Copy Rights: Property Rights (for SLATE)

Thursday, March 26, 2015

*Along time ago, a woman and her family collected grains, worked the soil, planted the seeds, and watered and weeded the plot. As they harvested the grain, another family came to harvest that grain saying, "You don't own this. It came from the soil. It will keep us all alive."*

*Sometime later, a poet and orator performed his works that drew enthusiastic audiences who paid for their pleasure. Later, a young performer found that other audiences would also pay for the pleasure of hearing those words even though it wasn't the poet reciting them. He told his friends, "Only a fool releases his fowl so that others can catch and eat (from them)."*

*Some time ago, a scribe copied his master's book, saying, "My master has this book. I can copy it through my own labors. He doesn't need another book. We both can read and learn at the same time."*

*Not so long ago, an advertising director told her artistic director to create a commercial that uses the same sequence of camera angles and set design as a recent movie simply placing their product in each scene. She said, "Those setting and shots are standard fare in movies now. You see them in dozens of movies, and they are taken from movies before them."*

Common law has developed and long recognized that soil and grain can be property--possessed exclusively by a person. That (tangible) matter is conserved has become a scientific law. No matter how hard society has tried, matter cannot be copied (even if it can be divided and shared).

Markings, words, expressions, and the like, can be copied. The original--and even a bad copy of an effective original--can make each possessor better, happier, more competent, more secure, and the like. Disseminating effective designs, knowledge, and instructions, makes the community better!

*Why should the competent not contribute to the common good of the community?*

They are, after all, the most effective and efficient in contributing.

*… because, unlike a farmer, an author cannot eat his or her produce-- his or her words, marks, or expressions!*

Sure, a blacksmith or a shipwright cannot eat their produce either--but they can trade or sell their produce. Common law gives them the exclusive right to decide to who, when, and for what price to trade or sell. But then again, who is going to assure that the blacksmith gets the ongoing benefit of a particularly effective plow design or that the shipwright gets the ongoing benefit of a particularly effective hull design?

Certainly, we can all see that the community will benefit from plenty of plows and fast ships--especially if the supply of plows and ships drives down the cost of them so everyone that wants one can buy one.

Nonetheless, the blacksmith, the shipwright, the poet-performer, or the author, cannot benefit from the special effectiveness of their design if they cannot control how it is copied. They also do not benefit when someone else sells a copy of their product or design in place of the original.

The greater community has recognized that, while some people create because they are internally driven, because they are curious, or because they enjoy attention, the most prevalent motivator for creation and innovation is exchange, that is, payment: Society has recognized that the best (most effective) strategy is to motivate the innovators in the society through payment for as long as they can (working to make sure that they have enough to satisfy their needs for food, shelter, and whatever else for as long as they live).

All states have created laws that recognize ideas that produce tangible innovations are as valuable as any physical property, that give their creators exclusive control over the coping of those innovations, and that give the creators strong remedies when that control is ignored by others. Judges in intellectual property suits side with and protect innovators whenever the innovators can show that idea that created the innovation is their product and their product alone, that the defendant has had an opportunity to view the product, and that the defendant has copied the product.

States have also recognized that the motivation of innovators is not damaged by limiting their exclusive rights to a period of time after which society benefits from the unfettered circulation and application of the innovation. Currently, intellectual properties in the US become publically available for duplication and derivation 70 years after the death of the creator.

Later, states recognized that limited copying at any time in some situations is very beneficial to society and not detrimental to the motivation of innovators. Those situations are ones that lead to further innovation: teaching, research, criticism, parody, and reporting. Copying is allowed (is protected from punishment) in these "fair use" situations as long as the copier can show that they acted within the preponderance of a set of four limitations:

* The copying has a minimal effect on the value of the work and on the potential market for the work.
* The purpose of the use is primarily educational and not commercial.
* The fraction and importance of the part copied is small compared to the work as a whole.
* The nature, state, or purpose of the original work suggests that the work can be shared.

The above text touches on the various ideas behind the institution of copy rights:

* Society benefits from engineering and artistic innovation.
* Society benefits most when innovators continue to innovate for as long as possible.
* Innovators need economic motivation to continue to innovate.
* Society needs to help and assure innovators to continue innovating by recognizing tangible expressions of as property that can be possessed, traded, and sold.
* Society can still benefit from innovation after the innovator does.
* Society needs to limit an innovator's exclusive right to copy in certain "fair use" situations and protect other innovators that can use limited pieces of another's innovation to create other simultaneous innovations.

While innovations, the fruit of ideas, can produce devices, the right to copy is applied to work that is "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." These copy-able products include:

* literary works
* musical works and lyrics
* dramatic works with any accompanying music
* pantomimes and choreographic performances
* pictorial, graphic, and sculptural works
* motion pictures and other audiovisual works
* sound recordings
* architectural works

Note that the rights and prohibitions associated with copying revolve around tangible (more specifically, sensible) material that is used for communication, but that they do not extend to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries, regardless of the forms in which they described, explained, illustrated, or embodied.

The ideas in the above text come from and are expanded in the following resources:

* The US Copyright Office web site:

<http://www.copyright.gov/>

<http://copyright.gov/help/faq/index.html>

* Copyright Clearance Center

<http://www.copyright.com/>

<http://www.copyright.com/Services/copyrightoncampus/intro/index.html>

<http://www.copyright.com/Services/copyrightoncampus/basics/fairuse.html>

* Paul Goldstein, "Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox", Hill and Wang: New York (1994).

* "Twenty Years Down the Road: A Q&A With Paul Goldstein, Author of Copyright’s Highway", [John Delaney](http://www.mofo.com/john-delaney/) and [Meredith W. Louis](http://www.mofo.com/people/l/louis-meredith-w), March 3rd, 2015, <http://www.sociallyawareblog.com/2015/03/03/twenty-years-down-the-road-a-qa-with-paul-goldstein-author-of-copyrights-highway/>

* <http://fairuse.stanford.edu/overview/fair-use/>

* <http://www.bitlaw.com/copyright/fair_use.html>

* <http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>

Appendix

A description of Fair Use from the US Copyright web site:

<http://www.copyright.gov/fls/fl102.html>

One of the rights accorded to the owner of copyright is the right to reproduce or to authorize others to reproduce the work in copies or phonorecords. This right is subject to certain limitations found in sections 107 through 118 of the copyright law ([title 17, U. S. Code](http://www.copyright.gov/title17)). One of the more important limitations is the doctrine of “fair use.” The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law.

Section 107 contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair.

1. The purpose and character of the use, including whether such use is of 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
4. The effect of the use upon the potential market for, or value of, the copyrighted work

The distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission.

The 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* cites examples of activities that courts have regarded as fair use: “quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.”

Copyright protects the particular way authors have expressed themselves. It does not extend to any ideas, systems, or factual information conveyed in a work.

The safest course is to get permission from the copyright owner before using copyrighted material. The Copyright Office cannot give this permission.

When it is impracticable to obtain permission, you should consider avoiding the use of copyrighted material unless you are confident that the doctrine of fair use would apply to the situation. The Copyright Office can neither determine whether a particular use may be considered fair nor advise on possible copyright violations. If there is any doubt, it is advisable to consult an attorney.

FL-102, Reviewed June 2012

**Copyright Law of the United States of America**

**and Related Laws Contained in Title 17 of the *United States Code***

Circular 92

**Chapter 1 [Selected Sections]**

From <<http://copyright.gov/title17/92chap1.html>>

**§ 101 . [Selected] Definitions**

…

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

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”.

A “device”, “machine”, or “process” is one now known or later developed.

A “digital transmission” is a transmission in whole or in part in a digital or other nonanalog format.[7](http://www.copyright.gov/title17/92chap1.html#1-7)

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

…

A “work made for hire” is—

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

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment—

(A) shall be considered or otherwise given any legal significance, or

(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,

by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made for Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

**§ 102 . Subject matter of copyright: In general**

(a) Copyright protection subsists, in accordance with this title, 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. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

**§ 103 . Subject matter of copyright: Compilations and derivative works**

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

**§ 106 . Exclusive rights in copyrighted works**

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

**§ 106A . Rights of certain authors to attribution and integrity**

(a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) Scope and Exercise of Rights.—Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

**§ 107 . Limitations on exclusive rights: Fair use**

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

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

**Chapter 3 [Selected Section]**

From <<http://copyright.gov/title17/92chap3.html>>

**§ 302 . Duration of copyright: Works created on or after January 1, 1978**[**4**](http://www.copyright.gov/title17/92chap3.html#3-4)

(a) In General. — Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) Joint Works. — In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire. — In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

**Chapter 4 [Selected Section]**

**§ 401 . Notice of copyright: Visually perceptible copies**[**2**](http://www.copyright.gov/title17/92chap4.html#4-2)

(a) General Provisions. — 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 as provided by this section 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.

(b) Form of Notice. — If a notice appears on the copies, it shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word “Copyright”, or the abbreviation “Copr.”; and

(2) the year of first publication of the work; 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 text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; 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.

(c) Position of Notice. — The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

(d) Evidentiary Weight of Notice. — If a notice of copyright in the form and position specified by this section 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 the last sentence of section 504(c)(2).

From <<http://copyright.gov/title17/92chap4.html>>



**Michael G. Prais, Ph.D.**, provides instructional technology support at UIC out of central User Services. He has provided similar services at Roosevelt University, NIU, and Saint Xavier University. Michael started as a faculty member in chemistry at Roosevelt promoting information technologies in a wide variety of courses and becoming tenured and the chair before deciding to leave and focus on promoting and supporting technologies across all departments. He is a chemical physicist with experience developing mathematical models and large scale calculations. Behind it all, he is a teacher who likes helping others understand and use mathematical, chemical, physical, information, and multimedia technologies.