

What is Copyright?

Federal Law Governing Copyright

Copyright is a form of protection provided by federal law that gives authors of “original works of authorship” certain exclusive rights in those works. Congress derives its power to regulate copyrights from Article I, Section 8 of the US Constitution. Copyrights in the United States are generally governed by Title 17 of the United States Code, also referred to as the 1976 Copyright Act. To view the 1976 Copyright Act and its many amendments, click on the following link: <http://www.copyright.gov/title17/>

US copyright protection is available to both published and unpublished works and gives the copyright owner exclusive rights to (and the ability to authorize others to):

- Reproduce the work;
- Make derivative works;
- Distribute copies of the work;
- Perform or display the work publicly; and
- Transmit sound recordings of the work in digital audio.

Also, federal copyright law grants “moral rights” to authors of one-of-a kind visual art and numbered limited editions of 200 or fewer copies—this is referred to as “attribution”. The right to attribution ensures that a work is correctly attributed to an author and protects an author from being associated with works created by others. On the other hand, the right of integrity protects the author’s works from modification or destruction that would harm the author’s reputation or honor.

Copyright Protection

The scope and subject matter of copyrights are codified in Section 102 of Title 17 of the U.S. Code. Generally, to enjoy copyright protection, a copyrighted work must be “an original work of authorship” that is “fixed in a tangible medium of expression.” However, federal copyright law protects only the expression of ideas, not the ideas themselves. The copyright automatically activates without the need for publication or registration.

The US Supreme Court defined “original” as it applies to copyright law in *Feist Publications, Inc. v. Rural Telephone Service Co.* In *Feist*, the Supreme Court stated “Original...means only that the work was independently created by the author..., and that it possesses at least some minimal degree of creativity.” To read the case, click the following link: http://www.law.cornell.edu/copyright/cases/499_US_340.htm .

An original work may be fixed in either a copy or a phonorecord. “Copies” are any material object (e.g.: a sheet of paper, a book, or a carved stone) “from which a work can be read or visually perceived.” A “phonorecord” is the material object in which sound is fixed (i.e.: a cassette tape or a compact disc). Copyright protects the expression the original work itself, not the material copies or the phonorecords. Thus if

you buy a book, you may lend or sell that book to another. However, you cannot reproduce that book without infringing on the author's copyright.

The categories of works protected include literary, musical, and dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, architectural works and sound recordings. These categories should be construed broadly. For example, "literary works" is defined as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia...."

What is and what is not a literary work is far from obvious. Most people would consider a play or a screenplay to be a literary work; however, these and other dramatic works have their own category even though they seem literary. On the other hand, automated databases and computer programs are also considered literary works even though there really is not anything literary about them. The U.S. Copyright Office has provided this list of literary works to help ease the confusion:

- fiction
- nonfiction
- manuscripts
- poetry
- contributions to collective works
- compilations of data or other literary subject matter
- dissertations
- theses
- reports
- speeches
- bound or looseleaf volumes
- secure tests
- pamphlets
- brochures
- textbooks
- online works
- reference works
- directories
- catalogs
- advertising copy
- single pages of text
- tracts
- games
- automated databases
- computer programs

However, this list does not cover every possibility. If you have any doubt when registering a copyright, you should consult an attorney who specializes in copyright or intellectual property law.

Audiovisual Works

Section 101 of the 1976 Copyright Act defines “audiovisual works” as:

...(W)orks 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.

The most common of these is the motion picture, which is an audiovisual work consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any. Motion pictures generally are fixed in film, videotape or videodisk. Motion pictures do not include live telecasts that are not fixed in a copy, nor do they include screenplays or treatments of future motion pictures.

Copyright only protects the expression that is fixed in a copy. For an audiovisual work, this expression includes (but is not limited to), the camera work, dialogue, and sounds. This expression does not include any characters portrayed in the work, or the idea or concept behind the work.

Sound Recordings

Sound recordings are a “series of musical, spoken, or other sounds” that have been fixed in a material object. The material object can be anything—discs, tapes or “any other phonorecords.” This category, however, does not include “sounds accompanying a motion picture or audiovisual work.” The copyright generally protects the performance and the production or engineering. The underlying work has a separate copyright from the sound recording. For example, on a new CD by a recording artist, the performance and engineering is protected as a sound recording, but the song itself may be protected as a musical work. If the was written by someone other than the recording artist, that person may hold the copyright to the musical work (song) while the recording artist might hold the copyright to the sound recording.

Sound recordings that were fixed prior to February 15, 1972 are not protected by federal copyright law. State law may apply to these sound recordings. A 2005 New York case, *Capitol Records, Inc. v. Naxos of Am., Inc.*, held that New York law protects sound recordings made before 1972 until February 15, 2067. However, the extent of this law is not clear, so you should always consult an attorney before acting.

Copyright Notice

As of March 1, 1989, federal law does not require the use of a copyright notice to protect a work. Using a notice informs the public that the work is protected by copyright, identifies the copyright owner and the date of first publication. In an infringement case, the copyright holder’s use of a notice will keep the defendant from claiming that he did

not know the work was protected. To use the notice, the copyright owner does not need permission from the Copyright Office and does not need to register the work.

For visually perceptible copies, the notice must contain the following:

1. ©, "Copyright," "Copr.;"
2. The year of first publication; and
3. The name of the owner of the copyright.

For example: © 2007 Laverne Berry

Care should be exercised when using the "©" symbol. It is not used for audio recordings fixed in phonorecords. For phonorecords and sound recordings, the letter "P" in a circle (⒫) is used instead. Other forms of notice exist, but you should seek legal advice before attempting to use them.

The copyright notice should be affixed to the copy, the phonorecord or the container or label of the phonorecord. It should be placed so that it gives "reasonable notice of the claim of copyright." For more information on the use of copyright notices please refer to Circular 3 issued by the Copyright office. To read this circular, click on the following link: <http://www.copyright.gov/circs/circ03.html>

Although notice is optional for all works published after March 1, 1989, it may still be important for works published before this date. These works risk the loss of copyright protection if the copyright notice is missing or defective. The law in this highly litigated area is complex. You should consult an attorney for further information.

Length of Copyright Protection

Copyright generally protects works created on or after January 1, 1978 from the moment of creation and for the duration of the life of the author plus 70 years. The duration for works created before January 1, 1978 is dependent upon a series of factors including the date the copyright was secured, whether it was renewed, and whether it was published with a copyright notice or not. The law in this area is complex and is best handled by an attorney who specializes in copyright law.

The length of copyright protection for works made for hire extends to 95 years from publication or 120 years from creation—whichever duration is shorter. The employer (not the employee) is deemed the author of a work made for hire. Federal copyright law defines a "work made for hire" as:

- a work prepared by an employee within the scope of his or her employment; or
- 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 Copyright Office has published three circulars detailing the rules for renewal of copyright and the duration of copyright—Circular 15, *Renewal of Copyright*, Circular 15a, *Duration of Copyright*, and Circular 15t, *Extension of Copyright Terms*. To read these circulars, click on the following links:

<http://www.copyright.gov/circs/circ15.pdf>

<http://www.copyright.gov/circs/circ15a.html>

<http://www.copyright.gov/circs/circ15t.html>

Advantages of Registration

Although federal law does not require registration for a work to be protected by copyright, registration does offer several advantages. These advantages include the following:

- Registration gives the public recorded notice that a work is protected by copyright.
- Section 411 requires registration before an infringement action may be filed—except for moral rights actions.
- In an infringement action, registration can help establish the validity of the copyright.
- In an infringement action, registration of a work within 3 months after publication or prior to the infringement entitles the plaintiff to statutory damages and attorney's fees not available to non-registered works.

Before 1978, the law required that the work be registered before publication. After January 1, 1978, a work may be registered anytime within the duration of the copyright.

Registration Procedures

To register a work with the Copyright Office, three items must be submitted in the same envelope or package to the Copyright Office: the application form, the deposit, and the application fee. An application may be filed by the author of the work, the copyright claimant (the author or person or organization who has obtained legal title to the copyright by contract), the owner of exclusive rights, or the duly authorized agent of one of the above. The registration is effective the date the Copyright Office receives the required three items.

The Application Form

Different forms are available depending on whether the work is a literary work, visual arts work, performing arts work, sound recording, or a serial/periodical. The copyright office has provided separate forms for copyright renewal, for corrections and amplifications, and for group contributions to periodicals.

The Deposit

Generally two complete copies or phonorecords of the work must be included with the application. However, this requirement can vary under certain circumstances. For example, only one copy is needed for a work that is first published outside the United States. Motion pictures, computer programs, or any work in a CD-ROM format have special deposit requirements.

The Application Fee

The current basic fee is \$45, but make consult with an attorney specializing in copyright law because the fee is subject to change.

Recoverable Damages for Copyright Infringement

Federal law gives the owner of an infringed copyright a choice between recovering non-statutory monetary damages or statutory damages. To qualify for statutory damages, the copyright owner must have registered the work with the Copyright office within 3 months after publication or prior to the infringement.

Non-Statutory Monetary Damages

In an infringement action, Section 504(b) entitles the winning plaintiff to recover actual damages suffered as a result of the infringement and any of the defendant's profits that are attributed to the infringement. The copyright owner has the burden to prove the infringer's profits, and the infringer must show "deductible expenses and the elements of profits attributable to factors other than the copyrighted work."

Statutory Damages

If the plaintiff is qualified to receive statutory damages, he has the choice between non-statutory monetary damages (504(b)) and statutory damages (504(c)). If the plaintiff chooses statutory damages, federal law entitles him to a minimum of \$750 and a maximum of \$30,000 per infringement per infringer. The exact amount is left to the court, but damage awards for actions with multiple infringements can quickly add up. Furthermore, the court has discretion to increase the statutory damage award by \$150,000 if the court determines that the infringement was committed willfully.

Costs and Attorney's Fees

The court may allow any party to recover full costs of the suit. However, attorney fees can only be awarded if the infringement of an unpublished work occurred after registration of that work or if the infringement of a published work occurred after first publication and before registration, unless the work was registered within three months of publication.

Exceptions to the Enforcement of Copyright Infringement

If someone infringes on a copyright, the holder of the copyright may bring an action in federal court for copyright infringement. The law provides for certain exceptions which allow a person to infringe on another's copyright. These exceptions include the Fair Use Doctrine discussed below, reproduction by libraries and archives, transfer of a particular copy or phonorecord, and other exceptions for certain performances or displays.

The Fair Use Doctrine

Fair use is a judicially created doctrine that has since been codified under Section 107 of the 1976 Act. Its purpose is to avoid stifling the creativity that the copyright law was designed to foster. Section 107 provides four factors are used to determine the applicability of the fair use doctrine to a particular case. The factors follow:

- The purpose and character of the defendant's use;
- The commercial nature of defendant's use of the plaintiff's work;
- The amount and substantiality of the portion used; and
- The effect of the defendant's use upon the potential market for the plaintiff's copyrighted work.

Courts have applied the Fair Use Doctrine in several different situations. For example:

- Scholarly use—quotations of short passages in scholarly or technical works.
- Parody, Burlesque, and Satire—courts have recognized the need to protect this sort of expression.
- Home Taping—video taping of broadcast television for the purpose of non-commercial time-shifting is protected.

Other Exceptions to the Enforcement of Copyright Infringement

Federal law provides for several other exceptions to the enforcement of copyright infringement. Some examples follow:

- Libraries and archives have certain limited rights to reproduce and distribute copies and sound recordings;
- Owners of a particular copy or phonorecord may transfer that particular copy—for example; you can sell a book you previously purchased.
- Certain performances and displays by teachers and students for educational purposes—you may perform parts of *Romeo and Juliet* in class.

- Certain copies of computer programs—you can make a back-up disc for personal use.

