COPYRIGHT LAW
FOR LIBRARIANS AND EDUCATORS

Creative Strategies & Practical Solutions

THIRD EDITION
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This Book and the Importance of Copyright

THE ADVANCEMENT OF innovative education, librarianship, and scholarship has become increasingly entangled with copyright law. Creative uses of protected works and new applications of digital technologies have roused complex questions about the appropriate uses of copyrighted works as well as the ownership and management of the legal rights. As we strive to better understand the issues, we are seeing steady transformation of our efforts, as well as incremental change in the law. Since the previous edition of this book, courts have handed down new rulings on many issues, including fair use and digital rights management. Congress, on the other hand, has confronted difficult issues—such as the use of orphan works—but has largely failed to pass major legislation directly centered on the challenges confronted by educators, librarians, researchers, and others. Meanwhile, research and education seem to be routinely reinvented with the creation of new software and technological devices.

This mix of change and inactivity has motivated private parties to take the lead in shaping some implications of copyright law. Creative Commons has become a salient point of rebellion against expanding rights. The open access movement calls for sharing rights of use. Institutional policies and agreements clarify rights of ownership and works made for hire. Educators and librarians steadily grapple with the need to define a standard for fair use. The proposed settlement of the Google Books litigation would establish its own regime of rules for creating a digital collection of copyrighted materials, although the settlement remains as of this writing under ongoing public and judicial scrutiny. Library acquisitions are shifting steadily toward electronic resources that are acquired under license agreements that define the terms of use of the journals, books, and many other works in the licensed collections. Textbooks and other instructional materials are now freely available online and reconceived as wikis and downloads. Such private agreements and pursuits are becoming a dominant force on the shape of legal rights and responsibilities.

Nevertheless, none of these private arrangements would be wise or possible without a solid grounding in copyright law. Parties would be remiss to make policy, negotiate agreements, or enter into licenses without knowing what the law already provides. Copyright is the foundation of licenses and other bargains. Copyright is the starting point for drafting and negotiating effective deals. Without knowing the law, you are at a disadvantage when determining
whether your policy or contract is expanding your rights, giving you something you already have, or taking away opportunities that the law has handed you. Moreover, regardless of the trend toward contracts and licenses, the rapid shifts in materials, demands, creativity, and distribution networks mean that we will always need to return to principles of copyright to determine fundamental rights, responsibilities, and opportunities. What works are protected? Who owns the rights? How does fair use apply? How does the law apply to library services, or to music and recordings, or to distance learning? This book addresses exactly these questions.

We also need to return to the fundamentals of copyright because as educators, researchers, librarians, and students, we continue to engage in new ventures. We steadily digitize and upload diverse materials. We launch websites for every program and project. Libraries obtain federal grants to establish vast digital collections as open resources for any user on the Internet. We download materials from databases and manipulate and incorporate them into online instruction. An understanding of copyright and our ability and willingness to work with the law can help make these important endeavors successful.

OBJECTIVES OF THIS BOOK

The primary purpose of this book is to provide a basis for understanding and working with the copyright issues of central importance to education, librarianship, and scholarship. This book is centered on the law. It is not about licensing, nor does it include more than a general mention of the proposed Google Books settlement. Copyright law bestows automatic protection for printed works, software, art, websites, and nearly everything else we create and use in our teaching and research. The protection lasts for decades, and we can infringe the copyright with simple photocopying or elaborate digitizing and uploading.

Fortunately, copyright law includes a number of exceptions to owners’ rights, such as fair use. Several other detailed provisions of the U.S. Copyright Act specifically benefit education and learning. These provisions allow library copying, permit performances and displays in classrooms or in distance learning, and sanction backup copies of computer software. This book will acquaint readers with the vital role that these exceptions play in the functioning of copyright and in the growth of knowledge. This book also offers strategies and techniques for reaping the benefits of these rights of use.

TAKING CONTROL

As professionals in the world of education and librarianship, we can enjoy the law’s benefits only if we take control. We need to understand the rules of the copyright world. We must comprehend our rights as owners and as users. We ultimately need to identify alternatives that the law allows and make decisions about copyright that best advance our objectives as teachers, learners, and information professionals. If we do not manage copyright to our advantage, we will lose valuable opportunities for achieving our teaching and research missions. If we do not manage our own needs, someone else will make the decisions for us.

This book demonstrates that much of copyright law is within the reach of professionals with diverse backgrounds. Admittedly, some aspects of the law will be bewildering and occasionally unworkable. But most issues about ownership, publication, library services, and fair use are within our grasp, and we can make practical sense of them. Copyright does not have to be an annoying or threatening nuisance that merely burdens our work. With a fresh understanding of the law, it can actually support teachers and scholars who are striving to meet their goals each day.
THE COPYRIGHT PATH
Changing Needs and Copyright Solutions

THE CHAPTERS OF this book are structured to provide a graceful and systematic walk through the principles and functioning of copyright law. Although the journey may be rough at times—thanks to a law that too often does not keep a straight path—the expedition should be intellectually engaging as well as practical. Indeed, working with copyright law in the context of applied situations is less of a quest for answers than it is a path that takes you toward a resolution, or at least a decision, about individual aspects of copyright. Consider one of the most common copyright questions: You, or a colleague, are working on a project that involves the reproduction or other use of a book, film, song, or other work created by someone else. The first copyright question is often simply phrased, “Is this fair use?” If you take the question at face value and go straight to analyzing fair use, you could find yourself on a steep and rutted road, edged with the thistles and thorns of a gray law.

In contrast, by reflecting on the entire copyright trail and planning the trip from the beginning, you might find various stops along the way that give you a better, more direct, and even easier answer than you would find by starting with fair use. You might determine:

• That the work in question is not protected by copyright at all. It may be a governmental work, or the copyright may have expired.
• That the use is not among the protected rights of the copyright owner. You might, for example, be making a private performance of music, while the owner has rights only with respect to public performances.
• That the intended use is within another statutory exception in the Copyright Act. If you can fit your use within one of the detailed provisions for classroom use, library copying, or backing up software, you will probably find a more satisfactory answer than you will with fair use.
Any one of those possibilities is a clearer and more secure answer than you will likely find with fair use. This book should accordingly help you see the issues and possibilities of copyright unfold systematically as they apply to your real needs. You should also see how the issues change with the growing innovation and complexity of education, research, and technology. This book is about law, but the real subject is teaching, research, innovation, and other spirited pursuits of educators and librarians. Yet because these pursuits constantly involve creating and using copyrighted works, legal issues steadily arise. The issues change and grow with each new variation. Change the materials you might be using, or change the method or circumstances of their use, and you may well encounter a different set of issues and possibly different outcomes under the law.

Notice that this book is exploring issues and not necessarily problems. Not all copyright questions are problems. In fact, some copyright questions are relatively easy, and many lead to good news. For example, copyright broadly permits some uses of work in the classroom, and it provides that all works eventually enter the public domain, where they may be freely used. Other questions are tougher, and not all will lead to a satisfactory conclusion. But anyone seeking to enjoy the benefits of the law will need to take a little time, learn a bit about the law, and make a determination about whether you are working within the terms and boundaries of the rules. Reading this book should be a great stride in that direction.

Let’s start the journey. Throughout this book you will find a variety of cases, examples, and scenarios intended to reveal the practical application of copyright law in ways that are relevant to educators, librarians, researchers, and others. Before delving deeply into the chapters and details of the rest of the book, a familiar and evolving scenario can provide a meaningful introduction as well as a map through the upcoming chapters.
TAKE ME TO THE MOVIES

Begin the scenario with simple and familiar facts. With each additional fact will come new questions about copyright, and the text boxes will highlight key points and lead you to other chapters in this book for more information and guidance.

SCENARIO A

You teach a college course on English literature, and you ask your students to buy and read the book *Pride and Prejudice*.

One of the curses of copyright is that you start to see issues everywhere. In even the simplest situation you have copyright questions—at this stage you only have questions, not problems. You are proposing nothing that will violate the law, but to get to that conclusion systematically and accurately, we have to sort through a few copyright issues.

Is the book protected by copyright?

• Chapter 2 makes clear that most original works are protectable under copyright.
• Chapter 4 surveys the law of *copyright duration*, and a book that was first published in 1813 is surely in the public domain.

If the work were still protected, would buying or reading a copy be a violation of copyright?

• Chapter 6 surveys the *rights of copyright owners*, and simply reading a book is not on the list. On the other hand, a copyright includes the *rights of distribution* of copies, so the bookstore may be infringing with each sale.
• Chapter 7 is an overview of *exceptions to the rights of owners*, and the *first sale doctrine* is a major limit on the distribution rights, enabling bookstores to sell copies and libraries to check out books and more.

SCENARIO B

To give your students a different perspective of the story, you would like to show the recent film version of *Pride and Prejudice* to the entire class.

Is the motion picture protected by copyright?

• Chapter 2 emphasizes that copyright *protects an extensive range of materials*, including text, sound recording, images, software, and movies.
• A version of the movie was released in 2005, and chapter 4 shows that it has *many years of copyright protection* still ahead. On the other hand, the 1940 version is likely still protected, but it could be in the *public domain* if the copyright owner did not comply with the formalities required at that time. Chapter 4 will take you step-by-step through that possibility.

Does showing the motion picture violate copyright?

• Chapter 6 itemizes the *rights of copyright owners*, and you may be making a *public performance* of the movie.
Chapter 6 includes mention of Section 110(1) of the Copyright Act, a statute that broadly permits showing a film in the traditional classroom. You may find that a specific copyright exception is enormously important for your teaching.

Look at what is happening to our scenario. The simplest version is rich with issues and subissues. You are not going to jail and probably will not even get a nasty letter from a Hollywood lawyer. But to know with confidence that you are acting within the law, you need to be astute about copyright. To get the best “answers,” you should follow a systematic path, starting at the beginning.

**GOING DIGITAL**

You do not want to take valuable class time to show the film in class, so you begin to explore new technologies and alternatives for making it available to students to view on their own time. Adding or changing the facts will usually give rise to new questions.

You would like to show the film, not in the ordinary classroom but through the course management system (such as Blackboard or Moodle). Students log on and the video is streamed to their computers at any location. Students have the advantage of setting their own schedule and being able to study the film more closely by reviewing and selecting scenes for closer study.

Does copyright law permit you to digitize, clip, and post some or all of a motion picture for your students to study? Actually, you have at least three possibilities for lawfully delivering the video clips.

- Chapter 6 notes the importance of Section 110(1) of the Copyright Act. Although it broadly allows performances of works in the classroom, it probably will not apply where you are making copies and posting them to a server.
- Chapter 12 examines Section 110(2), also known as the TEACH Act. If you can meet all of its requirements, this statute permits use of “reasonable and limited” portions of audiovisual works.
- Fair use is a vital option. Chapters 8 through 11 explore fair use in detail and suggest how it may apply, particularly to portions of works in a limited context.
- You might supplement the film clips with historical works, such as photographs and manuscripts. If these materials are unpublished archival materials, chapter 17 summarizes distinctive rules about protection, duration, and fair use.
- You might also focus on the film score and related musical works and recordings. Chapter 15 examines the copyright rules related to musical compositions and sound recordings.

You have studied the TEACH Act and fair use, and you conclude that you are simply not able to fit your use of the copyrighted film into any of these exceptions. Do you still have any choices?

- One obvious choice is to secure permission from the copyright owner. Chapter 18 offers pointers for locating owners and securing permissions. Sometimes permission is the most realistic or even necessary alternative.
Chapter 18 also suggests as a strategy that you might need to **rethink your plans**. You might have an exact plan or project in mind, but in light of copyright considerations, you may need to reconsider the materials you are using and exactly how you are using them.

**SCENARIO D**

Perhaps you have studied your needs and the applicable copyright law, and you confidently conclude that you are within fair use or the TEACH Act for your use of the film. You put the DVD into your computer in order to copy selected clips, only to discover that the disk is embedded with a copy protection code that prevents making the clips.

You find on the Internet that you can download software that allows you to bypass the protection code and make the copies. If your use of the film is lawful and within fair use, are you allowed to crack the protection code?

- Chapter 16 examines the complex and problematic law barring the **circumvention of technological protection measures**. You may be running afoul of that law.
- Chapter 16 also surveys **exceptions to the anticircumvention law**. Unfortunately, the exceptions are tightly limited, so you should study the details carefully. A new regulatory exception from the Library of Congress opens an important possibility.

**THE LIBRARY’S ROLE**

The libraries at your college or university, as well as the public library in your neighborhood, provide essential support for your research and instructional planning. The film versions of Pride and Prejudice that you plan to use are from the university library’s collections. You also find journal articles, photographs, music, and many other works that you would like to make available to your students. For many of these materials, you probably need to revisit all the foregoing questions about copyright protection, the public domain, classroom performance, the TEACH Act, fair use, and permissions. The library is also willing to provide various services that often involve making copies and delivering content to you or to your students. When the library provides services, the librarians need to consider a few additional copyright issues.

**SCENARIO E**

The librarians would like to make copies of some of the materials that you need for teaching, research, and other academic work.

Is the library allowed to make copies of various works and give them to you for your teaching and research?

- Chapter 13 details the conditions under which a library may make copies from the collection pursuant to Section 108 of the Copyright Act. Section 108, however, does not apply to all types of works, so the library may still need to rely on fair use or permissions when it copies some materials.
• Your local library may not have all of the materials you need; they will need to request copies from another library. Chapter 13 specifies the conditions under which the library may receive copies of some materials from another library as part of interlibrary loan arrangements.

Some of the materials in question are no longer on the market or are already damaged. One of the films is on a VHS tape; VHS players are hard to find today, and the tape quality degrades with each use. Can the library make copies of these materials?

• Chapter 13 also examines the provisions of Section 108 that allow a library to make copies of unpublished works for purposes of preservation or security. This provision generally applies to manuscripts, photographs, and any other work that is not published.
• Section 108 also allows a library to make copies of published works that may be damaged, deteriorating, lost, or stolen. These statutes have various conditions and requirements, but they offer important opportunities. If the VHS movie is no longer on the market, the library may be able to make up to three copies of it. Chapter 13 outlines the details.
• Section 108 further permits a library to make copies of works if the format has become obsolete. The VHS format may not be obsolete today, but it will be someday soon. Again, chapter 13 specifies the circumstances when a library may make the replacement copies.

**BECOMING AN AUTHOR**

You have become fascinated by these copyright issues (who couldn’t?), and you decide to do some additional research and write a journal article on the quirks and challenges of copyright in the academic setting. You become known as something of a copyright expert around campus and get appointed to chair the policy-making committee for the library and the university. You write a document outlining the policy of your institution on fair use issues.

**SCENARIO F**

You are the sole author of the journal article, and it has been accepted for publication in your first choice of journals. Congratulations!

But who owns the copyright in the article?

• Chapter 5 lays out the general rule that the author of the original work is the owner of the copyright.
• That chapter examines the doctrine of work made for hire, its application to academic work, and the importance of university policies.
• Chapter 5 also explores publication agreements and the possibility that they may include a transfer of the copyright. The copyright may have been yours initially, but be careful about what you sign.
• That same chapter further raises the prospect of open access and alternatives for publication and copyright, such as Creative Commons.
• Regardless of who owns the copyright, the publication agreement can clarify the specific rights of use that you might retain. Negotiate and draft the agreement carefully!
You chaired the committee and drafted much of the policy on fair use, but several of your colleagues had a hand in writing portions of it. Who owns the copyright in your institutional policy?

- Chapter 2 examines the broad scope of copyright. Even a copyright policy issued by a library or college is most likely copyrightable.
- Under the general rule in chapter 5 you and your colleagues may be the copyright owners. Together you may have a joint copyright in the document.
- Preparing the policy was likely one of you job assignments, and as such it is likely a work made for hire. Chapter 5 explores the significance of that determination.
- Chapter 5 surveys options for copyright management, such as Creative Commons, and CC may be a good option for handling and sharing the copyright in an institutional policy or other document.

STRATEGIES FOR COPYRIGHT DECISIONS

Finding the right trail through the law is clearly essential to any successful application of copyright. In addition to learning the law, however, you also need to develop an awareness of strategies and a process of decision making in an environment that is thoroughly affected by copyright. Copyright is, after all, the law. It comes with mandates and opportunities, rights and responsibilities. In the spirit of this book, most of your decisions should be centered on making a proper—and sometimes creative—application of copyright in furtherance of teaching, research, and library services. One cannot deny, however, that copyright decisions also raise risks and can lead to some (potentially) scary penalties.

Think back to some of the scenarios examined above. You want to clip excerpts from a motion picture and post them to your course management system for students. Consider just the question of whether you are acting within fair use. Chapters 8 through 11 provide considerable substance of the law and examples for thinking about the factors of fair use. But in addition to the substance of the law is the process of decision making. You are one person, holding your job and executing your duties, on the staff of a library, college, or university. Is copyright your responsibility? Are you the right person to make the decision about fair use?

One way to think about those questions stems from one basic legal principle about copyright: the person who makes the copies or other uses of a work is the first person responsible for any infringement that might result. In other words, if you are the one who operates the computer and does the clipping and uploading, you have the immediate responsibility and liability. That would tend to place the decision squarely in your hands.

However, if you are taking action as part of your duties as a teacher, librarian, or other members of the institution, then in almost any typical situation, the liability will be shared upstream with the organization. The question then becomes: Who is responsible for making legal decisions for the organization? Put that way, you might start looking up the corporate chart to find the senior officer (or is that already you?) or the connection out to the corporate counsel. You could easily find one of these situations:

No lawyer in sight. In many colleges, universities, libraries, and other organizations, no one is available to help with a lawyer’s view of copyright. Either your organization has no attorney on staff, or the lawyer is not well versed in copyright or is not able to handle multitudes of recurring fair use dilemmas.
Legal help today, but not every day. You may be among the fortunate few with direct access to an attorney, but the access is limited and infrequent. Often a good lawyer will in fact not make every decision. A lawyer might shape the general principles and give guidance for different types of situations, but the daily decisions about individual situations often come back to you and your colleagues. The attorney’s involvement may give you important reinforcement and protection, but you still need to make the final judgments. Chapter 14 of this book should give you some reassurance about your decisions, if you act responsibly and in good faith.

Building a support team. You are hardly alone in your search for copyright advice. Rather than wait for legal support, you may in the meantime find colleagues who have dealt with similar questions. You may find good help from the insights and experiences of directors, department chairs, deans, or other colleagues who have the authority to oversee business decisions or who have experience working with copyright. You might also simply want the support of colleagues and supervisors, but you might still be the one person who knows and cares the most about copyright. Sometimes you need to take the lead as you educate and build a team.

Regardless of which situation you confront, you cannot entirely avoid having a role in copyright decisions. Even complete deference to others is itself a decision. Moreover, if you are the one pushing the buttons on the machine and making the copies, you need to take good care of your own interests. You are, after all, responsible, even if your library or university shares the responsibility with you. Like a soldier on the front line, you might get orders, but in a calm moment you have to decide if the orders are right.

What goes into your decision about copyright? This book will provide a wide range of insights about that question. Naturally you need to base decisions on an accurate and current understanding of the law. The best decisions about copyright also consider much more than just law. They take into account the risks. Is my project limited to my classroom, or will it be on the Web for all to see? Am I using obscure photos from the 1930s or recent professional works with identified photographers? Multitudes of images are available from Flickr and other sources with generous Creative Commons licensing. A good decision contemplates alternatives. If you want the film clips because they are great scenes of London, then perhaps you should look for other clips that might be in the public domain or easily licensed. If you want all your students to study the entire film and it is easily available to buy or rent, then maybe you should expect all your students to acquire the DVD.

You are not avoiding copyright. You cannot. But mix this fact of life into your strategy: you have only a finite number of hours in the day. You cannot make every decision, review every situation, and evaluate every risk. You need to save your “copyright energy” for the situations that demand attention. Copyright must be addressed to implement programs of library services, digitization of collections, innovative teaching, and the management of our scholarship and publication. These are the kinds of pursuit that merit attention, where a careful, informed, and strategic approach to copyright can ultimately advance the needs of copyright owners as well as the researchers, teachers, students, and members of the public who will benefit from access to a wider range of information resources. This book is intended to send you along that path and toward the goal of constructive stewardship and use of copyrighted works.
KEY POINTS

- A work must be both “original” and “fixed in any tangible medium of expression” to be copyrightable.
- Originality requires a minimum amount of creativity and that the work originated with the author.
- A work is fixed if it is embodied in some stable form for more than a brief duration.
- A tangible medium allows a work to be perceived or communicated.

THE U.S. COPYRIGHT ACT sets forth in Section 102(a) that copyright protection vests immediately and automatically upon the creation of “original works of authorship” that are “fixed in any tangible medium of expression.”

ORIGINALLITY

The notion of originality in copyright law has two components. Fundamentally, originality means that the work came from your inspiration and that you did not copy it from another source. Second, originality implies some degree of creativity. Originality is easily found in new writings, musical works, artwork, photography, and computer programming. You may also find originality in a new arrangement of existing facts or information. Scientific findings or facts may not themselves be copyrightable, but their arrangement on a table or their presentation in text may be protectable expression.

In all these examples, the work is original if you did not copy it from another source, even if your photograph happens to look much like someone else’s view of the Grand Canyon. You stood at the same lookout point and snapped a beautiful picture. The similarity is coincidence and circumstance, not copying. Based upon this principle, typically the content and layout of a website is easily copyrightable. So is everyone’s Facebook page. A typical Facebook wall is an array of text, images, advertisements, and more. Each piece—from the snarkiest comments to the most elaborate program applications—is someone’s creative work and most assuredly copyrightable.

Copyright protection can also apply to a new work that is built on an existing work, but any new copyright protection will apply only to the added
creativity. For example, Homer’s epic poems may never have had any legal protection under the laws of ancient Greece, but a new translation is an original work subject to new copyright protection as a derivative work. A derivative work uses the original work—for example The Iliad—and creates a new work from it. In addition to translations, other familiar derivatives include a motion picture made from a novel, a stage play based on a movie, and songs based on poetry. The possibilities are legion. When a motion picture studio produces a film based on a Jane Austen book, the original book remains in the public domain, but the studio holds the copyright for its new dialogue, visuals, score, and other contributions to the movie.

YOUR FACEBOOK WALL may be filled with copyrighted pieces, but sorting out the copyright ownership is another matter. Facts, such as names and birth dates, are not protectable. Facebook Inc. surely holds rights in the layout, standard elements, and programming of each person’s site. You may hold rights in your updates and photos, while your FBFs have the rights in their scribbles on your wall. The limits of protection and the rules of joint ownership are in chapters 5 and 6.

CREATIVITY AND ORIGINALITY

How much originality is required? A work must embody only some “minimum amount of creativity” to be considered original. Courts have held that almost any spark of creativity beyond the “trivial” will constitute sufficient originality. The U.S. Supreme Court ruled in 1991 that a “garden-variety,” alphabetical, white pages telephone book lacks the requisite minimum creativity for copyright protection. Cases since 1991 have affirmed this ruling, but tested its limits. For example, a yellow pages listing may have sufficient originality resulting from its categorization of information into subject headings.

Technology and innovation routinely test the applicability of copyright law. Courts in recent decades have addressed the copyrightability of computer software and bootleg recordings. Long ago, the Supreme Court faced similar questions about a photograph of Oscar Wilde. The Supreme Court held that the picture met the standard of creativity because the photographer chose the camera, equipment, lighting, angles, and placement of the camera when shooting the picture.

What if the photograph encompasses little choice about the content and elements? A federal court ruled recently that a direct, accurate photographic reproduction of a two-dimensional artwork lacks sufficient creativity to be original. The work of art may still be creative and protected by copyright, but not the simple and direct photographic reproduction. Unlike the Oscar Wilde case, the photograph of artwork was meant to be a reproduction and did not necessarily include creative lighting, coloring, or angles, or capture more than just the work of art itself.

Similarly, another court held that digital models of automobiles that were meant to be exact reproductions were also not copyrightable. These recent cases also stand for the general

IN A SIMPLE but pointed assertion of a standard for copyrightability, the Supreme Court declared, "[T]here is nothing remotely creative about arranging names alphabetically in a white pages directory." The law may not require much creativity, but still, some works will not pass the test.

proposition that copyright law protects originality, not hard work. Copyright does not grant protection for the investment of labor, equipment, and know-how—unless the result is an original work with at least a minimum amount of creativity.

FIXED IN A TANGIBLE MEDIUM

For an “original work of authorship” to be eligible for copyright protection, it must also be fixed in some physical form capable of identification that exists for more than a “transitory duration.” Examples of fixed works might include scribbles on paper, recordings of music, paintings on canvas, and documents on web servers. A snapshot on film or in a digital camera is fixed. Sand castles, ice sculptures, and spray-painted graffiti all can qualify as fixed in tangible media.

The fixed form does not have to be readable by the human eye, as long as the work can be perceived either directly or by a machine or device, such as a computer or projector. Therefore, programming and substantive content stored on floppy disks or CDs are fixed, as long as the works can be read with the use of a machine.

THE SUPREME COURT noted that the photograph of Wilde was from the photographer’s "own original mental conception" as demonstrated "by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression."


IN HOLDING THAT photographic reproductions of art are not original, the court reiterated the principle that "slavish copying" does not qualify for copyright protection, "although doubtless requiring technical skill and effort."

PART I: THE REACH OF COPYRIGHT

The “tangible medium” requirement expands copyright protection from traditional writings and pictures into the realm of video, sound recordings, computer disks, and Internet communications—any format now known or to be later developed.2 If you can see it, read it, watch it, or hear it—with or without the use of a computer, projector, or other machine—the work is likely eligible for copyright protection. Harder questions surround works that exist in a particular form for a seemingly transitory duration. For example, are materials stored only in the random-access memory (RAM) of a computer sufficiently fixed? A fleeting appearance in RAM may not be enough. A court recently determined that a work that is perceptible for slightly more than one second is not fixed.10 By contrast, if that same work were saved, stored, or printed, it easily would fall within the purview of copyright.

Given the wide range of media and nearly boundless scope of originality, a vast array of works is brought under copyright protection. In addition, the statutes list various works that are generally protectable. Section 102(a) of the Copyright Act specifies that copyrightable materials can include

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EXPANSION OF COPYRIGHTABILITY

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AN IMPORTANT COURT case held that software programming loaded into RAM could be sufficiently stable to qualify as a copy for purposes of establishing an infringement. The concept of a work in a stable medium for purposes of copying is similar to the standard used to determine if the work is fixed in the first place to establish copyright protection. In this case, the work remained in RAM until the system was shut down and was not merely fleeting.

MAI Systems Corporation v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).
• Literary works
• Musical works, including any accompanying words
• Dramatic works, including any accompanying music
• Pantomimes and choreographic works
• Pictorial, graphic, and sculptural works
• Motion pictures and other audiovisual works
• Sound recordings
• Architectural works

These categories are illustrative and not exhaustive of all possibilities. Because the categories are construed liberally, literary works can range from novels to computer programs. The category of pictorial or graphic works can include maps, charts, and other visual imagery. Because of the law’s vast reach, the important question may not be what is copyrightable, but what is not copyrightable. The next chapter identifies various types of works that are outside the reach of copyright protection.

NOTES
7. The word fixed, as well as many other terms, is defined in the copyright statutes. U.S. Copyright Act, 17 U.S.C. § 101.
WORKS WITHOUT COPYRIGHT PROTECTION

KEY POINTS

- Ideas and facts are not protected by copyright.
- Works of the U.S. government are not copyrightable, but works created by state or local governments may be protected.
- Other specific types of works, such as databases, may be outside of copyright protection, but they may have limited protection under other laws.
- Once a copyright has expired, the work is no longer protected by copyright law and enters the public domain.

WHILE COPYRIGHT PROTECTION applies broadly to expressions that are original and fixed, several categories of works are specifically outside the boundaries of the law. These works are in the public domain, meaning they are wholly without copyright protection and are freely available for use without copyright restrictions. Sometimes copyright does not apply for practical reasons. For example, an oral presentation, if not fixed or otherwise recorded, may be difficult to prove and protect, so the law does not reach it. Sometimes copyright law does not apply for important policy reasons. For example, ideas and theories are not protectable. Ideas can evolve, earn Nobel Prizes, and change the world, but ideas are also meant to be shared and cultivated. Locking up ideas with legal protection can be harmful to the public interest and the expansion of knowledge.

On the other hand, the law of the public domain can get blurry. If you tell a friend your great idea for a book or scientific breakthrough and she uses only the idea in her own work, you have no copyright claim. If you show that same friend your draft manuscript about the idea and she uses the same words in her own study, she might have tread on your copyright. Copyright does not protect ideas, but it does protect your words or your expression of the ideas. Your friend needs to write her own book, with her own original expression. If we look beyond copyright, things get even fuzzier. Borrowing your ideas may sometimes be ethically unsound. If your ideas are part of your business plan, borrowing them may violate other laws, such as trade secrecy or misappropriation. But copyright protection simply does not extend to ideas.

Ultimately, many works are without copyright protection for good reason. A leading objective of copyright is to encourage creativity and the dissemination of new works. Sometimes limiting or denying rights also serves that same purpose. If ideas were protectable, we might be left with only one version of a
story, one software package for each need, or only one work of art that expresses beauty or angst. Sometimes denying rights can better foster creativity and render the greatest benefit for individuals and for society in general.

**FACTS AND DISCOVERIES**

Facts and discoveries are also not protectable by copyright. Facts cannot, by definition, be original as the law requires. You may conduct years of creative scientific study to discover a fact about the universe, but the fact itself is not your creative work. Denying legal protection for facts also assures that everyone can build on existing knowledge and share information.

On the other hand, you may have copyright protection for your original compilations of facts or your writings about the facts and discoveries. For example, after years of research to find facts, you write a journal article about your research findings. The sentences and paragraphs are most surely creative, original, and protectable. Suppose your article also includes several tables that organize the facts in a manner that is meaningful to your readers. For example, you might chart the boiling point of water, the rate of urban crime, or the election of presidents. If the chart is merely a presentation of facts, likely no protection is available. If the chart, however, is a creative display of information, with original organization, depiction, and explanation, the chart is likely within the scope of copyright protection.

What exactly is a fact? A book about rare coins is surely protectable, but the stated value of each coin could be a fact about market prices—or not. If the price is simply a recent actual selling price, it is likely a fact. On the other hand, one court has ruled that wholesale prices for collectible coins based on multivariable judgment calls and the appraiser’s “best guess” are creative works protectable under copyright. Similarly, historical interpretations may be creative fiction, or they may be presented as fact. The manner in which they are conveyed by the author will likely determine whether the court will treat them as unprotected fact or not.

**COMPILATIONS AND DATABASES**

Although facts themselves are not protected, a collection of facts may be. To the extent that you have selected, arranged, or coordinated the facts in some original manner, you can claim a compilation copyright in the work. Still, the facts are not your intellectual property. Another writer can extract the facts and include them in a new study, but if she copies your original expression of those facts, she is stepping into the realm of copyright.

Real examples of compilation copyrights are common, and the pressure for legal protection is profound. For example, many companies create, publish, and market bibliographies and other compilations of information. Individual author names, article titles, and the like are not protected under copyright, but if the data are arranged in some original manner, the resulting database can have copyright protection. A single issue of a standard academic journal can illustrate the point. An editor may select your article for publication and arrange it with other writings into a new journal issue. You may still hold the copyright for

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**THE U.S. SUPREME COURT** Court made clear that copyright protection depends on creativity, but the measure of creativity is modest at best: "[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."

your individual work, but the editor can hold a copyright in the compilation of the overall journal issue.\(^8\)

The journal—like any other compilation or database—has copyright protection only if it is original in its selection, arrangement, or coordination of data elements. Selecting and organizing articles in a journal may entail some originality; an editor selects articles from multiple submissions and organizes them into a logical sequence within the journal issue. By contrast, gathering data and listing it alphabetically or chronologically, or just uploading it in no order into a computer, often involves no creativity—the author is not making an original arrangement or necessarily selecting certain information for the compilation.

Without creativity, no copyright protection applies. The lack of protection for many databases is a great concern for companies that invest significantly to develop and market such works. In recent years, Congress considered legislation that would establish a new form of legal protection for data compilations, but none of the bills was enacted.\(^9\) Many educators and librarians cautioned against these bills, arguing that such a law would further restrain access to information. Meanwhile, many developers of databases have relied on licenses and contracts in an effort to impose some level of protection or control over their products.

All these examples underscore the need to distinguish between various elements of a total work, and to establish carefully whether each element is copyrightable. Some pieces may be in the public domain. Some components of a work may be separately copyrighted and held by different owners. Sometimes the distinction is fairly easy, such as the difference between the article and the journal. In other instances, the legal protection for each element is less clear, such as the difference between facts and the compilation of data.

**WORKS OF THE U.S. GOVERNMENT**

The United States government produces numerous works that may be original and fixed, but that are still not copyrightable. Section 105 of the U.S. Copyright Act specifically prohibits copyright protection for works of the federal government.\(^10\) Therefore, reports written by members of Congress and employees of federal agencies, as part of their official duties, are not copyrightable. Decisions from federal courts and statutes from Congress are not protected. The same holds true for presidential speeches, pamphlets from the National Park Service, and websites developed by federal agencies.\(^11\)

Even this broad rule of copyright is not as simple as it seems. Projects written by non-government officials with federal funding are eligible for copyright. For example, your research may be funded by government grants; that fact does not by itself put your work in...
the public domain. A government-funded project is not necessarily a “work of the United States government.”

Similarly, just because a work is published by the federal government does not mean that it is a government work and in the public domain. A publication from the Smithsonian Institution, for example, may well have been prepared by non-government authors and is therefore protectable by copyright. A brochure from the National Park Service may include copyrighted photographs licensed from an independent photographer. You need to examine each item closely, and inquire with the author or the issuing agency if you are in doubt.

A BILL INTRODUCED in California several years ago would have dedicated many state-owned copyrights to the public domain. However, the legislature never enacted the provision. Evidencing the complexity of the issues, a series of amendments to the bill carved out a long list of types of state works that could remain subject to copyright protection.

Keep in mind that this exemption applies only to works of the United States federal government. Works created by state and local governments are protected by copyright unless those governments have expressly waived their claims of copyright by statute. Some states have gone the other direction. The Idaho legislature has provided a blunt and direct declaration about copyright for its statutes: “The Idaho Code is the property of the state of Idaho, and the state of Idaho and the taxpayers shall be deemed to have a copyright on the Idaho Code.”

OUTSIDE THE SCOPE OF COPYRIGHT

Several additional categories of material are generally not eligible for statutory copyright protection:

DESPITE THE BLUNT assertion in Idaho law, copyright protection for state statutes and court decisions has been disputed for many years. An initiative to post Oregon legal materials online at Public.Resource.Org led to an exchange of frank and confrontational letters with state officials. In June 2008 a committee of the state legislature adopted a resolution agreeing not to assert copyright in the Oregon statutes. A variety of materials about this important development are posted at www.public.resource.org/oregon.gov/.
ADDITIONAL WORKS MAY be in the public domain for a variety of reasons. An author may voluntarily choose to dedicate a work to the public domain. The law previously recognized a concept of “abandonment” of a copyright. In other cases, Congress has simply chosen not to extend copyright to all works. For example, sound recordings are protectable today, but U.S. recordings made before Congress changed the law, effective Feb. 15, 1972, are without copyright protection. Chapter 15 offers much more information about copyright and sound recordings.

• Works that have not been fixed in a tangible form of expression. Examples include: choreographic works that have not been noted or recorded; improvisational speeches or performances that have not been written or recorded.
• Titles, names, short phrases, and slogans, as well as familiar symbols or designs—although the law of trademark may offer some protection.13
• Mere variations of typographical design, lettering, or coloring; mere list-ings of ingredients, as in recipes or contents.14
• Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices.15 On the other hand, patent or trade secret law may offer protection for some of these works.
• Works consisting entirely of information that is common property and containing no original authorship. Examples include standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources.

THE CONCEPT OF public domain applies to a work that has no copyright protection. The label is often mistakenly applied to works that are publicly available, such as on websites, without any apparent condition on access or use. Most materials that are freely available on the Internet are in fact protected by copyright, but the owners have simply permitted them to be openly available. Even open access works are usually copyrighted, but the owners again have chosen to make them publicly available. They are not necessarily in the public domain.

EXPIRED COPYRIGHTS

Another important source of the public domain is the expiration of copyright for any work. Copyrights may last a long time, but they do eventually expire. Works that were protected in the past may have lost their copyright due to the age of the work. The copyright to works from before 1989 may also have expired due to failure to comply with formalities that copyright law once required. The next chapter of this book takes a close look at the duration of copyright protection and the process of identifying works in the public domain.

NOTES

2. For general information regarding trade secrets, one of the leading treatises is Milgrim on Trade Secrets (New York: Matthew Bender & Co., 2009). For examples of possible misappropriation, see NXIVM Corporation v. The Ross Institute, 364 F.3d 471 (2d Cir. 2004); Gaiman v. McFarlane, 360 F.3d 644 (7th Cir. 2004); and Brown v. Ames, 201 F.3d 654 (5th Cir. 2000).


5. *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999).


8. Section 201(c) of the U.S. Copyright Act states: “Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole.”


14. Ibid.

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