no way affects the reproduction right. Thus, the first sale doctrine does not allow the transmission of a copy of a work (through a computer network, for instance), because, under current technology the transmitter retains the original copy of the work while the recipient of the transmission obtains a reproduction of the original copy (i.e., a new copy), rather than the copy owned by the transmitter. The language of the Copyright Act, the legislative history and case law make clear that the doctrine is applicable only to those situations where the owner of a particular copy disposes of physical possession of that particular copy.

The requirement that copies distributed under the doctrine be "lawfully made" under the Copyright Act does not limit the doctrine's application to copies made or authorized by the copyright owner. A copy could be "lawfully made," for example, if the reproduction is lawful under the fair use provision; the distribution of such a copy would be permitted within the limits of the first sale doctrine.

A copyright owner's exclusive right to publicly display copies of a work is also limited by Section 109:

> Notwithstanding the provisions of section 106(5) [which grants copyright owners the exclusive right to display publicly copies of a work], the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

Thus, an art gallery that purchases a painting may publicly display it without liability. The owner of a particular copy of an electronic audiovisual game intended for use in coin-operated equipment may also publicly perform or display that game in that equipment.
d. Educational Use Exemptions

Section 110(1) exempts from infringement liability the performance or display of a copyrighted work in the course of face-to-face teaching activities by a non-profit educational institution in a classroom or similar setting. Section 110(2) exempts from liability the transmission of a performance or display of a copyrighted work if (1) the performance or display is a regular part of the systematic instructional activities of the non-profit educational institution; (2) the performance or display is directly related and of material assistance to the teaching content of the transmission; and (3) the transmission is made primarily for reception in classrooms or similar places or by persons to whom the transmission is directed because of their disabilities.

Like the library exemptions, the educational use exemptions are provided in addition to the fair use and other general exemptions, which are also available to educational institutions.

e. Other Limitations

Reproduction of Computer Programs

The rights of an owner of a copyright in a computer program are limited such that the owner of a particular copy of a computer program may make a copy or adaptation of the program as an "essential step" in using the computer program in a computer or for archival purposes. This limitation applies only with respect to "owners" of copies of programs, not licensees, borrowers or mere possessors.

Certain Performances and Displays

Certain performances and displays are exempt from infringement liability under Section 110 of the Copyright Act, including:

- the performance or display of certain works in the course of religious services;
- the performance of certain works by governmental or non-profit agricultural or horticultural organizations;
- the performance of certain musical works in retail outlets for the sole purpose of promoting retail sales;
- the transmission of performances of certain works to disabled persons; and
- the performance of certain works at non-profit veterans' or fraternal organizations for charitable purposes.

The "communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes" is also exempted if there is no direct charge to see or hear the transmission and the transmission is not further transmitted to the public. This exemption allows proprietors to play radios or televisions (i.e., to perform or display
copyrighted works in those radio or television transmissions) in public establishments such as restaurants, beauty shops and bars.\[187]\ldots

### Ephemeral Recordings

Section 112 provides that it is not an infringement of copyright for a "transmitting organization" that has the right to transmit to the public a performance or display of a work "to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display" under certain conditions.\[188]\]

### Compulsory Licenses

Sections 111 and 119 are compulsory licensing provisions that allow cable systems and satellite operators to retransmit copyrighted programming without infringement liability if they pay a statutory licensing fee (which is then distributed among the copyright owners of the programming retransmitted).\[189]\] A compulsory license under Section 111 is only available to a "cable system," which is defined as "a facility . . . that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations . . . .". . . .

Compulsory licenses are also available for the public performance of nondramatic musical works by means of jukeboxes,\[190]\] for the use of certain works in connection with noncommercial broadcasting,\[191]\] and for the reproduction and distribution of nondramatic musical works in the course of making and distributing phonorecords of such works.\[192]\]

### 8. Copyright Infringement

#### a. General

Anyone who, without the authorization of the copyright owner, exercises any of the exclusive rights of a copyright owner, as granted and limited by the Copyright Act, is an infringer of copyright.\[193]\] Thus, any activity that falls within the scope of the exclusive rights of the copyright owner is an infringement and the infringer is liable, unless it is authorized by the copyright owner or is excused by a defense (such as fair use) or an exemption.\[194]\] For purposes of this discussion of infringement, the lack of such authorization, defense or exemption is generally presumed.

Copyright infringement is determined without regard to the intent or the state of mind of the infringer; "innocent" infringement is infringement nonetheless.\[195]\] Moreover, although the exclusive rights refer to such rights with respect to "copies" (plural) of the work,\[196]\] there is no question that under the Act the making of even a single unauthorized copy may constitute an infringement.\[197]\]

Courts generally use the term "copying" as shorthand for a violation of any of the exclusive rights of the copyright owner (not just the reproduction right). Courts usually require a copyright owner to prove ownership of the copyrighted work and "copying" by the defendant to prevail in an infringement action.

Since there is seldom direct evidence of copying (witnesses who actually saw the defendant copy the work, for instance), a copyright owner may prove copying through
circumstantial evidence establishing that the defendant had access to the original work and that the two works are substantially similar. Other indications of copying, such as the existence of common errors, have also been accepted as evidence of infringement.\textsuperscript{198}

The copying of the copyrighted work must be copying of protected expression and not just ideas;\textsuperscript{199} likewise, the similarity between the two works must be similarity of protected elements (the expression), not unprotected elements (the facts, ideas, etc.). The portion taken must also be more than \textit{de minimis}.

The similarity between the two works need not be literal (\textit{i.e.}, phrases, sentences or paragraphs need not be copied verbatim); substantial similarity may be found even if none of the words or brush strokes or musical notes are identical.\textsuperscript{200} Various tests have been developed to determine whether there has been sufficient non-literal copying to constitute substantial similarity between a copyrighted work and an allegedly infringing work.\textsuperscript{201} Judge Learned Hand articulated the well-known "abstractions test," where the expression and the idea are, in essence, treated as ends of a continuum, with infringement found if the allegedly infringing work crosses the line delineating the two.\textsuperscript{202} Such a line, as Judge Hand recognized, is not fixed in stone; indeed, as he put it, its location must "inevitably be \textit{ad hoc} . . . " The "pattern" test has also been suggested, where infringement is found if the "pattern" of the work is taken (in a play, for instance, the "sequence of events, and the development of the interplay of characters").\textsuperscript{204}

The "subtractive" test -- which dissects the copyrighted work, disregards the noncopyrightable elements, and compares only the copyrightable elements of the copyrighted work to the allegedly infringing work -- has been the traditional method for determining substantial similarity.\textsuperscript{205} Following the 1970 Ninth Circuit decision in \textit{Roth Greeting Cards v. United Card Co.},\textsuperscript{206} the "totality" test became popular for determining substantial similarity. The totality test compares works using a "total concept and feel" standard to determine whether they are substantially similar. Although chiefly used by the Ninth Circuit in the 1970s and 1980s,\textsuperscript{207} the test was used by other circuits as well.

The Ninth Circuit further defined an "extrinsic/intrinsic" test in proof of substantial similarity in \textit{Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.}\textsuperscript{208} The intrinsic portion of the test measures whether an observer "would find the total concept and feel of the works" to be substantially similar.\textsuperscript{209} The extrinsic portion of the test, meanwhile, is an objective analysis of similarity based on "specific criteria that can be listed and analyzed." Thus, this test requires substantial similarity "not only of the general ideas but of the expressions of those ideas as well."\textsuperscript{210}

More recently, however, both the Ninth and Second Circuits have moved away from the totality test, particularly with respect to computer applications. In \textit{Data East USA, Inc. v. Epyx, Inc.},\textsuperscript{212} the Ninth Circuit rediscovered "analytic dissection of similarities" in the substantial similarity determination of video games.\textsuperscript{213} Similarly, the Second Circuit, in \textit{Computer Associates International, Inc. v. Altai, Inc.},\textsuperscript{214} fashioned an "abstraction-filtration-comparison test" for a computer program that combined Judge Learned Hand's "abstraction" test (to separate ideas from expression) and "filtration" reminiscent of traditional "subtraction" analysis in distinguishing protectible from non-protectible material.
In addition to the evolution of substantial similarity tests, there is disagreement as to the appropriate "audience" for determining substantial similarity. The "ordinary observer test" -- alluded to in Arnstein v. Porter[215] and followed in a number of Second Circuit decisions[216] -- considers the question of substantial similarity from the viewpoint of the "average lay observer."[217] The Fourth Circuit, however, set forth a modified test in Dawson v. Hinshaw Music Inc.,[218] requiring the ordinary observer to be the "intended" audience for the particular work. Relying on decisions by both the Ninth and Seventh Circuits,[219] the court in Dawson stated:

[i]f the lay public fairly represents the intended audience, the court should apply the lay observer formulation of the ordinary observer test. However, if the intended audience is more narrow in that it possesses specialized expertise, . . . the court's inquiry should focus on whether a member of the intended audience would find the two works to be substantially similar.[220]

The challenge of this test, especially in more advanced technologies, is determining when, if ever, a work is not directed to an audience possessing specialized expertise, and at what point a work once intended for a specialized audience becomes accepted by the general public. . . .

b. Infringing Importation

The exclusive right to distribute copies or phonorecords includes the right to limit the importation of copies or phonorecords of a work acquired outside the United States into the U.S. without the authority of the copyright owner.[221] Such unauthorized importation, whether it be of pirated items (i.e., "copies or phonorecords made without any authorization of the copyright owner")[222] or "gray market" products (i.e., those copies or phonorecords legally produced overseas for foreign distribution, but not authorized for the U.S. market),[223] is an infringement of the distribution right.[224]

There are three exceptions to the importation right, which include a "suitcase" exception that exempts importation for the private use of the importer of one copy of a work at a time or of articles in the personal baggage of travelers entering the United States.[225]

. . . .

c. Contributory and Vicarious Liability

Direct participation in infringing activity is not a prerequisite for infringement liability, as the Copyright Act grants to copyright owners not only the right to exercise the exclusive rights, but also the right "to authorize" the exercise of those rights. The inclusion of the right "to authorize" was "intended to avoid any questions as to the liability of contributory infringers" -- those who do not directly exercise the copyright owner's rights, but "authorize" others to do so.[226] Other than the reference to a copyright owner's right "to authorize" exercise of the exclusive rights, however, the Copyright Act does not mention or define "contributory infringement" or "vicarious liability," the standards for which have developed through case law.[227]

If someone has the "right and ability" to supervise the infringing action of another, and that right and ability "coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials -- even in the absence of actual knowledge" that the
infringement is taking place -- the "supervisor" may be held vicariously liable for the infringement. Vicarious liability is based on a connection to the direct infringer (not necessarily to the infringing activity).

The best known copyright cases involving vicarious liability are the "dance hall" cases, where vicarious liability was found when dance hall owners allowed the unauthorized public performance of musical works by the bands they hired, even when the owners had no knowledge of the infringements and had even expressly warned the bands not to perform copyrighted works without a license from the copyright owners.

"Contributory infringement" may be found when "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." Contributory infringement is based on a connection to the infringing activity (not necessarily to the direct infringer). A contributory infringer may be liable based on the provision of services or equipment related to the direct infringement.

Services

Liability may be based on the provision of services related to the infringement. Courts have found contributory infringement liability, for instance, when a defendant chose the infringing material to be used in the direct infringer's work, and vicarious liability when a defendant was responsible for the day-to-day activities where the infringement took place.

Equipment

[NOTE: Under 17 U.S.C. § 1201, the sale of devices or services that are primarily used to circumvent copyright management information is prohibited.]

Infringement liability may also be based on the provision of equipment or other instrumentalities or goods used in or related to the infringement. However, the Supreme Court in Sony Corp. v. Universal City Studios, Inc., a 5 to 4 decision, held that the manufacturer of videocassette recorders was not a contributory infringer for providing the equipment used in the unauthorized reproduction of copyrighted works. Borrowing a patent law principle, the Court reasoned that manufacturers of staple articles of commerce that are capable of substantial noninfringing uses should not be held liable as contributory infringers. The Court held:

[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

The Court determined that the key question was whether the videocassette recorder was "capable of commercially significant noninfringing uses." The Court also held that in an action for contributory infringement against a manufacturer of copying devices, "the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome."
d. On-Line Service Provider Liability

[NOTE: On-line service provider liability is addressed by the D.M.C.A.'s "Safe Harbor" provision, 17 U.S.C. § 512].

. . . .

e. Civil Remedies

[NOTE: Statutory damages have been increased since the White Paper was published. Current damage amounts appear in brackets.]

Various remedies are available to copyright owners in infringement actions. A copyright owner may seek a preliminary or permanent injunction to prevent or restrain infringement.[240] Courts generally grant permanent injunctions where liability is established and there is a threat of continuing infringement.[241] Courts may also order the impounding of all copies or phonorecords at any time an action is pending.[242] As part of a final judgment, the court may order the destruction (or any other "reasonable disposition") of the infringing copies or phonorecords.[243]

At any time before final judgment is rendered, a copyright owner may elect to recover actual damages and profits of the infringer or be awarded statutory damages.[244] Actual damages may be awarded in the amount of the copyright owner's losses plus any profits of the infringer attributable to the infringement (that are not taken into account in the calculation of the losses).[245] Statutory damages may be awarded in an amount between [$750] to [$30,000] per work infringed.[246]

If an infringer can show that he or she was not aware and had no reason to believe that the activity constituted an infringement, the court may find there was an innocent infringement.[247] Such a finding is a factual determination, and does not absolve the defendant of liability for the infringement.[248] It does, however, give the court discretion to reduce the amount of damages awarded to the copyright owner.[249]

If a copyright owner can show that the infringement was willful, the court may increase statutory damages up to a maximum of [$150,000.][250] An infringement may be found to be willful if the infringer had knowledge that the activity constituted infringement or recklessly disregarded the possibility of infringement.[251]

Courts have discretion to allow the recovery of full costs by or against any party other than the United States or its officer.[252] Courts may also award reasonable attorney's fees to the prevailing party under certain circumstances.[253]

f. Criminal Offenses

Criminal sanctions are levied against infringers if the infringement was willful and for purposes of commercial advantage or private financial gain.[254] Criminal proceedings must begin within three years after the criminal action arose. Where there is a conviction, the court must order the forfeiture and destruction or other disposition of all infringing copies and "all implements, devices, or equipment" used in the manufacture of the infringing copies.[255]

. . . .

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The Copyright Act also makes certain non-infringements criminal acts, including:

- the placement, with fraudulent intent, of a copyright notice that a person knows to be false on any article;[236]

- the public distribution or importation for public distribution, with fraudulent intent, of any article containing a copyright notice the distributor or importer knows to be false;[237]

- the removal or alteration, with fraudulent intent, of any notice of copyright on a copy of a copyrighted work;[238] and

- false representation, with knowledge, of a material fact in an application for copyright registration or in any written statement filed in connection with an application.[239]

g. Defenses

The Supreme Court has stated that "[a] successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of the copyright."[240] There are a number of legal and equitable defenses available to defendants in copyright infringement actions. Fair use is the most common of the defenses.[241] Others include misuse of copyright by the copyright owner,[242] abandonment of copyright,[243] estoppel, collateral estoppel, laches, res judicata, acquiescence, and unclean hands.

Generally, a claim of innocent infringement is not a defense against a finding of infringement. An innocent infringer is liable for the infringement, but a court may reduce -- or, in some instances, remit altogether -- the amount of damages.[244] However, under certain, specified circumstances, a good faith reliance on a presumption that the term of protection had expired is a complete defense to an infringement action.[245]

As noted earlier, certain uses do not rise to the level of infringement, such as reproduction of a de minimis portion of a work.[246] In those cases, the plaintiff will not be able to sustain its burden of proof and no defense will be necessary.[247] In other cases, a defendant may successfully assert that the activity is noninfringing due to the existence of a license -- statutory, negotiated or implied.[248]

. . . .

9. International Implications

a. Background

. . . .

U.S. copyright industries are significant contributors to the United States' current trade accounts, reducing our balance of payments deficit by some $45.8 billion in 1993. Inadequacies in the present system of intellectual property protection for copyrights and neighboring or related rights, and the consequent losses to these industries from piracy and from trade barriers arising from differences in forms of protection, have been estimated by industry to cost them $15 to 17 billion annually. Improved protection for
copyrights and neighboring rights would contribute to reducing these losses and improving the balance of payments.\textsuperscript{720}

\(.\ldots\)

\(b.\) International Framework

In the 1970s, then-U.S. Register of Copyrights Barbara Ringer observed that if Justice Story considered copyright to be the metaphysics of the law, then international copyright is its cosmology. That message is brought home to us in 1995 by the need to evaluate the applicability of copyright in the context of the complexities of international commerce in information and entertainment products via advanced information infrastructures.

First, one must understand that there is no such thing as an international copyright, but rather, there is an international system that sets norms for protection to be implemented in national laws. Several international treaties link together the major trading nations and establish both minimum standards for protecting, under their own laws, each others' copyrighted works and the basis upon which protection is to be extended (e.g., national treatment).

The situation is further complicated because there are two major legal traditions applicable to the protection of what the United States regards as copyrighted works. To understand the complexities of the international copyright law system and the international treaties, it is necessary to have a basic appreciation of these two major legal regimes.\textsuperscript{721}

The United States and other countries that follow the Anglo-American or common law legal tradition have "copyright" systems in which the principal focus is on promoting the creation of new works for the public benefit by protecting the author's economic rights. This is seen as part of the basic "social contract" between the State and its citizens. This theory is reflected in the patent and copyright clause in Article 1, Section 8, clause 8 of the U.S. Constitution. The thesis is that providing such protection will induce the creation of more works which will "promote the progress of science" and redound to the public benefit. History has validated this principle which benefits the public as well as creators of copyrighted works.

Countries that follow the civil law tradition, however, regard authors' rights as natural human rights, or part of one's right of personality. As a part of this tradition, in addition to the protection of the author's economic rights, the protection of the author's "moral rights" is an essential part of the system.\textsuperscript{722} Moral rights, as reflected in Article 6bis of the Berne Convention, include the right of an author to be named as the author of a work and the right to object to uses of the work which could bring dishonor or discredit on the author's reputation. Often, in civil law systems, moral rights reflect a part of the author's personality and are non-transferable, and may be not waivable. Economic rights, in some instances, may be subordinated to moral rights. Under these systems, only works which are original, in that they reflect the personality of the author, are entitled to authors' rights protection. Productions that do not meet this originality requirement, but still merit some protection, are protected under a system of "neighboring rights."
Needless to say, with such divergent theoretical bases, the copyright and the authors’ rights systems are sometimes in conflict. One of these areas of conflict is in the nature and level of rights for owners of neighboring rights.

Neighboring rights are similar to the rights protected by copyright or authors' rights and are applied to protect the rights of producers of phonograms, performers and broadcasters. Under the copyright system, many of the rights covered under neighboring rights are protected as copyright rights. For example, under the U.S. copyright law, sound recording producers and performers are regarded as joint authors of sound recordings. Under droit d'auteur (or authors' rights) systems, such producers' and performers' rights would be protected as neighboring rights. Neighboring rights, while similar in economic character to authors' rights, may be protected at a lower level than authors' rights and are entirely separate and distinct from the higher-level rights granted to authors.

c. International Treaties and Agreements

The World Intellectual Property Organization (WIPO)

WIPO is responsible for the administration of, and activities concerning revisions to, the international intellectual property treaties. The principal WIPO copyright and neighboring rights conventions include the Berne Convention for the Protection of Literary and Artistic Works (Paris 1971) (Berne Convention), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), and the Geneva Convention for the Protection of Producers of Phonograms Against the Unauthorized Reproduction of their Phonograms (Geneva Phonograms Convention). UNESCO and WIPO jointly administer the Universal Copyright Convention (Paris 1971), which is a lower-level copyright convention that was negotiated in the years following World War II largely to bring the United States into the world of international copyright. Virtually all of the members of the Universal Copyright Convention are also members of the Berne Convention, and by the terms of the conventions the Berne Convention governs relations between members of both.

The Berne Convention is the principal international copyright convention and includes the most detailed provisions. In 1989, the United States joined the Berne Convention, which is the largest copyright convention. While it is generally regarded as providing adequate international standards of protection, some believe that it should be updated to account for advances in electronic communications and information processing technology. Its members come from the world's major legal traditions -- the Anglo-American common law copyright system and the European civil law droit d'auteur system. However, despite its level of detail, as previously noted, and in part because it must accommodate differing legal traditions, in some areas its standards may be insufficient to deal with the world of digital dissemination of copyrighted works.

The principal treaty for the protection of neighboring rights, the Rome Convention, was adopted in 1961, and is considered by many to include standards that are inadequate for dealing with the problems raised by current technological advances and the level of trade in the products and subject matter affected by its operation. It provides for the protection
of producers of phonograms against unauthorized reproduction of their phonograms, for
performers to prevent certain reproductions and fixations of their performances and it
provides limited rights for broadcasting organizations. The Rome Convention requires
that these rights endure for a period of 20 years. It also provides for protection against
certain "secondary uses" of phonograms, such as broadcasting, but it contains the ability
for members to reserve, or decline to implement, this right. The United States is not a
signatory to the Rome Convention.

The Geneva Phonograms Convention provides for the protection of phonograms against
unauthorized reproduction and distribution for a minimum term of 20 years. It does not
require signatories to provide a performance right in sound recordings. The United States
belongs to the Geneva Phonograms Convention.

WIPO has convened a Committee of Experts on a Possible Protocol to the Berne
Convention to account for developments since the 1971 revision of the Convention, and a
Committee of Experts on a Possible New Instrument for the Protection of Performers and
Producers of Phonograms to consider how to provide improved rights for performers and
producers of phonograms.

The World Trade Organization (WTO)

In addition to the traditional WIPO forum, other international fora now have a significant
role in intellectual property policy formulation. The TRIPs Agreement, concluded during
the recent Uruguay Round Negotiations, is administered by the World Trade
Organization (WTO). The TRIPs Agreement sets significant standards for the protection
of copyright and related rights. Perhaps most importantly, it contains provisions to ensure
that parties to the TRIPs Agreement fully implement obligations under it.

After defining the relationship between the TRIPs Agreement and the Berne Convention,
the TRIPs Agreement reiterates the basic principle of copyright protection -- that
protection extends only to expression and not to ideas, methods of operation, or
mathematical concepts.

Article 10 of the TRIPs Agreement confirms that all types of computer programs are
"literary works" under the Berne Convention, and requires each WTO country to protect
them as such. It also requires copyright protection for compilations of data or other
material that are original by reason of their selection or arrangement.

Article 11 of the TRIPs Agreement requires member countries to provide exclusive rights
for authors or their successors in title to authorize or to prohibit commercial rental to the
public of originals or copies of their copyrighted works for at least computer programs
and cinematographic works. The obligation as to rental rights for cinematographic works
need not be implemented unless rental has led to widespread copying that is having a
material effect on the author's exclusive right of reproduction.

Article 12 of the TRIPs Agreement provides minimum standards for the term of
protection for copyrighted works. The term of protection for most works is the life of the
author plus 50 years, but whenever the term of protection is not linked to the life of a
person, it must be a minimum of fifty years, except for works of applied art or photographs.

Article 9(2) of the Berne Convention bars imposition of limitations on, or exceptions to, the reproduction right except when such limits or exceptions do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Article 13 of the TRIPs Agreement widens the scope of this provision to all exclusive rights in copyright and related rights, thus narrowly circumscribing the limitations and exceptions that WTO member countries may impose.\[281\]

Article 14 of the TRIPs Agreement goes beyond the obligations of the Rome Convention and the Geneva Phonograms Convention and requires member countries to provide sound recording producers a 50-year term of protection and the rights to authorize or prohibit the direct or indirect reproduction and commercial rental of their sound recordings. However, a WTO member country that on April 15, 1994, had a system of payment of equitable remuneration to compensate for rental of recordings is permitted to keep that system.\[282\]

The Agreement requires WTO countries to make it possible for performers to prevent unauthorized sound recording or reproduction of their live performances. Broadcasting organizations are to be accorded similar rights, although member countries have the option of providing protection consistent with the Rome Convention or providing owners of copyright in works broadcast the right to prevent the same acts. The Agreement also makes Article 18 of the Berne Convention regarding copyright protection of existing works applicable to sound recordings.

d. Copyright Compared to Authors' Rights

Countries with common-law copyright systems such as the United States, and countries with authors' rights systems such as those in Europe, have in some cases defined the rights of certain categories of right holders differently. For instance, European performers, both in audiovisual works and in sound recordings, enjoy certain statutory rights that U.S. performers do not. In the United States, these performers' rights are guaranteed under contractual or collective bargaining agreements between the audiovisual producers and the performers' unions. Broadcasters have been concerned that harmonization of protection along European lines might have implications for the establishment of performance rights in sound recordings. A consequence of this divergence is that U.S. performers and producers have been denied the ability to share in remuneration for the use of their products and performances in some countries.

e. National Treatment

The principle of national treatment is the cornerstone of the great international intellectual property treaties -- Berne and Paris. It also has been the keystone of international trade treaties, such as the General Agreement on Tariffs and Trade and the recently established WTO. It is of enormous significance to our copyright industries. As a general matter, the principle of national treatment means that under a nation's laws, a foreigner enjoys no lesser rights and benefits than a citizen of that nation receives, subject
to the specific terms of the relevant international conventions. In copyright terms, it means, for example, that a German work for which copyright enforcement is sought in the United States would be treated under U.S. law exactly as if it were a U.S. work.

The Berne Convention

Article 5(1) and 5(2) of the Berne Convention establish the principle of national treatment for works protected by copyright. Under Article 5(1), there is an obligation to grant to nationals of countries of the Berne Union national treatment in respect of the rights specifically covered by the Convention. This point is not disputed. However, with respect to any new rights which may be hereafter granted, some have taken the position that the national treatment obligation applies only to the minimum rights in the Convention.

The Rome Convention

The fundamental problem with the Rome Convention is that, while it generally imposes a national treatment obligation, it permits a number of reservations and exceptions that allow a Member to avoid that obligation for important rights otherwise provided for in the Convention. Article 3.1 of the TRIPs Agreement provides that "[i]n respect of performers, producers of phonograms and broadcasting organizations, this obligation [national treatment] only applies in respect of the rights provided under this Agreement." It also provides that a Member may avail itself of the "possibilities provided in . . . paragraph 1(b) of Article 16 of the Rome Convention . . ." relating to reciprocity for the broadcasting right in respect of phonograms.

The TRIPs Agreement

Additionally, the TRIPs Agreement includes a national treatment obligation. In respect of copyright the TRIPs national treatment provision incorporates the standards of the Berne Convention, but in respect of neighboring rights, it allows members to impose the exceptions to national treatment permitted by the Rome Convention.

The NAFTA

The NAFTA includes a very broad national treatment provision that does not include the possibility of making the broad exceptions provided for under the TRIPs agreement.

f. Private Copying Royalty Systems

France's Law of July 3, 1985 (1985 Law) establishes a system of neighboring rights protection for performers, audiovisual communication enterprises, producers of phonograms and producers of videograms. The 1985 Law, *inter alia*, grants specified categories of right holders an entitlement to equitable remuneration in respect of the private copying of their works. Some of the 1985 law's provisions are based on reciprocity and thus discriminate against, for example, foreign motion picture interests.
Consequently, those provisions may be inconsistent with France's obligations under the Berne Convention and the Universal Copyright Convention, at least to the extent that they apply to Berne or UCC protected subject matter and rights.

**g. Moral Rights**

The author's moral rights are provided for under Article 6bis of the Berne Convention which requires recognition of the right of an author to be named as the author of a work (the right of paternity) and the right for an author to object to uses of a work which would bring dishonor or discredit on his or her reputation (the right of integrity). The controversy over moral rights was one of the reasons that kept the United States out of the Berne Convention for over a century. However, during that time our legal regime evolved and when the United States finally joined Berne, the Congress determined that no changes to U.S. law were necessary to comply with the moral rights provisions of Article 6bis. Congress found that the existing panoply of remedies available under U.S. common law, various state statutes and Federal laws provided sufficient moral rights protection. These findings were explicitly stated in the Berne Convention Implementing Act. When the Congress was convinced that enhanced protection for moral rights was necessary, legislation was passed.

**h. Conflict of Laws**

Conflict of laws issues may arise in copyright infringement actions. Resolution of these issues determines what country's law the court should apply. If the infringer and the infringement are in the United States, the U.S. Copyright Act would apply. However, different situations may present themselves which will raise conflict issues. For instance, users in country A, where certain actions are not considered copyright infringements, may use works located on servers in country B, where such actions are. Which country's law controls the resolution of a copyright infringement dispute -- the country from which a copyrighted work is uploaded or to which it is downloaded, or the country where the host server is located? In the case of direct transmissions, which country's law applies -- the country of origin of the transmission or the transmitter, or the country of the reception? It may be that rights of the copyright owner are exercised in each country. These issues, however, may be no more problematic than the current conflict issues that arise due to the use of telephones, fax machines or modems in international commerce.

**i. Harmonization of International Systems**

There is little dispute that worldwide high-speed digital communications networks will have an enormous effect on the way in which works of authorship will be created, stored, communicated to the public, distributed and paid for. The communication revolution is now bringing new opportunities and new challenges to creators and users of intellectual property.

As we move toward a world where dissemination of entertainment and information products through on-demand delivery services operating through interactive digital information communications networks is the norm, it may be necessary to harmonize
levels of protection under disparate systems of copyright, authors’ rights and neighboring rights, and consideration should be given to ways to bridge the gaps among these systems. . . .
White Paper - Endnotes

1 See U.S. Const., art. I, § 8, cl. 8.

2 On August 18, 1787, James Madison submitted to the delegates to the Constitutional Convention a list of powers to be granted Congress, which included the power "To secure to literary authors their copyrights for a limited time" and "To encourage, by premiums and provisions, the advancement of useful knowledge and discoveries." At the same time, Charles Pinckney submitted a list which included the power "To grant patents for useful inventions" and "To secure to authors exclusive rights for a certain time." On September 5, the clause "To promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries" was agreed to unanimously. On September 17, 1787, the draft was signed by the delegates to the convention with no substantive changes. See Debates on the Adoption of the Federal Constitution as reported by James Madison. The clause was finally ratified in its present form in 1788. George Washington signed the first copyright law on May 31, 1790.

3 The Federalist No. 43 (James Madison).


5 Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985) (hereinafter Harper & Row). See also id. at 546 ("monopoly created by copyright thus rewards the individual author in order to benefit the public").


10 Harper & Row, supra note 5, at 545-46 (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).


13 Id.

14 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

15 H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909) (report accompanying the Copyright Act of 1909, the first comprehensive revision of the copyright laws).

16 See discussion of term of protection infra and fair use and other limitations on an author's exclusive rights infra .

17 See discussion of unprotected subject matter infra .


19 Fogerty, supra note 6, at 1030.
20 17 U.S.C. § 102(a) (1988 & Supp. V 1993). The Copyright Act specifically excludes from protectible subject matter any "idea, procedure, process, system, method of operation, concept, principle or discovery" even if it meets the criteria for protection. See 17 U.S.C. § 102(b) (1988). The Copyright Act also preempts any grant of equivalent rights for works of authorship within the specified subject matter. Section 301 provides:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by section 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.


21 Many courts consider creativity to be an element of originality. For purposes of discussion, we examine originality and creativity as separate requirements.


23 Feist, supra note 7, at 345 ("vast majority of works make the grade quite easily, as they possess some creative spark").

24 Copyright protection literally begins when, for instance, the ink dries on the paper. There are no prerequisites, such as registration or affixation of a copyright notice, for obtaining or enjoying copyright protection.


29 House Report at 53, reprinted in 1976 U.S.C.C.A.N. 5666-67. This Report generally uses the term "copy" or "copies" to refer to copies and phonorecords except in those instances where the distinction is relevant.


31 See id.

32 See, e.g., Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 855 (2d Cir. 1982) (putting work in "memory devices" of a computer "satisf[ies] the statutory requirement of a 'copy' in which the work is 'fixed'").

33 See 17 U.S.C. § 101 (1988) (definition of "fixed"); see also Baltimore Orioles, Inc. v. Major League Baseball Players Assoc., 805 F.2d 663, 668 (7th Cir. 1986) (telecasts that are videotaped at the same time that they are broadcast are fixed in tangible form), cert. denied, 480 U.S. 941 (1987); National Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 731-32 (8th Cir. 1986) ("the legislative history [of the Copyright Act] demonstrates a clear intent on the part of Congress to resolve, through the definition of 'fixation', . . ., the status of live broadcasts, using -- coincidentally but not insignificantly -- the example of a live football game"). It is understood that the "fixation" must be made or authorized by the author.


See Advanced Computer Services of Michigan Inc. v. MAI Systems Corp., 845 F. Supp. 356, 363 (E.D. Va. 1994) (conclusion that program stored only in RAM is sufficiently fixed is confirmed, not refuted, by argument that it "disappears from RAM the instant the computer is turned off"; if power remains on (and the work remains in RAM) for only seconds or fractions of a second, "the resulting RAM representation of the program arguably would be too ephemeral to be considered 'fixed'"; Triad Systems Corp. v. Southeastern Express Co., 1994 U.S. Dist. LEXIS 5390, at *15-19 (N.D. Cal. March 18, 1994) ("[C]opyright law is not so much concerned with the temporal 'duration' of a copy as it is with what that copy does, and what it is capable of doing, while it exists. 'Transitory duration' is a relative term that must be interpreted and applied in context.").


17 U.S.C. § 407 (1988). "[T]he owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of 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, together with any printed or other visually perceptible material published with such phonorecords." 17 U.S.C. § 407(a) (1988). The deposit requirements are not conditions of copyright protection, but failure to deposit copies of a published work may subject the copyright owner to significant fines. See, 17 U.S.C. § 104(a) (1988).

See 17 U.S.C. § 408(b) (1988) ("the material deposited for registration shall include -- (1) in the case of an unpublished work, one complete copy or phonorecord; (2) in the case of a published work, two complete copies or phonorecords of the best edition; (3) in the case of a work first published outside the United States, one complete copy or phonorecord as so published; (4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work").

The first factor of the fair use analysis -- the nature of the copyrighted work -- generally weighs against a finding of fair use if the work is unpublished. See Harper & Row, supra note 5. In 1992, Congress was prompted to amend Section 107 by the near determinative weight courts were giving to the unpublished nature of a work. See Act of October 24, 1992, Pub. L. 102-492, 1992 U.S.C.C.A.N. (106 Stat.) 3145 (adding to the fair use provisions, "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.").


49 See 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 4.04 (1994) (hereinafter Nimmer on Copyright). In a couple of aspects, the concept of publication was broadened to include the authorization of offers to distribute copies in a commercial setting and the distribution to certain middlemen, such as retailers, motion picture exhibitors and television stations. See Paramount Pictures Corp. v. Rubinowitz, 217 U.S.P.Q. 48, 50 (E.D.N.Y. 1981) (discussing evolution of definition of publication); National Broadcasting Co., Inc. v. Sonneborn, 630 F. Supp. 524, 532-33 (D. Conn. 1985).


51 See White v. Kimmell, 193 F.2d 744, 746-47 (9th Cir. 1952). Before the notice requirement was eliminated, the Copyright Act generally provided for the invalidation of the copyright in a work if copies of the work were distributed to the public, under the authority of the copyright owner, without a copyright notice. In virtually all instances where limited publication was applied, the distribution was noncommercial in nature.

52 See Academy of Motion Picture Arts and Sciences v. Creative House Promotions, Inc., 944 F.2d 1446, 1451-54 (9th Cir. 1991) (distribution of personalized Oscar statuettes to select group of distinguished artists constituted limited publication); Lish v. Harper's Magazine Found., 807 F. Supp. 1090, 1102 (S.D.N.Y. 1992) (letter distributed to members of class remained unpublished).

53 See 37 C.F.R. § 202.1(a) (1994); see also, e.g., Takeall v. PepsiCo Inc., 29 U.S.P.Q.2d 1913, 1918 (4th Cir. 1993) (unpublished) (holding phrase "You Got the Right One, Uh-Huh" is not copyrightable and, thus, was not infringed by commercial using phrase "You Got the Right One Baby, Uh-Huh"). While short phrases may not be copyrightable standing alone, they may be protected as part of a larger, copyrighted work. See, e.g., Dawn Assocs. v. Links, 203 U.S.P.Q. 831, 835 (N.D. Ill. 1978) (holding phrase "When there is no room in hell . . . the dead will walk the earth" to be an integral part of a copyrighted advertisement, and defendant's unauthorized use of it demonstrated likelihood of success on the merits of infringement suit); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183-85 (S.D.N.Y. 1991) (finding lyric "alone again" to be protected as part of a copyrighted work and infringed by defendant rap artist's "sampling"). Short phrases may also be eligible for trademark protection if used to identify goods or services.

54 In Mazer v. Stein, the Supreme Court held that works of art which are incorporated into the design of useful articles, but which can stand by themselves as art works separate from the useful articles, are copyrightable. See 347 U.S. 201, 214-17 (1954). See also 17 U.S.C. § 101 (defining "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information"); 17 U.S.C. § 101 (in the definition of "pictorial, graphic, and sculptural works" noting that "the design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article"). The House Report indicates that the required separability may be physical or conceptual. See House Report at 55, reprinted in 1976 U.S.C.C.A.N. 5668; see also Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980).

55 17 U.S.C. § 102(b) (1988); see Feist, supra note 7, at 359 ("facts contained in existing works may be freely copied"); Harper & Row, supra note 5, at 547 ("no author may copyright facts or ideas").

56 The ideas are not protected; the expression is. Baker v. Seldon, 101 U.S. 99, 103 (1879); Beal v. Paramount Pictures Corp., 20 F.3d 454, 458-59 (11th Cir.), cert. denied, 115 S. Ct. 675 (1994); see also Harper & Row, supra note 5, at 547-48 ("copyright is limited to those aspects of the work -- termed 'expression' -- that display the stamp of the author's originality"). The line between idea and expression is not easy to draw. The distinction is not that one is fixed and the other is not -- they are both fixed in the
copyrighted work of authorship. At some point, the idea becomes detailed enough to constitute expression. Judge Learned Hand explained:

Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

*Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

57 *Harper & Row*, supra note 5, at 548.


59 *Feist*, supra note 7, at 349-50.

60 17 U.S.C. § 105 (1988). There are limited exceptions to this noncopyrightability provision. For instance, the Secretary of Commerce is authorized to secure copyright on behalf of the United States "in all or any part of any standard reference data which he prepares or makes available" under the Standard Reference Data Program. See 15 U.S.C. § 290(e) (1988). Works of the U.S. Postal Service, such as designs on postage stamps, are also copyrightable by the Postal Service. See House Report at 60, *reprinted in* 1976 U.S.C.C.A.N. 5674 ("the Postal Service could . . . use the copyright law to prevent the reproduction of postage stamp designs for private or commercial non-postal services"). Copyright interests transferred to the U.S. Government by assignment, bequest or otherwise may be held and enforced by it. See 17 U.S.C. § 105 (1988).

61 A work of the U.S. Government is a work "prepared by an officer or employee of the United States Government as part of that person's official duties." (definition of "work of the United States Government"). Although the wording of this definition is not identical to that of a "work made for hire," the concepts "are intended to be construed in the same way." House Report at 58, *reprinted in* 1976 U.S.C.C.A.N. 5672. See discussion of works made for hire infra notes and accompanying text.


68 A phonorecord generally embodies two works -- a musical work (or, in the case of spoken word recordings, a literary work) and a sound recording. Musical works available through services on the NII may also be the subject of Musical Instrument Digital Interface ("MIDI") recordings. A MIDI is a data stream between a musical unit in a computer and a music-producing instrument. The data stream instructs the instrument, such as a synthesizer, on what notes to play.


72 Mazer v. Stein, 347 U.S. 201, 214-17 (1954); see supra note 25.


77 The sounds accompanying an audiovisual work are specifically excluded from the definition of sound recordings. See id.


79 Id.

80 17 U.S.C. § 101 (1988) (definition of "compilation"). A "collective work," which is one kind of "compilation," is "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101 (1988) (definition of "collective work").


82 See id.


85 Id.

86 See Feist, supra note 7, at 350-51 (alphabetical "arrangement" of comprehensive list of telephone subscribers not sufficiently "original" and therefore noncopyrightable); see also supra. . . (discussion of the noncopyrightability of facts).

87 See Feist, supra note 7, at 354 ("to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors'").

88 The embodiment of two or more different types of works in one medium is not a new concept. For instance, a book may contain both a literary work and pictorial works. A compact disc may contain a musical work and a sound recording.

89 A true "multimedia" work would be one in which several material objects, such as a book, a videocassette and an audiocassette, are bundled into one product.

90 See discussion of compilations supra. . .

91 While expressly protected under the Copyright Act, the category of "compilations" is not a particularly useful subject matter category. Works in any of the eight enumerated categories of protectible subject matter outlined above may take the form of a compilation, and a protectible compilation must fit into one or more of the subject matter categories. "A compilation or derivative work is copyrightable if it represents an
'original work of authorship' and falls within one or more of the categories listed in section 102." House Report at 57, reprinted in 1976 U.S.C.C.A.N. 5670 (emphasis added).

92 The list "sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories." House Report at 53, reprinted in 1976 U.S.C.C.A.N. 5666.


94 It should be noted that the Copyright Office classifies works into four broad categories for purposes of registration: nondramatic literary works, works of performing arts, works of visual arts, and sound recordings. See 37 C.F.R. § 202.3(b)(i)-(iv) (1994). The Copyright Office notes that in cases "where a work contains elements of authorship in which copyright is claimed which fall into two or more classes, the application should be submitted in the class most appropriate to the type of authorship that predominates in the work as a whole." See 37 C.F.R. § 202.3(b)(2) (1994). However, the Copyright Act makes clear that the Copyright Office classification of works for purposes of registration "has no significance with respect to the subject matter of copyright or the exclusive rights provided." See 17 U.S.C. § 408(c)(1) (1988); see also House Report at 153, reprinted in 1976 U.S.C.C.A.N. 5769 ("[i]t is important that the statutory provisions setting forth the subject matter of copyright be kept entirely separate from any classification of copyrightable works for practical administrative purposes").

95 See, e.g., 17 U.S.C. § 106(4), (5) (1988 & Supp. V 1993). The public performance right is limited to literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. The public display right is limited to 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. Id.


98 The definition of "sound recordings" explicitly excludes from the category of sound recordings musical, spoken or other sounds "accompanying a motion picture or other audiovisual work . . . ." See 17 U.S.C. § 101 (1988) (definition of "sound recordings"). The definition of "audiovisual works" also expressly includes any "accompanying sounds." See 17 U.S.C. § 101 (1988) (definition of "audiovisual works").

99 Audiovisual works are "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment . . . ." 17 U.S.C. § 101 (1988) (definition of "audiovisual works").

100 Categories are "overlapping in the sense that a work falling within one class may encompass works coming within some or all of the other categories." House Report at 53, reprinted in 1976 U.S.C.C.A.N. 5666.

A "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (1988) (definition of "joint work").

This legal conclusion may only be altered by the parties in a written instrument signed by them expressly agreeing otherwise. Id.

The Copyright Act does not define "employee." In 1989, the Supreme Court held that an employment relationship determination for copyright purposes should be made by reference to the "general common law of agency." See Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740-41 (1989). The central question in an agency law inquiry is whether the hiring party has the "right to control the manner and means by which the product is accomplished." Id. at 751. The factors to be considered include the skill required, the source of the instrumentalities and tools used in creating the work, where the work was created, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the method of payment, the extent of the hired party's discretion over when and how long to work, the hired party's role in hiring and paying assistants, whether the hiring party is in business and whether the work is part of the regular business of the hiring party, the provision of employee benefits, and the tax treatment of the hired party. Id. at 751-52. The Court did not specify any factors that should be weighed more heavily than others, but made clear that an "employee" under the Copyright Act is not limited to a formal, salaried employee.

To qualify as a work made for hire under the second prong, the work must be specially ordered or commissioned for use as (1) a contribution to a collective work, (2) part of an audiovisual work, (3) a translation, (4) a supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test or (9) an atlas. 17 U.S.C. § 101 (1988) (definition of "work made for hire").


An exclusive license is considered a transfer of copyright and, therefore, must be in writing. Although an exclusive license may be limited in time, place or scope, it nevertheless extends the benefits of copyright ownership with respect to the rights granted to the licensee for the duration of the license. The rights of a copyright owner may also be licensed on a nonexclusive basis to one or more licensees. The Copyright Act does not require nonexclusive licenses to be in writing.

With the exception of transfers by operation of law, all transfers of copyright ownership must be in writing. 17 U.S.C. § 204(a) (1988) ("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").


See discussion of the exclusive rights of a copyright owner infra . . .
See 17 U.S.C. § 501(b) (1988) ("legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it"). In certain circumstances, television broadcast stations and others are treated as legal or beneficial owners and may bring actions for infringement by cable systems and satellite carriers. See 17 U.S.C. § 501(c), (d), (e) (1988).

However, like exclusive licenses, nonexclusive licenses may be terminated 35 years after the effective date of the license. See 17 U.S.C. §§ 203(a) (1988), 304(c) (1988 & Supp. V 1993).


The term for anonymous or pseudonymous works differs if the identity of one or more of the authors is revealed before the end of the term of protection. See id.

The public domain is the legal status of works whose term of copyright protection has ended or which are not protected for other reasons, such as the noncopyrightability of the subject matter.

Copyright notice is still required on copies and phonorecords of works publicly distributed prior to March 1, 1989, the effective date of the Act.

The copyright owner of a sound recording may also place a notice of copyright on publicly distributed phonorecords of the sound recording. 17 U.S.C. § 402(b) (1988).

Registration is required before a suit for infringement may be brought for works of U.S. origin and for foreign works from countries which are not members of the Berne Convention.

Only one copy of the work is required for certain types of works, including unpublished works.

The weight to be accorded a certificate when registration has been made more than five years from the date of first publication is within the discretion of the court. 17 U.S.C. § 410(c) (1988).

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Section 106(A) grants additional rights for certain works of visual art in single copies or limited editions. The development of the NII does not raise unique issues with respect to those rights. See 17 U.S.C. § 106(A) (Supp. V 1993).


A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.' 17 U.S.C. § 101 (1988) (definition of "derivative work").

The current law addresses only transmissions of "performances" and "displays."

Although sometimes referred to as "rights" of the users of copyrighted works, "fair use" and other exemptions from infringement liability are actually limitations on the rights of the copyright owners. Thus, as a technical matter, users are not granted affirmative "rights" under the Copyright Act; rather, copyright owners' rights are limited by exempting certain uses from liability. It has been argued, however, that the Copyright Act would be unconstitutional if such limitations did not exist, as they reduce First Amendment and other concerns. Others have argued that fair use is an anachronism with no role to play in the context of the NII.

The judicially created doctrine, although now codified in the Copyright Act, has been described as "so flexible as virtually to defy definition." See Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

As an affirmative defense, the burdens of persuasion and coming forward with evidence both must be carried by defendants to avoid liability (i.e., a copyright owner need not prove an accused use not fair, but, rather, the defendant must prove its fairness).

Id.

See id.


Harper & Row, supra note 5, at 561.

Justice Story stated that courts should "look to the nature and the objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

Existing guidelines cover certain copying by and for teachers in the classroom context, the copying of music for educational purposes, the copying of relatively recent journal articles by one library for another, and the off-air videotaping of educational broadcast materials.

154 Hereinafter, the term "library" will be used to refer to a library or archives, or any of its employees acting within the scope of their employment.


163 Id.


165 Id.


172 See 17 U.S.C. § 109(b)(1)(A) (Supp. V 1993). The prohibition with respect to record rental does not apply to nonprofit libraries or nonprofit educational institutions for nonprofit purposes. Id. In addition, a nonprofit educational institution may transfer possession of a lawfully made copy of a computer program to another nonprofit educational institution or to faculty, staff and students. Id. Nonprofit libraries may also lend a computer program for nonprofit purposes if each copy has a copyright warning affixed to the package. 17 U.S.C. § 109(b)(2)(A) (Supp. V 1993). The prohibition with respect to computer program rental does not apply to a computer program "which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product" or "a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes." 17 U.S.C. § 109(b)(1)(B) (Supp. V 1993).

See 17 U.S.C. § 109(a) (1988) ("the owner of a particular copy or phonorecord . . . is entitled . . . to sell or otherwise dispose of the possession of that copy or phonorecord"); House Report at 79, reprinted in 1976 U.S.C.C.A.N. 5693 (under the first sale doctrine in Section 109 "the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns 'a particular copy or phonorecord lawfully made under this title' and who wishes to transfer it to someone else . . .") See also, e.g., Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 159 (3d Cir. 1984) ("first sale doctrine prevents the copyright owner from controlling the future transfer of a particular copy once its material ownership has been transferred").


Section 109(e) reversed the decision in Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275 (4th Cir. 1989), cert. denied, 493 U.S. 1058 (1990), which held that video games could not be operated in an arcade without the permission of the copyright owner because such operation entailed violation of the copyright owner's exclusive rights to perform and display the work publicly. Section 109(e), however, does not allow the public display or performance of any other work of authorship embodied in the audiovisual game if the copyright owner of the game is not also the copyright owner of the other work. See 17 U.S.C. § 109(e) (Supp. V 1993).


Section 117 of the Copyright Act provides:

Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

17 U.S.C. § 117 (1988 & Supp. V 1993). Any identical copies made in accordance with Section 117 "may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program." Adaptations made may be transferred only with the authorization of the owner of the copyright in the original program. Id.


188 See 17 U.S.C. § 112(a) (1988). This limitation of the copyright owner's reproduction right is applicable only if:

(1) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(2) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(3) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

Id.

189 See 17 U.S.C. §§ 111, 119 (1988 & Supp. V 1993). These provisions are referred to as "compulsory licenses" because under such provisions, copyright owners are compelled to grant the licenses. No license agreements are signed and the terms of such licenses are set forth in the statute; the copyright owner cannot object to the use of the work and must be satisfied with the license fees collected under the statute, which are distributed among all of the affected copyright owners by arbitrators impaneled by the Librarian of Congress.

190 See 17 U.S.C. § 116 (Supp. V 1993). This compulsory license may only be invoked if private negotiations fail to produce a consensual license.


193 See 17 U.S.C. § 501(a) (Supp. V 1993). Anyone who "trespasses into [the copyright owner's] exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute" is an infringer of the copyright. Sony, supra note 9, at 433.

194 See discussion of the scope of the exclusive rights supra... For instance, activities such as loading a work into a computer, scanning a printed work into a digital file, uploading or downloading a work between a user's computer and a BBS or other server, and transmitting a work from one computer to another may be infringements (in those cases, of the reproduction right). See, e.g., MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) (the turning on of the computer, thereby causing the operating system to be copied into RAM, constituted an infringing reproduction of the copyrighted software); Advanced Computer Services v. MAI Systems Corp., 845 F. Supp. 356 (E.D. Va. 1994) (loading software into computer's random access memory constituted infringing reproduction); see also 2 Nimmer on Copyright § 8.08 at 8-103 (1993) ("input of a work into a computer results in the making of a copy, and hence... such unauthorized input infringes the copyright owner's reproduction right").

195 The innocence or willfulness of the infringing activity may be relevant with regard to the award of statutory damages. See 17 U.S.C. § 504(c) (1988); see also discussion of remedies infra... 


197 See House Report at 61, reprinted in 1976 U.S.C.C.A.N. 5674 ("references to 'copies or phonorecords' are intended [in Section 106(1)-(3)] and throughout the bill to include the singular"; "the right 'to reproduce the copyright work in copies or phonorecords' means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated... "). Further evidence of the intent of Congress to make even a single act of unauthorized reproduction an infringement is found in specific exemptions created for certain single-copy uses. See, e.g., 17 U.S.C. §§ 108(a), 108(f)(2), 112(a) (1988); see also Texaco, supra... 

publishers of directories and other compilations to deliberately insert mistakes into the work (such as periodically adding a fictitious name, address and phone number in a telephone directory) to detect and help establish copying. See 2 H. Abrams, The Law of Copyright § 14.02[B][3][c], at 14-19 to 20 (1993).

199 This should be implied in the requirement that there be copying of the copyrighted work. Ideas and facts, of course, are not copyrightable. In the case of compilations, such as databases, if enough facts are copied, the copyrighted expression (the selection, arrangement or coordination of the facts) may be copied and infringement may be found. See CONTU Final Report at 42 ("The use of one item retrieved from such a work -- be it an address, a chemical formula, or a citation to an article -- would not . . . conceivably constitute infringement of copyright. The retrieval and reduplication of any substantial portion of a data base, whether or not the individual data are in the public domain, would likely constitute a duplication of the copyrighted element of a data base and would be an infringement.").

200 See Donald v. Zack Meyer's T.V. Sales & Service, 426 F.2d 1027, 1030 (5th Cir. 1970) ("paraphrasing is equivalent to outright copying"), cert. denied, 400 U.S. 992 (1971); Davis v. E.I. DuPont de Nemours & Co., 240 F. Supp. 612, 621 (S.D.N.Y. 1965) ("paraphrasing is tantamount to copying in copyright law"); see generally 3 Nimmer on Copyright § 13.03[A] at 13-28 to 13-58 (1993). Nimmer identifies two bases upon which courts impose liability for less than 100 percent verbatim copying: (1) "fragmented literal similarity" (where words, lines or paragraphs are copied virtually word-for-word, although not necessarily verbatim) and (2) "comprehensive nonliteral similarity" (where the "fundamental essence or structure" of a work is copied); see also P. Goldstein, Copyright § 7.2.1 at 13-17 (1989). Goldstein identifies three types of similarity: (1) where the infringing work "tracks" the original work "in every detail," (2) "striking similarity" (where a brief portion of both works is "so idiosyncratic in its treatment as to preclude coincidence") and (3) similarities that "lie beneath the surface" of the works ("[i]ncident and characterization in literature, composition and form in art, and rhythm, harmony and musical phrases in musical composition"). Id. at 13 (citations omitted).

201 For analyses of the various tests that have been used, see 3 Nimmer on Copyright § 13.03[A] at 13-28 to -58 (1993); M. Leaffer, Understanding Copyright Law §§ 9.5 - 9.7 at 268-76 (1989).

202 See Nichols v. Universal Pictures, Corp., 45 F.2d 119, 121 (2d Cir. 1930).

203 See Peter Pan Fabrics Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960).

204 See Z. Chaffee, Reflections on the Law of Copyright: I, 45 Columbia L. Rev. 503, 513 (1945).

205 See Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 908-09 (3d Cir.), cert. denied, 423 U.S. 863 (1975) (subtracting all but the "stick figures" from chart as non-protectible subject matter); Alexander v. Haley, 460 F. Supp. 40, 46 (S.D.N.Y. 1978) (finding "alleged infringements display no similarity at all in terms of expression or language, but show at most some similarity of theme or setting. These items, the skeleton of creative work rather than the flesh, are not protected by the copyright laws.").

206 See 429 F.2d 1106 (9th Cir. 1970).

207 See, e.g., Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); McCulloch v. Albert E. Price, Inc., 823 F.2d 316 (9th Cir. 1987).

208 Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).

209 See Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991).


211 Krofft, supra note 139, at 1164.

212 862 F.2d 204 (9th Cir. 1988).
213 See also Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1445 (9th Cir. 1994) (approving of district court's use of analytical dissection and agreeing with other courts' use of the "same analysis although articulated differently").


215 154 F.2d 464 (2d Cir. 1946).

216 See, e.g., Peter Pan Fabrics, Inc v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960); Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021 (2d Cir. 1966); Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498 (2d Cir. 1982).

217 Ideal Toy Corp. at 1023 n.2.

218 905 F.2d 731 (4th Cir. 1990).

219 See Aliotti v. R. Dakin & Co., 831 F.2d 898, 902 (9th Cir. 1987) (holding that perceptions of children must be considered in substantial similarity analysis because they are intended market for product); Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 619 (7th Cir.), cert. denied, 459 U.S. 880 (1982) (holding that "[v]ideo games, unlike an artist's painting, . . . appeal to an audience that is fairly undiscriminating insofar as their concern about more subtle differences in artistic expression").

220 Dawson, supra . .


223 Id. (Section 602 covers "unauthorized importation of copies or phonorecords that were lawfully made").


225 See 17 U.S.C. § 602(a) (1988) (subsection does not apply to "(1) importation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State, but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use; (2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States with respect to copies or phonorecords forming part of such person's personal baggage; or (3) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes, unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2)"); House Report at 170, reprinted in 1976 U.S.C.C.A.N. 5786.

226 See House Report at 61, reprinted in 1976 U.S.C.C.A.N. 5674. There must be a direct infringement upon which contributory infringement or vicarious liability is based.

227 The concepts of contributory and vicarious liability are well-established in tort law. Contributory infringement of intellectual property rights was first codified in patent law. See 35 U.S.C. § 271(c) (1988).
228. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (holding that company that leased floor space to phonograph record department was liable for record department's sales of "bootleg" records despite absence of actual knowledge of infringement, because of company's beneficial relationship to the sales).

229. See, e.g., Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929); Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n, Inc., 554 F.2d 1213 (1st Cir. 1977); KECA Music, Inc. v. Dingus McGee's Co., 432 F. Supp. 72 (W.D. Mo. 1977). Indeed, the "cases are legion which hold the dance hall proprietor liable for the infringement of copyright resulting from the performance of a musical composition by a band or orchestra whose activities provide the proprietor with a source of customers and enhanced income. He is liable whether the bandleader is considered, as a technical matter, an employee or an independent contractor, and whether or not the proprietor has knowledge of the compositions to be played or any control over their selection." Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (citing some 10 cases).


232. See Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 366 (9th Cir. 1947) (rejecting defendant's argument that as an employee, he was not responsible for his employer's decision to use infringing material, in light of defendant's personal selection and appropriation of the protected material).


235. Sony, supra note 9.

236. Id. at 440.

237. Id. at 442. The Court cited two principles of patent law, but used only one as the appropriate analogy for copyright law:

The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the Patent Act expressly brands anyone who "actively induces infringement of a patent" as an infringer, 35 U.S.C. § 271(b), and further imposes liability on certain individuals labeled "contributory" infringers, § 271(c).

Id. at 434-35. Section 271(b) of the Patent Act provides, "Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b) (1988). Section 271(c) provides, "Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer." 35 U.S.C. § 271(c) (1988).

238. Sony, supra note 9, "In order to resolve that question, we need not explore all the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the District Court a significant number of them
would be noninfringing." *Id.* The Court declined to "give precise content" to the issue of how much use is needed to rise to the level of "commercially significant." *See id.*

The four dissenting Justices did not agree that the patent "staple article of commerce" doctrine of contributory infringement was applicable to copyright law. *See Sony,* supra note 9, at 490-91 n.41 (Blackmun, J., dissenting) ("[t]he doctrine of contributory patent infringement has been the subject of attention by the courts and by Congress . . . and has been codified since 1952, . . . but was never mentioned during the copyright law revision process as having any relevance to contributory copyright infringement"); *see also id.* at 491 (disagreeing that "this technical judge-made doctrine of patent law, based in part on considerations irrelevant to the field of copyright . . . should be imported wholesale into copyright law. Despite their common constitutional source, . . . patent and copyright protections have not developed in a parallel fashion, and this Court in copyright cases in the past has borrowed patent concepts only sparingly.") Recognizing the "concerns underlying the 'staple article of commerce' doctrine," the dissent concluded that "if a significant portion of the product's use is noninfringing, the manufacturers and sellers cannot be held contributorily liable for the product's infringing uses." *See id.* at 491 (Blackmun, J., dissenting).

239 *Id.* at 446.


248 *D.C. Comics Inc.* v. *Mini Gift Shop,* 912 F.2d 29, 35 (2d Cir. 1990); *Innovative Networks, Inc.* v. *Satellite Airlines Ticketing, Inc.,* 871 F. Supp. 709, 721 (S.D.N.Y. 1995). However, the court must remit statutory damages if (1) the infringer "believed and had reasonable grounds for believing" that the use was a fair use, and (2) the infringer was a nonprofit educational institution, library or archives (or its employee or agent) and infringed the reproduction right or a public broadcasting entity (or a person who "as a regular part of the nonprofit activities" of a public broadcasting entity) that infringed by performing a published nondramatic literary work or reproducing a transmission program embodying a performance of such work. *See 17 U.S.C. § 504(c)(2)* (1988).

249 *See 17 U.S.C. § 504(c)(2)* (1988) ("where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court . . . may reduce the award of statutory damages to a sum of not less than $200"); *D.C. Comics Inc.*, supra note 248, at 35 (defendant's lack of business sophistication and absence of copyright notice on copies were basis for a finding of innocent infringement and statutory damages of only $200). A person who is misled and innocently infringes by relying on the lack of a copyright notice on a copy of a work that was lawfully publicly distributed before March 1, 1989, is not liable for any damages (actual or statutory) for infringements committed before actual notice of registration of the work is received. *17 U.S.C. § 405(b)* (1988). The court may allow, however, the recovery of any of the infringer's profits attributable to the infringement. *Id.*


253 Id.; see also Roth v. Pritikin, 787 F.2d 54, 57 (2d Cir. 1986) (attorney's fees generally awarded to prevailing plaintiffs because Copyright Act is intended to encourage suits to redress infringement); Chi-boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1230 (7th Cir. 1991) (attorney's fees and costs serve to deter infringement, dissuade defendant's disdain for copyright law, and encourage plaintiffs to bring colorable claims against infringers). No attorney's fees may be awarded for an infringement of copyright before its registration unless, in the case of published works, the infringement occurred after first publication and registration was made within three months of first publication. 17 U.S.C. § 412 (1988 & Supp. V 1993).


256 17 U.S.C. § 506(c) (1988). The penalties in Section 506(c) apply with regard to copyright notices or "words of the same purport." Id.

257 Id.


260 See Fogerty v. Fantasy, supra note 6, at 1029.

261 See discussion of the fair use defense supra. . .


264 See 17 U.S.C. § 504(c)(2) (1988); see also supra. . . If a proper copyright notice was affixed to the published copy to which the infringer had access, the court may not give any weight to a claim of innocent infringement in mitigation of damages, except in limited circumstances involving certain infringers (including nonprofit educational institutions and libraries) who violated certain exclusive rights and who believed, and had reasonable grounds for believing that the use was a fair use. See §§ 401(d), 504(c)(2) (1988); see also 17 U.S.C. § 405(b) (1988) (effect on innocent infringers of omission of copyright notice on copies publicly distributed before March 1, 1989).

265 See 17 U.S.C. § 302(e) (1988) (after a period of 75 years from first publication of a work, or 100 years from its creation, whichever is shorter, a person who obtains from the Copyright Office a certified report that the records relating to the deaths of authors disclose nothing to indicate that the author is living, or died less than 50 years before, may presume that the author has been dead for at least 50 years, and good faith reliance on that presumption is a complete defense).

266 See generally discussion of infringement supra. . .

267 Further, no action will lie if the statute of limitations has run. See 17 U.S.C. § 507 (1988).

268 A nonexclusive license may be implied from conduct. See Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990), cert. denied, 498 U.S. 1103 (1991); MacLean Assocs., Inc. v. Wm. M. Mercer-Meidingen-Hansen, Inc., 952 F.2d 769, 779 (3d Cir. 1991); see also 3 Nimmer on Copyright § 10.03[A] at 10-38 (1994). Implied licenses, like oral licenses, are always nonexclusive in nature and may be limited in scope. See Oddo v. Ries, 743 F.2d 630, 634 (9th Cir. 1984); Gilliam v. American Broadcasting Cos., 538 F.2d 14, 19-21 (2d Cir. 1976). Delivery of a copy of a work by the copyright owner to the moderator of a
newsgroup may imply a license to reproduce and distribute copies of the work to the subscribers of that newsgroup, but may not be evidence of an implied license to reproduce and distribute copies to other newsgroups.

269 "Neighboring rights" are discussed infra . . .


271 See generally S. Stewart, International Copyright and Neighbouring Rights (2d ed. 1989) (hereinafter Stewart). Stewart presents a summary of international copyright principles and synopses of the copyright laws of a number of countries. Stewart also identifies socialist copyright laws as a category. However, since the demise of the USSR, many of the former socialist countries have moved to enact modern copyright legislation. The copyright laws of the People's Republic of China and Russia follow the civil law model.

272 Stewart at 6. In some common law countries, moral rights are protected by a combination of statutory provisions and common law. In the United States, for instance, this protection is found in Federal legislation, such as the Lanham Act and the Copyright Act, various state legislative provisions and the common law of privacy, defamation and the like. See Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Colum. VLA J.L. & Arts 513, 548-57 (1986); 2 Nimmer on Copyright § 8D.02[A] at 8D-10 to -11 (1994).


275 There were 48 members of the convention as of July 1, 1995, but the United States is not a member. The Rome Convention is jointly administered by WIPO, the International Labor Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

276 Done at Geneva on October 29, 1971; entered into force on April 18, 1973; for the United States on March 10, 1974. 25 UST 309; TIAS 7808; 888 UNTS 67. There were 53 members of the Convention as of July 1, 1995.

277 UNESCO is the United Nations Educational, Scientific and Cultural Organization.

278 Universal Copyright Convention, as revised, with two protocols annexed thereto. Done at Paris on July 24, 1971, entered into force on July 10, 1974. 25 UST 1341; TIAS 7868. As of May 31, 1995, there were 96 members of the Convention.

279 As of July 1, 1995, there were 114 signatories to the Berne Convention.

280 This fundamental principle is set forth in Section 102(b) of the U.S. Copyright Act. See discussion supra . . .

281 This approach is consistent with Section 107 of the U.S. Copyright Act (relating to fair use of copyrighted works).

282 Only Japan and Switzerland qualify under this exception.

283 Article 5 provides:
(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

285 Id. at 21.
287 Id.
288 Article 3 (National Treatment) provides:

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention and paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights.

2. Members may avail themselves of the exceptions permitted under paragraph 1 above in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary.
to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

289 Article 4 of TRIPs (Most-Favoured-Nation Treatment) provides:

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance and law enforcement of a general nature and not particularly confined to the protection of intellectual property;

(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPs and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.


291 Article 6bis provides:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.
