



U.S. COPYRIGHT LAW:

*Protecting Your Intellectual Property
Rights: An Archaeologist's Primer*

- **Copyrights**
- **Trademarks**
- **Patents**
- **Trade Secrets**
- **Rights of Publicity**

Intellectual property
rights

Copyrights are the rights to exclude others':

- *reproduction* (copying);
- *public distribution* of copies;
- *public performance*;
- *public display*; and
- *adaptation* (preparation of derivative works) *of. . .*

Copyrights: What are they? 3

- *original* works of authorship
- *fixed* in any tangible medium of expression,
- now known or later developed,
- from which they can be perceived, reproduced, or otherwise communicated,
- either directly or with the aid of a machine or device.

See U.S. Copyright Act Sections 102 (copyrightable subject matter) and 106 (identification of exclusive copyrights), 17 U.S.C. §§ 102 and 106.

Copyright subject matter

A work is considered original for purposes of copyright protection if it both:

- Is independently created by the author.
- Possesses some minimal level of creativity.

The level of creativity required to show originality is low. Originality does not mean that a work must be novel or unique.

Originality requirement

While only a low level of originality is required, a work must still possess a minimal amount of creative expression to be protected by copyright.

Copyright does not protect:

- Single words or short phrases.
- Book titles.
- Headlines.
- Slogans.
- Typefaces.

These may, however, qualify for trademark protection.

Non-protected subject matter

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. Constitution, Art. 1, sec. 8, cl. 8.

U.S. copyrights:

Constitutional foundation



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Whole No. 660]

SATURDAY, JULY 17, 1790.

[No. 36—of VOL. XIII.

LAWS of the UNITED STATES.
PUBLISHED

By Authority.



CONGRESS of the UNITED STATES:
AT THE SECOND SESSION,
*Begun and held at the City of New-York, on
Monday the 4th of January, 1790.*

An ACT for the ENCOURAGEMENT
of LEARNING, by securing the Copies
of Maps, Charts and Books, to the
Authors and Proprietors of such Copies,
during the Times therein mentioned.

BE it enacted by the SENATE and HOUSE
of REPRESENTATIVES of the United
States of America, in Congress assembled,
That from and after the passing of this act,
the author and authors of any map, chart,
book or books already printed within these
United States, being a citizen or citizens
thereof, or resident within the same, his
or their executors, administrators or al-
ligns, who hath or have not transferred
to any other person the copy-right of such
map, chart, book or books, share or shares
whereof: and any other person or persons,
being a citizen or citizens of these United
States, or residents therein, his or
their executors, administrators or assigns,
who hath or have purchased or legally
acquired the copy-right of any such map,

very sheet which shall be found in his or
her possession, either printed or printing,
published, imported or exposed to sale,
contrary to the true intent and meaning
of this Act, the one moiety thereof to the
author or proprietor of such map, chart,
book or books, who shall sue for the same,
and the other moiety thereof to and for
the use of the United States, to be re-
covered by action of debt in any court of
record in the United States, wherein the
same is cognizable: *Provided always*, That
such action be commenced within one
year after the cause of action shall arise,
and not afterwards.

And be it further enacted, That no per-
son shall be entitled to the benefit of this
Act, in cases where any map, chart, book
or books, hath or have been already print-
ed and published, unless he shall first de-
posit, and in all other cases, unless he shall
before publication deposit a printed copy
of the title of such map, chart, book or
books, in the Clerk's office of the district
court where the author or proprietor shall
reside: And the clerk of such court is
hereby directed and required to record
the same forthwith, in a book to be kept
by him for that purpose, in the words
following, (giving a copy thereof to the
said author or proprietor, under the seal
of the court, if he shall require the same)

"District of _____ to wit: Be it
remembered, That on the _____ day of
_____ in the _____ year of
the independence of the United States of
America, A. B. of the said district, hath
deposited in this office the title of a map,
chart, book or books, (as the case may
be) the right whereof he claims as author
or proprietor, (as the case may be) in the

Act, entitled, "An Act for fi-
nally adjusting and satisfying the claims
of Frederick Wm. deSteuben"—An Act in-
titled, "An Act for giving effect to an Act,
intituled, "an Act to establish the Judicial
Courts of the United States," within the
State of North-Carolina"—and *do* Act, intit-
tuled, "an Act supplemental to the Act for es-
tablishing the Salaries of the Executive Of-
ficers of Government, with their Assist-
ants and Clerks"—were inserted in THE
CENTINEL of June 10, 1790. Accord-
ing to their dates, they follow the above.

MISCELLANY.

OBSERVATIONS on the MANUFAC-
TURES and COMMERCE of the United
States.

By W. BARTON, of Philadelphia.
(CONTINUED FROM OUR LAST).

PAPER-HANGINGS, equal in qua-
lity and cheapness to any imported,
are manufactured in large quantities by
Mr. William Poyntell, and Messrs. Le
Collay and Chardon, at Philadelphia;
by Messrs. Mackay and Dixey, at Spring-
field, in New-Jersey; and other places
in the Union*.

A great progress has been made in the
manufacture of hosiery, in this country;
and, with proper encouragement, much
more may be accomplished in that branch.
Mr. Burnaby, (in his travels through the
middle settlements of North-America, in
the years 1759 and 1760) notices the high
estimation in which the Germantown
stockings were then held; and this gen-
tleman mentions his having been credi-
bly informed, that two years before that
period, there were manufactured, in that
town, sixty thousand dozen pair: the

The great and increasing consumption
of window-glass and bottles, in this coun-
try, should operate as a powerful motive
for encouraging the glass-manufactories
already established in some of these States,
and for promoting the speedy establish-
ment of similar works in other parts of
the Union.—The glass manufactory on the
Patowmack, it is said, gives employment
to five hundred persons.

The printing of calicoes, cottons, and
linens, may be expected to increase in
proportion as we extend the manufac-
tures of those articles: And the mullins
and white calicoes imported from India,
will likewise give employment to our ca-
lico printers. Mr. John Hewson, and
Mr. Robert Taylor, both in the neigh-
bourhood of this city, are masterly work-
men in this branch: The former obtain-
ed a premium from the manufacturing
society for the best specimens of printed
goods.

In the state of Pennsylvania, there
are twenty-one powder mills, capable of
making six hundred and twenty-five tons
of powder, per annum. This is retailed
at five dollars per quarter, of 25lbs; and
is offered for sale in larger quantities un-
der sixteen dollars per cwt. The Eng-
lish price, after deducting the bounty of
4/6, is 75/6 sterling; or, about sixteen
dollars and seventy-eight cents, per cwt.
Independently of the importance of this
article, as a means of national defence,
the manufacture of it in this state is
worth two hundred thousand dollars per
annum. It is said, that the largest gun-
powder works existing any where, are
those at Frankford, near Philadelphia—
now the property of Mr. Joseph J. Mil-

- Copyright protection in the US is governed primarily by federal statute.
- The current law governing copyright protection is the Copyright Act of 1976, as amended (**17 U.S.C. § 101 *et seq.***).
- With limited exceptions, the Copyright Act preempts state law.

Copyright Act of 1976

Copyright protects original expression of ideas in various forms and media, but not the ideas themselves.

U.S. Copyright Act Section 102(b), 17 U.S.C. § 102(b).

Ideas, systems and processes
are not copyrightable

The Copyright Act of 1976 protects:

- Published and unpublished works.
- Registered and unregistered works.
- Works that bear a copyright notice and works with no copyright notice.

Before the 1976 act, works that were neither published nor registered were protected, if at all, only by state law.

Publication, registration and
notice not required

Elements of Proper Notice for works created before March 1, 1989 – Proper notice for these works must include all three of the following elements:

1. Any of the:
 - symbol © for visually perceptible copies (or the symbol ® for phonorecords of protected sound recordings);
 - abbreviation "**Copr.**"; or
 - word "**Copyright**".
2. The year of first publication.
3. The name of the copyright owner, which may include an abbreviation or alternate designation that is generally known.

For example, one form of proper copyright notice for this presentation is
"© 2013 Paul Dennis Connuck & Practical Law Company, Inc."

The size and position of the notice must be sufficient to give reasonable notice of the claim of copyright.

See 17 U.S.C. §§ 401(b), 402(b), 401(c) and 402(c).

Notice form

Registration

- The Copyright Act does not require registration for federal copyright protection (**17 U.S.C. § 408(a)**).
- Registration does provide substantial benefits, however, including:
 - With certain exceptions, a copyright owner must register its copyright in a work before suing for infringement (**17 U.S.C. § 411**).
 - In an infringement action, a copyright owner may recover statutory damages and attorneys' fees only if the work was registered before the infringement commenced or within three months after first publication (**17 U.S.C. § 412**).
 - If the copyrights are registered within five years of the work's first publication, the registration is prima facie evidence of the copyright's validity (**17 U.S.C. § 410**).
 - Registration may eliminate an innocent infringement defense (**17 U.S.C. §§ 401(d), 402(d)**).
 - The copyright owner may record the registration with the US Customs Service to stop the importation of infringing copies.

Registration

Deposit

- The Copyright Act requires (with certain exceptions) that each copyrighted work published in the US be deposited with the Library of Congress.
- Failing to make a deposit does not result in the loss of copyright protection, but may result in certain fines.
- No deposit requirement exists for unpublished works.
- The Copyright Office publishes detailed information about the mandatory deposit requirements (see **US Copyright Office, Circular 7D, Mandatory Deposit of Copies . . . for the Library of Congress at <http://www.copyright.gov/circs/circ07d.pdf>**).

US Copyright Act Section 407, 17 U.S.C. § 407.

Deposit requirement

An “author” is the creator of the original expression in a work and is ordinarily the owner of all copyrights in the work, unless:

- the author signs a written assignment of (or agreement to assign) one or more of these copyrights; or
- the work is made as a work made for hire.

US Copyright Act Section 201(a), 17 U.S.C. § 201(a).

Copyright ownership

A work is considered a joint work if all of the following apply:

- It is created by two or more authors.
- The contributions of the authors are inseparable or interdependent parts of a single work (*e.g.*, the music and lyrics of a song).
- The authors intend that their contributions will be merged into a single work.

US Copyright Act Section 101, 17 U.S.C. § 101.

Joint authorship

- In general, for a contributor to be considered a joint author, his or her contribution must be independently copyrightable.
- However, the US Court of Appeals for the Seventh Circuit has held that the contribution of ideas, which are not independently copyrightable, may qualify a contributor as a joint author (*Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004)).

Joint authorship

Ownership of Works of Joint Authorship

- The copyright in a jointly authored work is initially owned jointly by its authors (**17 U.S.C. § 201(a)**).
- Unless the authors agree differently in writing:
 - their interests in the work are divided equally between or among them;
 - each joint author has a right to an equal share of the profits received from the sale, licensing, rental or other commercial exploitation of the joint work; and
 - they each have the right to transfer their interest in the work, or grant licenses under or otherwise exploit the work without the consent of the other(s).

Ownership of joint works

The key exception to creator ownership is when the author creates a work as a “work made for hire.” In that case, the employer or, in certain instances, the commissioning party, is considered to be the author and, therefore, the copyright owner.

US Copyright Act Section 201(b), 17 U.S.C. § 201(b).

Copyright ownership:
Works made for hire

A copyright interest may be transferred in its entirety or in number of other ways, including by:

- transferring one or more exclusive rights, or subdivisions of rights (*e.g.*, the owner of the copyright in a book may assign the right to distribute the work).
- granting an exclusive license, which, under the Copyright Act is considered the transfer of an ownership interest in the copyright.
- Voluntary transfers of copyrights must be made in writing and signed by the transferring party.
- Non-exclusive licenses, however, need not be in writing.

See US Copyright Act Sections 201(d)(1), 201(d)(2) and 204(a), 17 U.S.C. §§ 201(d)(1), 201(d)(2) and 204(a)).

Transfer of ownership

“Ownership of a copyright
... is distinct from
ownership of any material
object in which the work
is embodied.”

U.S. Copyright Act Section 202, 17 U.S.C. § 202.

Ownership of material object
is not ownership of copyright²¹

The US Copyright Office regulates and administers copyrights under the authority of the Copyright Act. Its primary functions include:

- Examining and processing copyright applications and related documents.
- Recording copyright transfers.
- Enforcing mandatory deposit requirements.

The Copyright Office provides legal background information and procedural guidance on its website,
<http://copyright.gov/>

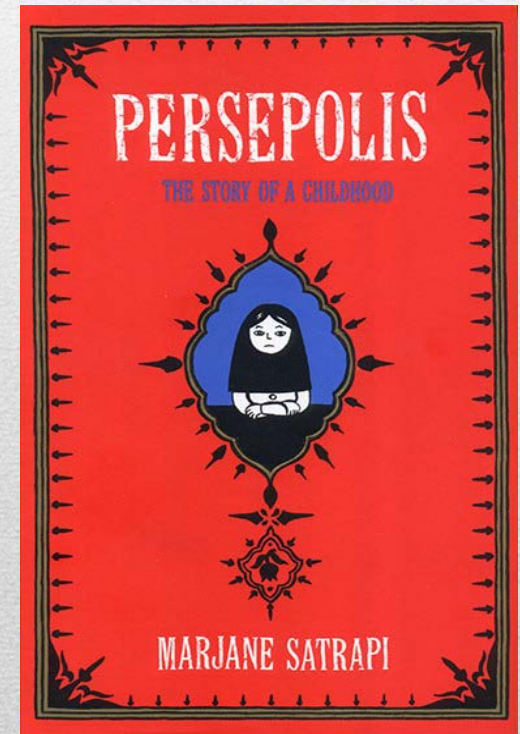
US Copyright Office

Copyrightable “works of authorship” include:

1. *literary works*;
2. *musical works*, including any accompanying words;
3. *dramatic works*, including any accompanying music;
4. *pantomimes and choreographic works*;
5. *pictorial, graphic, and sculptural works*;
6. *motion pictures and other audiovisual works*;
7. *sound recordings*; and
8. *architectural works*.

U.S. Copyright Act Section 102, 17 U.S.C. § 102.

Works of authorship



Literary works (text)



Pictorial and sculptural works²⁵

Victor Whitmill, a tattoo artist . . . designed the tattoo for Mr. Tyson, called it “tribal tattoo,” and claims it as a copyrighted work.”

NOAM COHEN
New York Times, May 20, 2011



Photo by Chris Pizzello/AP

Pictorial works – Design

Copyright protection applies to original compilations (17 U.S.C. § 101).

- A compilation is a work that compiles and arranges preexisting material or information. It achieves originality by the author's original selection, coordination and arrangement of the preexisting materials.
- An original compilation may be protected by copyright even if the preexisting material is not individually copyrightable, as long as the selection and organization of the material meet the standard for originality.

Compilations

Copyrightable compilations include “collective works,” which consist of preexisting copyrightable works.

Examples of collective works include:

- Periodicals.
- Encyclopedias.
- Anthologies.

Collective works

Section 201(c) of the Copyright Act provides:

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution.

In the absence of an express transfer of the copyright [in the individual contribution], **the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.**

17 U. S. C. § 201(c).

Rights to contributions to collective works

Copyrights also include the exclusive right to prepare, reproduce, distribute, publicly display and perform “derivative works”, which are transformations or adaptations of one or more preexisting works

17 U.S.C. §§ 101, 106(2).

Derivative works

Derivative works include:

- Translations.
- Versions of a work produced in a different medium.
- Art reproductions.
- Abridgments and condensed versions.
- Musical arrangements.
- Dramatizations.
- Fictionalized versions of factual works.
- Sound recordings.
- Any other forms that recast, transform or adapt a work.

Derivative works

The author of a compilation, collective work or derivative work:

- Does not acquire any interest in any copyrights that protect the underlying constituent works.
- Does not acquire any copyrights in any part of the derivative or collective work the author has used without the permission of the owner of copyrights in that constituent part.
- Generally needs to obtain a license or other permission from the owners of copyrights in the underlying works.

Rights in underlying works ³²

Certain works may be copyright protected in more than one category.
For example:

- Song lyrics may be protected as part of a musical work and also as a literary work.
- A motion picture may be copyrighted as both a literary work and an audiovisual work.

Combined works

Copyrights in architectural works protect the designs of buildings embodied in any medium, including:

- Architectural plans.
- Drawings.
- Buildings.

**US Copyright Act Sections 101 and 102(a), 17
U.S.C. §§ 101 and 102(a).**

Architectural works

The copyright in architectural works has two express statutory limitations:

- It does not cover the making, distributing or publicly displaying of pictorial representations – such as drawings, paintings or photographs – of buildings located in or ordinarily visible from public places (**17 U.S.C. § 120(a)**).
- The building's owner may alter or destroy it without obtaining the consent of the copyright owner or author (**17 U.S.C. § 120(b)**).

State laws may also control the representation of local landmarks, historic preservation, zoning, or building codes, relating to architectural works.

Architectural works: Exceptions

Any one or more of the following persons or entities may be the copyright owner of an interview:

- The interviewer who prepares the questions.
- The interviewee who provides the answers.
- The interviewer and interviewee individually with respect to their own their respective contributions.
- The interviewer and interviewee jointly as the joint authors of the entire interview.
- The person who videotapes, records or transcribes the interview.
- The interviewer's or interviewee's employer, if the interview has been conducted in the course of that person's employment as a work made for hire.

Interviews

The copyright in a sound recording:

- Exists separately from any copyrights in the underlying musical, literary or dramatic work.
- Protects only the particular recording.

An independently created recording – even one that is indistinguishable from the original – does not infringe the reproduction right in a sound recording (but may infringe the rights in the underlying musical composition).

Sound recordings

Copyright Duration for Works Created on or after January 1, 1978

With certain exceptions, the term of the copyright in a work created on or after January 1, 1978 starts when the work is created (fixed in a tangible medium) and expires:

- 70 years after the author's death, for a work created by a single author and not as a work made for hire.
- 70 years after the last author's death, for a work of joint authorship that is not a work made for hire.
- For works made for hire, and pseudonymous and anonymous works, the later of:
 - 120 years after creation; or
 - 95 years after first publication.

US Copyright Act Section 302, 17 U.S.C. § 302.

Copyright term

Fair use is a key statutory exception to exclusive copyrights.

Section 107 of the U.S. Copyright Act (**17 U.S.C. § 107**) provides, in relevant part, that the *fair use* of a copyrighted work . . . *for purposes of:*

- *criticism,*
- *comment,*
- *news reporting,*
- *teaching,*
- *scholarship, or research,*

is not an infringement of copyright.

Fair use exemption

In deciding whether the use of a work is a *fair* use, courts consider —

- (1) the purpose and character of the use, including *whether such use is of a commercial nature or is for nonprofit educational purposes*;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use on the potential market for or value of the copyrighted work.

US Copyright Act Section 107, 17 U.S.C. §107.

Fair use factors



Photo by Patrick Cariou, from "Yes Rasta"



Painting by Richard Prince, from the "Canal Zone" series

Infringement or Fair Use?

- There is no “one-size-fits-all” solution to the fair use question.
- A case-by-case analysis of the relevant facts and law is required to gauge whether the author of an allegedly infringing work is likely to:
 - face a credible threat of suit, and, if so;
 - prevail in the litigation on the basis of a solid fair use defense.

Case-by-case analysis

Moral rights recognize the author's rights of:

- **Attribution.** To be identified, or prevent being identified, as the creator of the work.
- **Integrity.** To control certain modifications and destruction of the work.

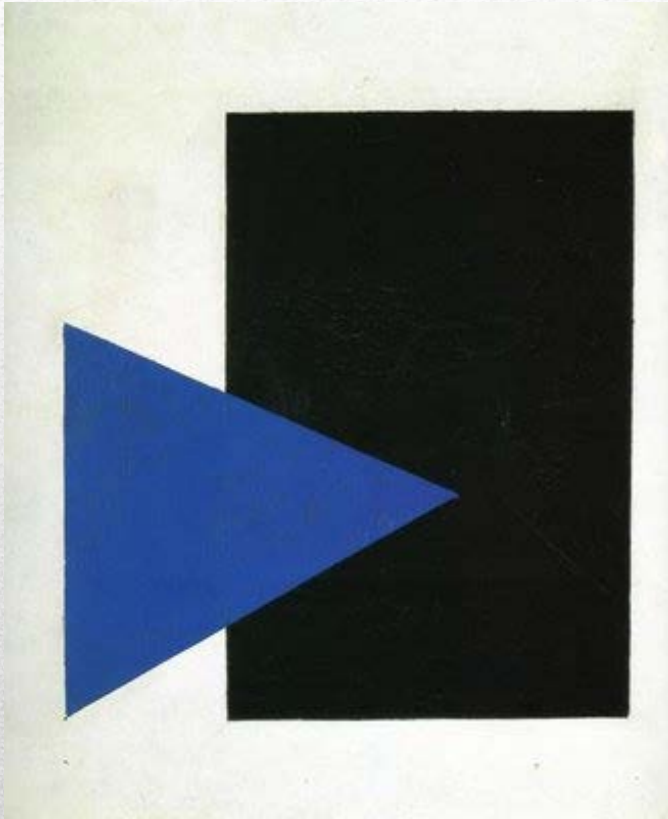
Moral rights apply:

- regardless of whether the work is protected by copyright; and, if the work is copyright protected,
- regardless of who owns the copyright.

While many countries, particularly in Western Europe, broadly protect moral rights, the US Copyright Act provides only limited moral rights protection under the **Visual Artists Rights Act of 1990 (VARA)** (17 U.S.C. § 106A).

Moral rights

Thank you!



Kazimir Malevich,
Suprematism with Blue
Triangle and Black Square
1915

Paul Connuck

Editor, Intellectual Property
& Technology

The Practical Law
Company

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for informational and
educational purposes.**

**Please consult an attorney
should you need legal
advice.**