PATHFINDER TO U.S. COPYRIGHT LAW

(17 U.S.C. § 101 et seq.)

PREPARED BY CATHERINE K. HARRIS

Catherine K. Harris is the Law Librarian at the Texas State Law Library.

December 1, 1992

The Pathfinder

Pathfinders are prepared by the Texas State Law Library to assist readers—lawyers and nonlawyers alike—who are interested in a particular topic. The Pathfinder is not intended to be a comprehensive treatise on the topic. Rather, the Pathfinder is a starting point for those who wish to know more about the topic. The Pathfinder is prepared for two purposes: first, to gain a general understanding of the topic; and second, to obtain research sources so that the reader can conduct additional research. Note, however, that if any of the research contained in this Pathfinder is used after the date on which this Pathfinder was prepared, the research should be updated. In addition, the reader should be aware that due to space limitations, not every aspect of the law is included, nor is every pertinent research source listed.

Pathfinder to U.S. Copyright Law
(17 U.S.C. § 101 et seq.)

Scope: This research guide to copyright law provides an introduction to copyright; answers to commonly asked questions about copyright with citations to relevant cases addressing those questions; and lists of important primary and secondary sources for further research. In addition, offices and organizations concerned with copyright are referenced.

1. INTRODUCTION TO COPYRIGHT

Copyrights are governed in the United States by federal law, not by state law. Since 1978, when the 1976 Copyright Act took effect, the field has been governed almost exclusively by federal statutes and the cases that interpret them. There is little relevant state law, except that which applies to areas not covered by federal law (see below), and only a few significant administrative regulations.

International copyright practices are increasingly important and in 1988, more than a century after the first Berne Convention, the U.S. joined the international convention, conforming its 1976 Copyright Act to the Convention's requirements.

The created product has been protected by U.S. law since 1790 when the first federal copyright act was passed, deriving its authority from the U.S. Constitution:

"The Congress shall have power ... (8) 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. ..." (Art.I, Section 8, Clause 8).

As the nation has grown, and technology for copying and producing "Writings and Discoveries" has advanced, the impact of copyright industries on the nation's economy has not been insignificant. U.S. industries whose products are copyrightable in whole or in part include book, newspaper, music and periodical publishers; motion picture companies; producers of audio and video recordings in all media; radio and television broadcasters; advertisers; producers of computer software; and semiconductor chip designers.

A. Subjects of copyright

Copyrightable products are grouped by law into seven categories: 1) literary; 2) musical; 3) dramatic; 4) pantomimes/choreographic; 5) pictorial/graphic/sculptural; 6) motion pictures/other audiovisual; and 7) sound recordings. (17 USC § 102)

B. Registration classes of copyrightable works

1. Non-dramatic Literary Works: e.g., fiction; non-fiction; poetry; periodicals; textbooks; reference works; directories; catalogs; advertising copy; compilations of information; computer programs/databases.

2. Works on the Performing Arts: e.g., musical works, with accompanying words; dramatic works, with accompanying music; pantomimes; choreographic works; motion pictures; other audiovisual works.

3. Works of the Visual Arts: e.g., fine, graphic, and applied art (includes cartoon characters, fabric designs); photographs; prints and art reproductions; maps; globes; charts; technical drawings (includes architectural plans and drawings); diagrams; models; pictorial or graphic labels and advertisements.

4. Sound Recordings.

5. Renewal Registration.
C. Works that are not copyrightable (selected examples)

1. Blank forms intended for recording information, not conveying information: e.g., time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms.

2. Words and short phrases such as names, titles, and slogans; familiar symbols or designs (U.S. trademark law protects these).

3. Listing of ingredients or contents, e.g., recipes, telephone lists. Recent case of interest on non-copyrightable lists: *Key Publications, Inc. v. Chinatown Today Pub. Enterprises, Inc.*, 945 F.2d 509 (2d Cir. 1991). This case may influence computer database copyright.

4. Less developed literary characters, e.g., word portraits.

5. Typeface designs.

6. Historical facts and research (some exceptions).

7. Works consisting entirely of information that is common property containing no original authorship, e.g., standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events.

8. Any work of the United States government (some exceptions).

2. ELEMENTS OF COPYRIGHT

A. What is copyright?

Copyright is a federal right owned by every author of a work to exclude others from doing any of the following five activities in connection with the copyrighted work: 1) reproduction; 2) adaptation; 3) distribution to the public; 4) performance in public; or 5) display in public. (17 U.S.C. § 106)

B. What makes my work copyrightable?


A work must have originated with the author—not copied by the author—and it must be expressed or fixed in a tangible form, i.e., in a form such that it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." (17 U.S.C. § 102).


C. What is the duration of copyright?

Constitutionally, the duration must be for a "limited time." (U.S. Const. Art. I § 8, Cl.8) The measurement of "limited time" was changed significantly with the 1976 Copyright Law, effective January 1, 1978, making the latter date crucial in calculating the duration of copyrights.

Generally, copyright in a work created on or after January 1, 1978, endures for the life of the author plus fifty years after the author's death. (17 U.S.C. § 302)

Works created, but not published or copyrighted before January 1, 1978, are given a duration the same as for works created after January 1, 1978, but are guaranteed protection until January 1, 2003 (a 25-year term), which can be stretched until December 31, 2027, if the work is published before that date (17 U.S.C. § 303).


D. What constitutes infringement of my copyright?

Infringers are those who violate any one of the five exclusive rights of copyright as described above in 2.A. Infringement occurs when, without authorization, someone exercises the rights reserved exclusively for the copyright owner. Infringement is established by proof of

1) "substantial similarity" to the copyrighted work; and

2) access, i.e., the infringer actually copied from the original.

Substantial similarity must be similarity of "expression," not merely similarity of ideas or concepts, for copyright law does not protect ideas, concepts, systems. Federal courts have developed the test for "substantial similarity."

Although the Copyright Act of 1976 allows for five exclusive rights of ownership as described above in 2.A, the law also places limits on the exclusive rights of the copyright owner. Users of copyrighted works also have rights. See: *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774 (1984).

**Limits on exclusive rights concern the following:**

1) Fair use. (17 U.S.C. § 107)

Factors considered include purpose and character of use, including whether use is commercial; nature of copyrighted work; amount of the original used in relation to copyrighted work as a whole; effect of use upon potential market for or value of the copyrighted work. Fair use is most commonly raised as a defense in educational activities, literary and social criticism, parody, and First Amendment activities (e.g., news reporting).


2) Reproduction by archives and libraries (17 U.S.C. § 108) limited to one copy, which may be distributed under certain circumstances.


3) Transfer of a lawful copy by the owner of that copy. (17 U.S.C. § 109)


4) Exemption of certain performances and displays in 10 specific circumstances: classroom activities; instructional broadcasting; religious services; nonprofit performances of nondramatic literary works and musical works; store receivers (limited reception on home-type receivers involving no admission charge); performances at state fairs; record store receivers; performances by or for handicapped persons; and, as added in a 1982 amendment, fraternal organization performances of nondramatic literary and musical works. (17 U.S.C. § 110)

Related cases: *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 95 S.Ct. 2040 (1975); *National Football League v. McAllister*, 972 F.2d 726 (8th Cir. 1986).

5) Secondary transmissions. (17 U.S.C. § 111) (Includes compulsory licensing; also see §§ 115, 116, 118)


Copies/adaptations of computer programs. (17 U.S.C. § 117; 1980 amendments to 1976 Copyright Act included computer programs)

Selected Cases: Whelan Assoc. v. Jastrow Dental Laboratory, Inc., 797 F.2d 1222 (3rd Cir. 1986) (This case has been considered the standard for copyright protection of non-literal elements of a computer program), but see Computer Associates v. Altai, 982 F.2d 693 (2d Cir. 1992), and see Lotus Development Corp. v. Borland International Inc., 795 F.Supp. 203 (D.Mass. 1992); also: Atari Games Corp. v. Nintendo of America, Inc., 975 F.2d 832 (Fed. Cir. 1992); Apple v. Microsoft, 759 F.Supp. 1444 (N.D. Cal. 1991); for doctrine of “copyright misuse” and controversy of protection of computer programs by patent rather than copyright, see Lasercomb America, Inc. v. Reynolds, 911 F.2d 970 (4th Cir. 1990).

E. Does the Copyright Act protect federal or state government publications?
17 U.S.C. § 105 states that any work of the U.S. government, i.e., a work prepared by an officer or employee of the U.S. government as part of that person’s official duties, is not copyrightable, but the U.S. government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

OMB Circular A-110 (see below in 3.G. Regulations) states that federal grant recipients are free to copyright publications developed under the agreement, but that the sponsoring agency “shall reserve a royalty-free, non-exclusive and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use, the work for government purposes.”


A state agency may obtain a copyright in its works. (18 CJS § 9)

F. Can copyrighted materials be copied in special-format editions for use by blind and physically handicapped persons?
No U.S. law automatically permits this kind of reproduction. Each copyrighted work to be produced in a special-format must be individually approved by copyright holders. Copyright registrants have the opportunity to grant permission and donate a license (voluntary license) at the time a work is submitted for registration with the Copyright Office of the Library of Congress. 15 Library of Congress Information Bulletin 403 (Nov. 16, 1992).

3. PRIMARY RESEARCH SOURCES
A. Major Statutory Law
The U.S. Congress regularly addresses copyright issues, and has passed several major copyright acts since 1790. Major acts are listed below with selected revisions and amendments. (See the USC for complete lists.)
1. Statute of Anne, 8 Ann., c. 19 (1709) first English law
2. U.S. Constitution, Article I, Sec. 8, Cl. 8
3. U.S. Copyright Act of 1790—first U.S. law after Constitution included books, charts, and maps
4. U.S. Copyright Act of 1802 added prints
5. U.S. Copyright Act of 1831 (substantial rewriting) added musical compositions
6. U.S. Copyright Act of 1865 added photographs
7. U.S. Copyright Act of 1870 (substantial rewriting) added paintings, drawings, statuary, models/designs of fine art
8. U.S. Copyright Act of 1909 (35 Stat. 1075) (major rewriting)
9. U.S. Copyright Act of 1912 (37 Stat. 488) added motion pictures
10. U.S. Copyright Act of 1971 (85 Stat. 391) added sound recordings
12. Copyright Amendments Act of 1980 (94 Stat. 3028) added computer programs

B. Related Statutes
C. International Conventions for Protection of Intellectual Property
3. Inter-American Conventions:
   a. Mexico City Convention of 1902
   b. Buenos Aires Convention of 1910
4. Paris Convention for the Protection of Industrial Property (patent/trademark)

D. Trade Initiatives with Protection of Intellectual Property
1. 1930 Tariff Act
2. 1974 Trade Act
3. 1988 Omnibus Trade Act

E. State Laws
   The Copyright Act of 1976 narrowed, but did not completely eliminate common law copyright. The federal act protects only works fixed in a "tangible medium of expression," leaving protection of unfixed works to the states, or to common law. For example, choreography that has not been filmed or notated, an extemporaneous speech, conversations, live broadcasts, a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down remain subject to state protection. (H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976)). There is no preemption of state law claims concerning the copying of noncopyrightable aspect of a work. (18 CJS § 8)

F. Case Law (see case references in Part 2. above)
   Cases can be identified through several sources:
   1. West's Reporter and Digest System
   2. CCH Copyright Law Reporter
   3. Legal encyclopedias, treatises, and texts
   4. Current news sources of the legal press
   5. U.S. Law Week. General Topic Index: "Copyrights"; "Books"

G. Administrative Law/Regulations—Selected Citations
   Generally, the Copyright Office in the Library of Congress administers copyright law and issues rules and regulations (17 U.S.C. § 701 (d)) according to provisions of the federal Administrative Procedure Act (5 U.S.C. § 551 et seq.)
   1. Code of Federal Regulations
      37 CFR Part 201 ff (Copyright Office)
      37 CFR Part 202 (Registration of copyright claims)
      37 CFR Part 301 ff (Copyright Royalty Tribunal)
      37 CFR Part 302 ff (Filing of cable royalty fee claims)
      37 CFR Part 303 (Access to jukeboxes)
      37 CFR Part 304 (Noncommercial broadcasting)
      37 CFR Part 305 (Jukebox royalty fee claims)
   Consult the CFR Index for additional citations.
      (Explains copyright for projects under contract with the U.S. government.)

4. SECONDARY RESEARCH SOURCES
   A. Electronic Sources
      Both WESTLAW and LEXIS/NEXIS have numerous databases for federal intellectual property (FIP), including copyright.
      For example, in WESTLAW, search FIP-SCT for U.S. Supreme Court cases; or search FIP-USCA for federal statutes; or BNA-PTCJ for BNA's Patent, Trademark & Copyright Journal; USPQ for United States Patents Quarterly, or COPYRIGHT for U.S. copyrights since 1978.
      In LEXIS/NEXIS, search the copyright law library; COPYRT, for federal copyright case law and legislation as well as several other publications such as International Trade Commission decisions from 1979, or the American Intellectual Property Law Association Quarterly Journal. Check current catalogs of WESTLAW and LEXIS/NEXIS for other files.
B. Legislative Histories


C. Encyclopedias


18 *Am Jur* 2d, secs. 1-267, Copyright and Literary Property

ALR 4th, ALR Fed, and ALR 5th are useful since these volumes include the time period after the passage of the 1976 Copyright Act; search “Copyright”.

D. Treatises


E. Dictionaries/Other Sources

WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights (1980) (1 vol.)


F. Periodical Indexes

*Index to Legal Periodicals*

Search these topics: Copyright, Authors and publishers; Derivative works; Fair use doctrine; Works for hire doctrine.

*Current Law Index*

Search these topics: Copyright, Authors and publishers; Derivative works; Legal deposit (of books, etc.); Public domain; Works made for hire doctrine.

G. Recent Selected Law Review Articles


H. Other Books, Journal Articles - A Sampling


Fall 1993


The following titles must be consulted regularly to keep abreast of new developments in copyright:

- Legal Times—recent case decisions; special features on IP. Weekly.
- United States Patent Quarterly (includes copyright).
- Annual Report. ABA Section of Patent, Trademark and Copyright Law.
- BNA Patent, Trademark & Copyright Law Daily and BNA’s Patent, Trademark & Copyright Journal on WESTLAW.

I. Organizations/Associations

Over 60 domestic and international organizations concerned with intellectual property are listed in the current Encyclopedia of Associations (Gale Research). Selected ones follow:

- Register of Copyrights
- The Copyright Office
- Library of Congress
- Washington, D.C. 20559 (202)707-3000

- Copyright Royalty Tribunal
- 1111 20th Street, N.W.
- Suite 450
- Washington, D.C. 20036 (202)653-5175

- Copyright Clearance Center
- 27 Congress St.
- Salem, Mass. 01970 (212)595-3050

- American Society of Composers, Authors and Publishers (ASCAP)
- One Lincoln Plaza
- New York, NY 10023 (212)595-3050

- Broadcast Music, Inc. (BMI)
- 320 W. 57th St.
- New York, NY 10019 (212)586-2000

- American Intellectual Property Law Association
- 2001 Jefferson Davis Hwy
- Suite 203
- Arlington, VA 22202 (703)521-1680

- Copyright Society of the USA
- NY University School of Law
- 40 Washington Sq. S. Room 343
- New York, NY 10012 (212)998-6194

- Songwriters Guild of America
- 276 5th Ave.
- New York, NY 10001 (212)686-6820

- American Copyright Council
- 1600 1 Street, N.W.
- Washington, D.C. 20006 (202)293-1966

- Home Recording Rights Coalition
- P.O. Box 33576
- 1145 19th St., N.W.
- Washington, D.C. 20033 (800)282-8273

- Intellectual Property Owners
- 1255 23rd St. N.W. Suite 850
- Washington, D.C. 20037 (202)866-2396

- International Copyright Information Center and International Intellectual Property Alliance
- c/o Assn. of American Publishers
- 1718 Conn. Avenue, N.W. 7th Floor
- Washington, D.C. 20006 (202)232-3335

- Educators’ Ad Hoc Committee on Copyright Law
- c/o August Steinhelber
- National School Boards Assn.
- 1680 Duke St.
- Alexandria, VA 22314 (703)838-6710

- Los Angeles Copyright Society
- c/o Donald L. Zachary
- 3000 W. Alameda Ave.
- Burbank, CA 91523 (818)840-3508

- c/o Office of Public Affairs
- U.S. Patent and Trademark Office
- Crystal Plaza 2, Room 1 A05
- 2021 Jefferson Davis Hwy
- Arlington, VA 22202 (703)555-3341

- Software Publishers Assn.
- 1101 Conn. Ave. N.W. Suite 901
- Washington, D.C. 20036 (202)452-1600

“Operates industry wide campaign backed by the Copyright Protection Fund, to stop software theft and protect the legal rights of software copyright holders.”