

ONE COPYRIGHT BASICS

The Congress shall have 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.

—United States Constitution¹

YOU DON'T NEED A DETAILED understanding of copyright law to read this book: a brief overview should give you enough to get by. The Statute of Anne, enacted by the British Parliament in 1710, is generally considered to be the world's first copyright law. The United States passed its first copyright statute in 1790. Early U.S. copyright laws required compliance with a variety of formalities (registration, copyright notice, renewal)² as a condition of copyright protection. Recent laws have dropped requirements for copyright notice, registration, or renewal, and have abandoned conditions limiting copyright to publicly distributed works. Today, copyright protection is automatic.

Copyright laws in the United States and elsewhere begin with the principle that neither the creator of a new work of authorship nor the general public ought to be able to appropriate all of the benefits that flow from the creation of a new, original work of authorship. If creators can't gain some benefit from their creations, they may not bother to make new works. If distributors can't earn money from the works, they may not bother to disseminate them. But all authors use raw material from elsewhere to build their works. Novelists, composers, sculptors, and programmers all incorporate into their works ideas, language, building blocks, and expressive details they first encountered elsewhere. If creators were given control over every element and use of the works they created, there would be little raw material left for later authors. Thus, both as a matter of fairness and as a matter of promoting learning by encouraging authors to create works and the

public to consume them, copyright has always divided up the possible rights in and uses of a work, and given control over some of those rights to the creators and distributors and control over others to the general public.

When you buy a book today, you pay a flat fee to some bookseller rather than agreeing to be billed by the glance. You may read and reread the book, or any part of it. You may learn the stuff that's in it. You may talk about the book with your friends. You may loan your copy of the book to any friend who wants it. When you've finished with the book, you may resell it to a used bookstore or donate it to the local library, which may loan it out to anyone with a library card. You don't need the copyright owner's permission to do any of these things.

When you buy a musical recording on compact disc, you again pay some amount of money to own the thing. You have no further obligation to pay for each listen. The law permits you to make a tape of the recording for your car. You may resell the CD, or loan it out, even to friends who want to use it to make tapes for their cars. What you can't do without the copyright owners' permission is rent the CD out commercially, or broadcast it over the radio, or play it at a concert or in your restaurant, bar, or store.

When your child needs to consult an encyclopedia for a report on hive-building insects, you don't have to buy one; you can send her to the public library to look the stuff up. When she writes her report, she doesn't have to pay the encyclopedia company to use what she learned. When you see a building, you can snap a picture without paying the architect. When you go to a bookstore, you may skim the first chapter of a book before you buy it. When you turn on your car radio, you needn't pay the composers of the music you hear, or the artists who perform it. But you know at some level that in the process of writing music and delivering it to your ears, someone at some point has paid them something.

When you turn on your computer, you needn't pay a royalty to Microsoft® or Apple® for the use of the operating-systems program that makes the computer work. We take this for granted, but it isn't natural law. It is the result of a complicated legal bargain that allocates the different benefits that flow from works of authorship to writers, to publishers, and to the public at large in a way intended to promote the progress of science and useful arts. There's no particular reason why we had to choose this system. We could have relied on the patronage system that gave us Shakespeare. We could have decreed that authors who create works of authorship have exclusive control over every use of their works for a year, or a decade, or a life, or forever.

Instead, we came up with a system designed to give some market-based financial compensation to people who create works, and to people who distribute them, without giving them extensive rights to prevent the use and reuse of those works by the public and by the authors of the future. The system is premised on the assumption that we can give authors and their publishers rights to control some ways of exploiting their works, and reserve the rest of the value of the works to the public at large.

Under the current copyright statute,³ copyright vests automatically in original works of authorship as soon as they are “fixed in tangible form,” i.e., embodied in a permanent, tangible object. No notice or registration is required.⁴ The copyright in this book came into being as I typed the words that you are reading. The copyright in a song exists from the moment the song is first written down or recorded on tape, disc, or microchip. The copyright will belong either to the individual who created it (in which case it will last until seventy years after that person’s death), or, if the work is created within the course of employment, to that individual’s employer (in which case it will last for ninety-five years from its first public distribution).⁵ It will give the copyright owner rights over the material the author added, but not over any preexisting material appropriated from elsewhere. The copyright will protect the expression in the work from being copied without permission, but will give no protection whatsoever to the underlying ideas, facts, systems, procedures, methods of operation, principles, or discoveries.⁶ It may seem paradoxical that copyright fails to protect what for many works are their most valuable features, but that balance is a long-standing one; it derives, the U.S. Supreme Court tells us, from copyright’s constitutional foundation.⁷ The chief purpose of copyright is to promote learning, and learning would be frustrated if facts and ideas could not be freely used and reused.

United States copyright law gives authors a number of broad rights: the right to reproduce the work in fixed, tangible copies; the right to create adaptations; the right to distribute copies to the public; and the rights to perform publicly and display publicly. These rights are made subject in the statute to a variety of exceptions.⁸

Some of the exceptions are broad: under the “first sale doctrine,” for example, the copyright owner has no right to control the distribution of a copy of a work after she has sold that copy.⁹ The buyer can keep it, loan it, rent it, display it, or resell it to others. Another exception covers useful articles: If a protected photograph, painting, or sculpture embodies or depicts

a useful article, anyone can reproduce the useful article, which is not itself subject to copyright protection. In other words, copyright protects a painting or photograph of an automobile, but gives no protection to the automobile itself.¹⁰ Under the fair use privilege, a variety of otherwise infringing acts are excused for policy reasons.¹¹ (Common fair uses include quotations, parodies, photocopies for classroom use, and home videotaping of television programs.)

Most of the exceptions, though, are narrow and specific. Broadcasting organizations, for example, licensed to broadcast a musical recording, are allowed to make a copy of the work to facilitate the broadcast.¹² Libraries may make photocopies so long as they comply with a long list of conditions and limitations.¹³ Cable television operators can retransmit broadcasts without the permission of the owners of the copyrights in the works being broadcast, so long as they pay a statutory license fee.¹⁴ A small restaurant may play radio or television broadcasts for its customers, but may not play prerecorded music.¹⁵ A church may play religious music during services.¹⁶

The presence of detailed exceptions shouldn't obscure the fact that some uses of copyrighted works are simply not subject to copyright owners' control at all. Copyright owners are given no control, for example, over *private* performance or display. Watching a videotape in your living room, showing the sculpture you just purchased to your cousin, or singing the latest Metallica hit to your friend over the telephone are simply not among the uses that the copyright owner has any right to prohibit or permit.¹⁷ They have no power to prevent the owners of copies of their works from loaning them repeatedly. More fundamentally, copyright does not protect ideas, no matter how original, brilliant, or unique they may be.¹⁸ $E=mc^2$ is in the public domain. Nor may copyright give owners legal rights over the functional or factual elements of their works. The design used for the onramps to the Triborough Bridge is not protected by copyright.¹⁹ The facts reported in a biography of San Francisco Jewish families belong to no one.²⁰ Copyright owners do not own any of the ideas expressed in their works. They have no ownership of the functional or factual aspects of their works. They have no claim to any compensation when their readers learn and use their teachings.

All of this has worked more or less invisibly to the general public, because traditionally, copyright owners have had control over the sorts of uses typically made by commercial and institutional actors and little con-

trol over the consumptive uses made by individuals. That has permitted the copyright law to be drawn as a complex, internally inconsistent, wordy, and arcane code, since the only folks who really needed to know it were folks for whom copyright lawyers were an item of essential overhead. Most copyright infringement suits proceeded against businesses and institutions.

A law intended to be enforced against individual consumers would have needed to be structured differently; the current setup would strike many individuals as unfair. Under the current statute, anyone who invades the copyright owner's exclusive rights without a license or statutory privilege can be held liable for infringement.²¹ The law has never required that an infringer be aware that she is violating another's copyright. It is copyright infringement to copy a protected work subconsciously and unknowingly;²² it is also copyright infringement to perform or distribute copies of a work in the mistaken belief that one's use is licensed.²³ Successful plaintiffs in copyright-infringement suits can recover substantial damages without needing to prove any actual harm to the market for their works.²⁴ In addition, courts routinely order defendants to stop infringing activity, to surrender or destroy infringing copies, and to pay plaintiffs' lawyer bills.²⁵

Digital technology changed the marketplace. It's a cliché that digital technology permits everyone to become a publisher. If you're a conventional publisher, though, that cliché doesn't sound so attractive. If you're a record company, the last thing you want is a world in which musicians and listeners can eliminate the middleman. But can you stop it, or at least delay it? Is the copyright law one tool that might help you do so?

NOTES

1. U.S. Const., art. I, § 8, cl. 8.

2. Until 1909, one secured copyright through registration. The copyright lasted for a fixed term, and could be renewed for an additional term if the copyright owner complied with renewal procedures. The 1909 act provided that one could secure copyright in some works by registering them, and in others by publishing them with the prescribed copyright notice. Registration was in any event necessary in order to apply for the renewal term. In either case, distributing copies to the public without the statutory notice forfeited the copyright. See Robert A. Gorman and Jane C. Ginsburg, *Copyright: Cases and Materials* 4–9, 339–43, 383–97 (5th ed., Lexis Law Publishing, 1999).

3. The current statute was enacted in 1976 and has been amended periodi-

cally in the years since then. It is codified at 17 U.S.C. §§ 101-1332 (2000).

4. 17 U.S.C. § 102.

5. 17 U.S.C. §§ 201, 302.

6. 17 U.S.C. § 102(b).

7. *Feist Publications v. Rural Telephone Service*, 499 U.S. 340 (1991); *see also Baker v. Selden*, 101 U.S. 99 (1879).

8. 17 U.S.C. § 106.

9. 17 U.S.C. § 109. There are two narrow exceptions. Owners of copyrights in sound recordings and computer programs have the right to prohibit rental, but not loan, gift or resale, of copies of sound recordings or computer programs. *Ibid.*

10. 17 U.S.C. § 113.

11. 17 U.S.C. § 107.

12. 17 U.S.C. § 112(a).

13. 17 U.S.C. § 108.

14. 17 U.S.C. § 111. Federal Communications Commission regulations impose other restrictions that limit the ability to transmit particular works, and some of those regulations may constrain cable operators in ways that echo copyright limitations. See 47 U.S.C. § 325(b).

15. 17 U.S.C. § 110(5).

16. 17 U.S.C. § 110(3).

17. In *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors*, 866 F.2d 278 (9th Cir. 1989), for example, motion picture studios sued a resort hotel that rented videodiscs for its guests to play on the large-screen TVs in their rooms. The court held that there was no *public* performance and therefore no infringement.

18. 17 U.S.C. § 102(b). *See Baker v. Selden*, 101 U.S. 99 (1879). Charles Selden devised a novel bookkeeping system that permitted accountants to condense six pages of accounts onto only two. Selden published several copyrighted manuals about his system, and hired an agent to travel through the country seeking to license the system and the ledger forms Selden had designed to go with it. An Ohio accountant, impressed with the Selden system but unable to pay Selden's price, adopted it anyway, and later peddled his version to other accountants. The United States Supreme court dismissed Selden's copyright infringement suit:

The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.

101 U.S. at 103.

19. *See Muller v. Triborough Bridge Authority*, 43 F. Supp. 298 (S.D.N.Y. 1942).

20. *See Narell v. Freeman*, 872 F.2d 907 (9th Cir. 1989).

21. 17 U.S.C. § 501.
22. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd*, 722 F.2d 988 (2d Cir. 1983); *Fred Fisher v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924).
23. See, e.g., *Lipton v. Nature Co.* 71 F.3d 464 (2d Cir. 1995).
24. 17 U.S.C. § 504(c).
25. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); Gorman and Ginsburg, *Copyright*, at 729–30.