A Very Brief Primer on Copyright

in the United States

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What is a copyright? Where does copyright law come from?

A copyright is a government-granted monopoly over an original expressive work to the author of that work. It lasts about 100 years, and the legal right arises automatically and immediately with the creation of a copyrightable work.

With the exception of pre-1972 sound recordings, copyright law is **exclusively federal** and the federal courts have exclusive jurisdiction. Congress gets its power to grant copyrights from the Progress Clause of the Constitution.[1] Copyright law is codified as Title 17 of the United States Code.

What's the rationale?

The driving idea behind copyright, at least in American law, is that people need some economic inducement to create and share their creations. This theory is at odds with a great deal of empirical evidence, however. And to the extent the incentive theory seemed plausible in years past, it certainly seems to be wearing thin in this era of massive uncompensated creation and instant digital distribution. While some works apparently need copyright as an incentive (expensively produced motion pictures being a good example), copyright appears largely irrelevant to much of what is created and consumed these days – including YouTube, Wikipedia, open-access textbooks, fan fiction, blogs, and user-generated content on Facebook, Twitter, and Instagram.[2] Nonetheless, the best conceptual framework for making sense of copyright law is thinking about it from the perspective of encouraging artistic and expressive production. This is copyright's unifying theory.

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[1] "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

[2] For a discussion of these issues, see Eric E. Johnson, *The Economics and Sociality of Sharing Intellectual Property Rights*, 94 B.U. L. REV. 1935 (2014); Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 Fla. St. U. L. Rev. 623 (2012)

What is copyrightable?

To be copyrightable, an expressive work must be fixed in some tangible medium – written down on paper, painted on canvas, recorded to digital storage, etc. The categories of expressive works that are copyrightable include music, pictures, audiovisual works, architectural works, and sculpture. The broadest category is literary works, which includes not only poems but computer source code for software.

To be copyrighted, a work must be **original**, which means it must have some modicum of creativity. This is a very, very low threshold. Even a boring photograph of a frame full of beige carpeting would qualify. And it must be a work of human **authorship**.

There are some exclusions from copyrightable subject-matter: **Facts cannot be copyrighted**. This means that databases of factual information are not copyrightable either. **Words and short phrases are excluded** from copyright as well.

Importantly, **functional aspects of works are excluded**. This keeps copyright entitlements from overrunning all aspects industry and design. Furniture and clothing designs, for instance, are uncopyrightable.[3] Designs and inventions can be the subject of patents – if they meet patent law's myriad requirements – but copyright does not intrude in this area.

While functional articles themselves are not copyrightable, they may incorporate separately copyrightable works. A t-shirt, for instance, is not copyrightable, but the screen-printed picture on it could be. The courts use the concept of **conceptual separability** to draw the line between an uncopyrightable utilitarian object and the copyrightable picture or sculptural work it might contain.

And finally, this is fundamental: **An idea is not copyrightable**. Only expression is. If you have a great idea for a screenplay, it's not copyrightable. Your screenplay will be copyrightable, because that's expression. Even a synopsis of the story will be copyrightable, since it too counts as expression. But not the idea itself.

How do you copyright something?

You already have. Since January 1, 1978, every new copyrightable work is copyrighted immediately upon being fixed in a tangible medium. So as soon as you write something down, it's copyrighted. And since March 1, 1989, using a copyright notice is not necessary. (Before then, it was possible for works to lose copyright protection by being published without notice.[4])

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[3] But note that as of 2016, the U.S. Supreme Court is considering a case about copyright and clothing designs. So stay tuned.

[4] See, e.g., Douglas A. Hedenkamp, *Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909,* 2 VA. SPORTS & ENT. L.J. 254 (2003) (concluding that because of a lack of an

A copyright notice can be useful for letting people know who owns a work; that way they know whom to ask for a license. And a notice can have some evidentiary effect in litigation. If you wish to put a copyright notice on your own work, this is the correct form:

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Copyrights can be registered with the U.S. Copyright Office. Registration offers a number of advantages. If a work's copyright is registered within three months of first publication or before a given act of infringement, then the copyright owner is eligible to recover statutory damages – which can massively increase the economic value of an infringement case – as well as attorneys fees.

Duration

Under the original Copyright Act of 1790, copyright lasted only 14 years, renewable for one additional 14-year term. Over the centuries, however, Congress has steadily extended copyright terms. Today, **copyrights last about 100 years**. For most works, it's the life of the author plus 70 years. For works with a corporate or anonymous author, copyright expires 95 years after the year of first publication or 120 years after creation, whichever comes first.[5]

If past practice is any indication, media companies and owners of valuable copyrights may lobby Congress for another extension in the next few years.

The Public Domain

Works not protected by copyright are in the "public domain," and are free for anyone to use.

A key part of the social bargain of the copyright system is that copyright terms are to eventually expire, leaving the formerly copyrighted works to then enrich the public domain. (The Constitution, in fact, specifically provides that copyright entitlements must be for "limited times.")[6] But this mode of expanding the public domain has been on hold because of repeated retroactive copyright extensions granted by Congress.

Many works entered the public domain in decades past because of a lack of renewal registration or because of publication without proper notice. The public domain can no longer grow in this way, however, since more recent legislation has eliminated these formality requirements for currently in-force copyrights.

Perhaps the biggest current input to the public domain in the United States is works of the federal government, which are exempted by statute from copyright protection.[7]

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adequate copyright notice on the film *Steamboat Willie,* the early version of Mickey Mouse is now in the public domain).

[5] 17 U.S.C. §§ 302, 305.

[6] See note 1, *supra*.

[7] 17 U.S.C. § 105.

Ownership, Licensing, and Transfers

The initial owner of a copyright is the author. In some very particular cases, the author of a work may be an employer of the person who actually did the creative work. This is called **work made for hire**.[8] But do not think that because you hired someone to create a copyrighted work and paid for their labor that you will end up owning the copyright. The requirements for works made for hire are idiosyncratic and strict. The law in this area departs considerably from expectations.[9]

The ownership of a copyright can be transferred by assignment with a signed writing.[10] And a portion of the copyright – limited by territory, term, or a particular category of rights – can be transferred in a signed writing as well, a grant called an **exclusive license**.

A **nonexclusive license** – which just is a fancy term for permission – can be granted with or without a writing and can even be **implied-in-fact** by the circumstances.

Exclusive Rights and Infringement

Exercising one of the exclusive rights of a copyrighted work is infringement. The main **exclusive rights** of copyright are: to copy, to sell and distribute, to publicly perform, to publicly display, and to prepare derivative works.[11] There is no intent or *mens rea* requirement. Copyright is essentially a strict liability offense.

Although **the elements of copyright infringement** have many different formulations and go by varied names, an infringement claim always has three essential components: **(1) a valid copyright, (2) actual copying, and (3) appropriative similarity**.

I've already discussed above what's needed for a valid copyright. The requirement of actual copying means what it says: The infringer must have derived her or his work from the plaintiff's to be liable. If an alleged infringer independently created the accused work, then there is no copyright infringement. The final requirement of appropriative similarity is the trickiest. For copyright infringement, it is not necessary that the infringing work be exactly the same as the infringed work. That is, it doesn't need to be a literal copy to be infringing. But how much similarity is required to rise to the level required for infringement? That remains a difficult question.

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[8] 17 U.S.C. §§ 101 & 201(b).
[9] For more on works made for hire, see U.S. Copyright Office, *Circular 9: Works Made for Hire*, https://www.copyright.gov/circs/circ09.pdf.
[10] 17 U.S.C. § 204.
[11] 17 U.S.C. § 106.

Fair Use and Other Defenses

The center-stage defense against copyright infringement is **fair use**.[12] It's the one doctrine of copyright everyone has heard of. But despite its familiarity, it remains mysterious. The boundaries of fair use are frustratingly fuzzy, and predicting whether a particular use will be held a fair use is often impossible.

The aim of the fair use defense is to provide cultural breathing room. It furthers people's abilities to criticize and comment, to learn, experiment, and engage. Courts look to several factors in making a fair use determination, including how much of the copyrighted work has been taken, the nature of the use (e.g., educational, scholarly, journalistic, and artistically transformational uses are often looked on favorably), and the effect on the market for the copyrighted work.

Another crucial defense is **license**, including **implied license**. If you buy a lawn gnome based on a newly sculpted design, it is almost certainly covered as a sculptural work by copyright. Does that mean you can't put it on your lawn? After all, one of the exclusive rights of copyright is public display. Luckily, however, you can win the argument that included with the sale of a lawn gnome was an implied license to publicly display it.

Finally, the **first-sale defense** allows the owners of lawfully acquired copies of a copyrighted work to sell or give away those copies to others, notwithstanding the copyright owner's exclusive distribution right.

Complications

Copyright law has many twists and turns that this brief primer can't cover. Title 17 is so complex, in fact, some have likened it to the tax code. A few of the areas in which copyright is particularly complicated are music,[13] internet transmission and digital storage,[14] television broadcasting,[15] the duration of older copyrights,[16] and the recapture of copyrights transferred away in decades past.[17] So, although broad principles inform a great swath of copyright law, it is, for better or worse, an area where Congress has provided a great deal of specificity, largely at the urging of particular industry groups.

[12] 17 U.S.C. § 107.
[13] 17 U.S.C. §§ 114–116, 801–805 & 1101.
[14] 17 U.S.C. §§ 1001–1010 & 1201–1205.
[15] 17 U.S.C. §§ 110, 111, 118, 119, 122 & 801–805.
[16] 17 U.S.C. §§ 302–305.
[17] 17 U.S.C. §§ 203 & 304(c).