AUTM EDUCATIONAL SERIES:

Copyright Protection of Software, Multimedia, and Other Works: An Author's Guide

by Charles C. Valauskas
Catherine Innes

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No. 4

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The Association of University Technology Managers is pleased to release the first of two publications in this Series that address the complexities of copyright law. This fourth issue in the Educational Series offers a discussion on questions related to copyright that arise frequently in the academic environment and shares an understanding of basic copyright law needed to address these issues. An accompanying publication, Issue No. 5 entitled: "Development and Deployment of Digital Works in Universities: A Guide for Authors and Licensing Officers," expands upon the complexities of copyright through its discussion on ownership and use issues that arise specifically regarding digital works created in the academic environment. Appreciation is extended to the authors who researched this topic in sufficient detail to make these publications possible. We hope you enjoy both new releases in the AUTM Educational Series.

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AUTHORS' SUMMARY

Interesting and complex copyright questions are the by-products of academic research. Who is the rightful author of a work? Who owns it? What rights do student contributors have to a work? What rights do those that funded the work have? What rights do those that simply obtain a copy of the work have? These questions all come up frequently in the academic environment. An understanding of basic copyright law is necessary in order to answer them.

This work provides a concise discussion of certain key areas of copyright law including: what type of subject matter is protected by copyright; how ownership of copyrightable subject matter is established; what rights the owners of copyrightable subject matter enjoy; and how the owners may transfer rights to others. There are many excellent reference materials available that cover in far greater detail the issues that may arise during the development and commercialization of a work in a digital environment.[1]

Every attempt has been made to provide as much up to date and practical information as is possible. But the good news and bad news is that technology is rapidly changing and along with it, albeit with a considerable lag time, the law. As a result, this book must be viewed as a snapshot of copyright law at the time this book was written. For this reason, and because this book is not intended to provide legal advice, readers should not rely upon it as such. If legal advice or other expert assistance is required, the services of a competent professional should be sought and obtained.

Copyright Protection of Software, Multimedia, and Other Works: An Author's Guide

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INTRODUCTION

Copyright is one of the easiest forms of intellectual property protection to obtain because it is conveyed automatically and without formalities as soon as a work is created. It is also a versatile form of protection. Copyright is the primary form of protection for many different types of works including text, drawings, musical works, architectural plans, motion pictures, software, multimedia works, and internet-distributed content. The versatile and easy form of protection, however, is a double-edged sword. Copyright provides protection not only for your work, but it may also protect works created by others that you may wish to use. As a result, the copyright consequences of your actions must be considered fully before embarking on any development or commercialization program.

Copyright law is largely a response to the economic interests that form around new information products and technologies. The first copyright law was established in England nearly three hundred years ago in response to the earlier development of the printing press. In 1790, America adopted its first copyright law based on the English copyright system.[2] This first law protected only books, charts, and maps. As new technologies were developed to package information in new ways, Congress expanded copyright protection, but often with considerable delay between the introduction of new commercial products and the implementation of protection. Over the years, copyright law has expanded to protect prints (1802); musical compositions (1831); photographs and negatives (1865); paintings, drawings, statuary, models, or designs of fine art (1870); motion pictures (1912); sound recordings (1971); computer programs (1980); and architectural works (1990).

The most recent large-scale overhaul of the law came with the 1976 Copyright Act (effective January 1, 1978, termed in the following as the "1976 Act"). The 1976 Act is significant for many reasons, one of which is that it clearly established that copyright protection is a matter of federal law (and no longer a confusing mix of state and federal law).[3] This important change resulted in a single copyright law governing all works created in the United States.

Copyright law seeks to achieve two purposes. First, it serves to encourage individuals to devote themselves to intellectual and artistic creation by providing them with the opportunity to secure a fair return for their efforts. Second, the more far-reaching and ultimate goal is to advance public interest through the talents of these creators.

ELIGIBILITY FOR COPYRIGHT

The types of subject matter that copyright can protect are virtually limitless provided three simple requirements are met. The work must be "original"; a "work of authorship"; and "fixed in any tangible medium of expression," from which the work can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[4] By defining broad characteristics of protectable expression rather than specific works, Congress allowed the courts to reinterpret the Act as new forms of expressions were made possible by new forms of technology. In the following, we will discuss how these key terms have been defined and as a result what is subject to copyright protection.

Originality

"Original" means for copyright purposes that the work was independently created and not copied from another work. In applying this objective definition, originality should not be confused with novelty. Novelty—which generally means new or unique—is a required element for patentable subject matter. However, this is not a consideration for copyright subject matter.[5] As a result, even similar or identical works that meet the standard of being "original" may be protectable as copyrightable works.

The courts have also said that for a work to be original it must show at least a minimum amount of creativity.[6] This has come to mean that a work cannot be considered original if it is simply a mechanical or

physical transformation of another work (such as the digitization of a printed work); a wholly functional item (such as a car valve); or a very simple piece (such as a limited string of words forming an advertising phrase). Such works do not meet the originality requirement and are not protectable by copyright.

Work of Authorship

The second requirement is that works be "works of authorship." The Act identifies in non-limiting fashion, broad categories of "works" as those that may be considered "works of authorship" and protected by copyright.[7] While we still tend to think of an "author" in a limited sense as a person who writes books and articles, the definition is much broader in current copyright law and the term "authors" also applies to creators of works as divergent as paintings, photographs, software, architectural works, and dance sequences. Legal entities such as corporations can be "authors" as well as individuals, as will be discussed in more detail later.

The Act does provide some limitations on what works may not be covered by copyright. Copyright protection in an original work of authorship does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[8] Elements of a work that are "idea-like" and therefore have no copyright protection are themes, plots and stock characters of literary works, rhythm and harmony of a musical work, and the main purpose or function of a computer program.[9]

Fixed in a Tangible Medium

The third element of eligibility for copyright protection is that the work must be "fixed in any tangible medium of expression from which it can be perceived, reproduced or otherwise communicated."[10] The reason for this is that without committing an original creation to something tangible such as paper or a disk, it is unclear what exactly the author created.

Any form, manner, or medium can be used to "fix" the expression as long as it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[11] For many works—such as paintings or photographs—determining if or when the work is fixed is not an issue

because the creation of the work itself necessarily involves the fixation process. For other types of works, however, whether fixation has occurred may be more difficult to discern. Generally, software is considered fixed when it is written to and reproducible from a disk or hard drive, or when it appears in a printout such as the source code (the eye-readable and humanly intelligible version) or object code (the machine-readable version). More specifically, a computer program embodied in the Read Only Memory (ROM),[12] an audiovisual display of a video game fixed in a printed circuit board,[13] and a video game that provides many play variations[14] are considered to be sufficiently fixed for purposes of the fixation requirement. The fact that a work cannot be viewed by the naked eye or without the aid of a machine does not mean that the work is not fixed.[15]

The time period for fixation can also be very short. Courts have said that works that exist only in the Random Access Memory (RAM) of a computer for "more than a transitory duration" are considered "fixed" for copyright purposes.[16] A purely transient or ephemeral creation—such as an extemporaneous speech, conversation, or lecture—is not eligible for copyright protection unless it is "fixed" in some medium such as an audio or videotape. Live broadcasts and transmissions, such as televised sporting events, are protectable provided the work is recorded simultaneously with the transmission.[17]

Works that are not fixed are not eligible for copyright protection. However, many states provide protection for original works that are not fixed and federal copyright law does not preempt such laws.[18]

COPYRIGHT SUBJECT MATTER

By satisfying these three simple copyright requirements, a vast array of works are eligible for copyright protection. The eight categories of works listed in the Act as non-limiting examples of the types that may be protected are:

- Literary works - such as books, periodicals, and computer programs
- Musical works - including the accompanying words
- Dramatic works - including plays, musicals, and accompanying music
- Pantomimes and choreographic works

- Pictorial, graphic, and sculptural works - including paintings, prints, and photographs
- Motion pictures and other audiovisual works
- Sound recordings - including performances of musical works
- Architectural works - including the design of buildings, architectural plans, and drawings.[19]

To illustrate the wide scope of works contained within each of these categories, "literary works" are defined to be any works other than "audiovisual works" that are "expressed in words, numbers, or other verbal or numerical symbols... regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords [any form of a recording of a work, such as an audio or video tape], film, tapes, disks, or cards, in which they are embodied."[20] Despite the name of the category, no "literary" merit or aesthetic merit need be associated with such works to qualify for copyright protection. As a result, computer programs, catalogs, directories, instructional works, and computer databases are all literary "works of authorship" protected by copyright.

One should note that these categories are not mutually exclusive. A motion picture is a defined category of copyright subject matter and may be protected as such. However, a movie may also contain separately copyrightable components such as a screenplay (protected as a literary work) and a soundtrack (protected as a compilation of both musical works and sound recordings). In any multimedia work, this "nesting" of works within another work makes the reuse of this type of work challenging. Developers of multimedia works must identify what these nested works are, who the rights owners are, and obtain the appropriate grants or permissions before using the works in a multimedia product.

As said above, copyrightable subject matter does not include ideas and concepts embedded in a work, only the expressions of those ideas.[21] This distinction has led to considerable debate surrounding computer software. Software contains written expressions that instruct a computer to perform certain functions. Programmers would like to protect both the ideas behind the code as well as the expression of those ideas as written commands. Copyright law, however, has not expanded to allow protection of the ideas contained in software, even though the lines between ideas and expression may be hard to establish. For this reason, many argue that copyright is inadequate to fully protect software from misappropriation by others. Software developers may pursue patent

protection for the novel functional ideas in their software as well as copyright protection for the ideas as expressed in the form of code. In this booklet, we will only discuss the attributes of copyright protection for software.

SPECIAL TYPES OF COPYRIGHT WORKS

The Derivative Work

Anyone who has worked in a creative endeavor knows that many "new" works build to one degree or another on the earlier works of others. From the copyright perspective, when is this building campaign proper "inspiration" and when is it instead improper infringement?

Authors can reuse the ideas, facts, or style of another's earlier work to form a new work because copyright does not protect these elements of a work. Authors can be inspired by, but not copy the copyright-protected elements of a work. To copy a part or all of an earlier author's copyright-protected expression in a new work may infringe the earlier author's rights. Such a reuse generally requires the permission from the owner of the earlier work.

With permission, an author can recast, transform, or adapt a copyright-protected work—such as by adding a non-trivial amount of new and original material to the original work—such that a new work, termed a "derivative work," is formed.[22] Copyright protects the new original matter added to the pre-existing work but does not extend the protection afforded the earlier work.[23] The right to prepare a derivative work from an author's original work is part of the package of rights that comes with the ownership of a copyright.[24]

The Compilation (and Collective Work)

The Act also provides copyright protection for the compilation or collection and assemblage of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.[25] Copyright protects only the original aspects of such a work and is independent from any copyright protection for the pre-existing materials.

Virtually any combination of materials can be used to form a compilation: materials that are individually protected by copyright; materials that are no longer protected by copyright; and materials that individually could not be protected by copyright. An example of a compilation is a database of facts. For a compilation of facts (or other materials otherwise excluded from copyright protection on their own) to be protected by copyright, the facts must be selected, coordinated, or arranged in an original manner.

"Selection" involves the exercise of judgement or choice in determining which facts or what information from a given body of data to include.[26] "Arrangement" refers to the ordering or grouping of data into lists or categories beyond the merely mechanical, alphabetical, chronological, or sequential listing of information.[27] Copyright protection in a compilation is typically considered to be "thin" because it does not extend to any materials in the collection, only the originality of the selection, coordination, or arrangement of the materials.[28] Arranging facts in a database in chronological or alphabetical order may not be original enough for the arrangement to be protected by copyright.

A "collective work" is a specific type of compilation in which the items brought together to form the work are or were already protected by copyright.[29] Examples of collective works include a periodical issue, an anthology, or an encyclopedia; each contribution within such a collection of contribution is or was copyrightable subject matter. The copyright in a collective work or any other compilation is independent from, and does not expand or diminish, any copyright that may exist in any of the components.[30]

OWNERSHIP OF COPYRIGHT

Once a work is completed (or in the jargon of copyright law once it is "fixed in a tangible medium"), two significant events occur. First, the work is automatically protected by copyright. Second, the ownership of the work is established.

Copyright initially vests in the author of the work.[31] It becomes increasingly complex to establish whom the owner or owners of a work may be as the number of individuals contributing to the production of the work increases and the contribution of each varies. An employer or hiring party may own works of their employees. These important

distinctions and the issues involved in determining ownership will be discussed in the following paragraphs.

Joint Ownership

If two or more individuals collaborate on a project with the intention that each will consider themselves as a co-author of the final work and that the contribution of each individual will be merged into "inseparable" or "interdependent" parts of a "unitary whole" work, a "joint work" is formed.[32] An example of such an "inseparable" work is a software program in which the contribution of any one individual cannot be separated from the contributions of others. Alternatively, individuals can collaborate on a project such that the contributions of each are separable, but dependent upon each other. An example of such a work is a song including music and lyrics in which the composer is different from the lyricist. As with "authors," not only people but also businesses can be "joint authors."

To form a joint work, the contributors need not work together while preparing their individual part of the unitary whole or make contributions that are equal in quantity or quality. However, it is critical that each of the authors prepares his or her contribution as a co-author and intends that the contribution will be merged with the other author's contribution at the time the entire work is completed. It is critical also that each contributor make a contribution that individually is copyrightable subject matter—that is, an original and fixed tangible expression. Merely providing suggestions or recommendations, offerings of ideas or assistance, or exercising direction or approval of the work, will likely not be considered copyrightable contributions.[33]

The Copyright Act provides that the authors of a joint work are co-owners of the copyright to the work; that is, each owns an undivided interest in the whole (legally each is a "tenant in common" with the other).[34] This means that each co-owner can use or license on a nonexclusive basis the entire work, without consent of the other owner or owners, but must account to the other owners for any share of the profits.[35] Joint authors enjoy all the other rights of authorship that individual authors would enjoy. Special considerations are necessary regarding transfer of the rights in joint works. These will be discussed further in the section on transfer of rights and ownership.

Works Made For Hire

A work prepared while on the job—either by an employee for an employer or by an independent contractor preparing certain types of works for a hiring party—receive special attention when it comes to copyright ownership. Such a work is termed a "work made for hire" ("WMFH") and special consequences follow.

Works by Employees

Any "work prepared by an employee within the scope of his or her employment" is a "work made for hire."[36] Finding that a work is indeed a WMFH is significant because the employing party becomes the author and owner of the work. It would seem to be an easy matter to determine whether an employee, as part of his or her job responsibilities, prepared a work. However, businesses use many different arrangements to obtain the services of individuals. The U.S. Supreme Court responded to the difficulty the courts were having in trying to determine whether individuals were preparing WMFHs in the seminal 1989 *Reid* case. The *Reid* Court stated that thirteen factors must be examined in order to determine whether the work was produced during the course of an employment relationship or not. While the Court in *Reid* said that no one of the thirteen factors carried more weight than any other,[37] later courts have held that certain of the thirteen factors—such as whether the developer was accorded benefits that employees receive and whether the developer was treated as an employee for tax purposes[38]—are more important than the others.[39]

It is simply not enough to identify someone as an employee or the product of an individual's creative efforts as a WMFH to indeed make the work a WMFH. Just because a work was developed by an employee does not automatically mean that the employer owns the work.[40] For the employer to be the owner of the copyright to the work, the work must be one that the employee was expected to create during the course of employment or prepared by the employee while on assignment from the employer.

In conducting the WMFH analysis, it must not be forgotten that the WMFH doctrine is of relevance only to copyrightable subject matter. The academic environment places a high value on creative thinking. Faculty members are expected to exchange ideas and make suggestions

to other faculty members and to students. However, just because an employee is expected to be creative as part of the job does not mean that every creative expression can be subjected to the *Reid* analytical framework. Subject matter that is protectable by patent or trademark law, and verbal, non-recorded suggestions are not subject to the WMFH analysis.

Even if it is a matter of tradition to add an individual's name to a publication's list of "authors" because the individual made a helpful suggestion (or even provided lab space or funding), does not mean that the individual was a contributor of copyrightable subject matter that should be subjected to the WMFH analysis.[41]

Individuals who receive a salary and benefits for which tax is withheld and prepare an original work of authorship while on the job and as a part of their job responsibilities are almost certainly employees under the Act and the work is a WMFH. However, it is clear also that if a student makes a contribution to a work for a grade (or on a voluntary basis for the experience), the student is still not an employee and the work is not a WMFH. Depending upon the context in which the student worked, the student may be the sole author (and owner) or the joint author (and joint owner) of the contribution with all the consequences of such authorship and ownership flowing therefrom. Rights to the work can be obtained only through a license—either express or implied—or through an assignment, both of which will be discussed below.

Works by Independent Contractors

Often times a business hires an individual specifically to create a copyrightable work as an independent contractor and not as an employee of the hiring party. Although it seems reasonable for the hiring party to own the works created in this circumstance, it is not automatic. The law provides that the independent contractor is the owner of the copyright in the work he or she prepares for the commissioning party unless the commissioning party can satisfy two rules.[42] One, the work must fall within the scope of ten enumerated categories. A collective work and a compilation—both of which are often relevant to software—are two of the ten categories.[43] Two, the parties must expressly agree in a written document, signed by *both* the commissioning party and the contractor, that the work is a WMFH.[44]

This issue may arise in the context of sponsored research at academic institutions. The sponsoring agency may state in an agreement that the sponsor will own copyrightable works created in the performance of the sponsored research project as WMFH. It is important to consider if the anticipated work products fall within the appropriate categories for WMFH and if this result is intended. As such, the individual authors and the institution will have no rights to the work unless the sponsor expressly grants certain rights back to the institution. Those involved should understand the impact to the institution and the individual contributors by accepting such terms.

Consequences of WMFH Status

If copyright subject matter is made as a WMFH, a number of important consequences follow. First, the work becomes the property of the hiring party. This is true even if one or thousands actually contribute to the work.

Second, the hiring party can also identify itself as the author of the work. This consequence needs to be handled with sensitivity for a number of reasons. Creative people often cannot understand how they can be stripped of the title "author" even though they are not the owners of the work. This is particularly true of creators who have had some experience with patentable contributions: a patent still identifies the actual inventors even when the ownership of the patent resides with another. However, it must be remembered that even though copyright law reserves the term "author" for only certain individuals and entities, copyright law does not prevent those who contributed to a work from being acknowledged.

An additional important consequence is that the period of copyright protection for a WMFH has a different duration (which will be discussed in greater detail later).[45] A further consequence is that the assignor can rescind the assignment of a copyright starting 35 years after the assignment.[46]

THE COPYRIGHT RIGHTS

Copyright secures for authors the exclusive right to their works for a limited time. Actually, a "copyright" confers five main rights to the owner. For this reason, a copyright is often referred to as a "bundle of rights."

Only the copyright owner has the right to:

- Make copies of a work (the reproduction right)
- Make new versions of the original work (the adaptation right)
- Distribute copies of the work to others (the distribution right)
- Perform works publicly (the public performance right)
- Display works publicly (the public display right)[47]

The owner cannot prevent a use of a work that does not fall within these rights. For example, a copyright owner cannot prevent one from reading a work, but can prevent one from copying the work in order to read it. Such a fine distinction becomes important in many contexts such as when the work is digital content made available on the Internet. Also, some of these rights have applicability to only certain works. For example, only certain works can be performed or displayed.[48] Each of these rights will be discussed in more detail below. Please note that there are important exceptions to the exclusivity of all of these rights. These exceptions will also be discussed in greater detail below.

The Reproduction Right

When a copy of a work is made, the "reproduction" right is exercised.[49] Copying can involve using a device such as a photocopier or scanner, as well as transcribing a passage from a text or tracing an image such as a pattern or design. Transferring a copyright-protected subject matter to or from a storage medium, such as a phonograph record, disk, or CD-ROM, also constitutes a reproduction of the work. Viewing text or images on the Internet also exercises the reproduction right because many copies are made in the process of communicating the information from its source to your computer. The Act provides that a copy is made even if it takes a machine or device to perceive or communicate the work. The production of such copies, if not authorized by the copyright owner, constitutes an infringement of the owner's rights.[50]

It should be noted that the term "copying" is commonly used to mean not only just the reproduction right but also any of the other exclusive copyright rights.[51] As a result, the use of the term in a license can create unintended confusion. If the license is directed to something less than all the rights, it should be specifically stated.[52]

The Adaptation Right

The copyright owner's exclusive right to prepare derivative works is termed the adaptation right.[53] Whenever one prepares a digitally altered version of an analog work, a translation of a work into a new language, or a work to which new subject matter is added or that is extensively revised, the adaptation right is exercised. How much of the original work has to be changed before a wholly new work (and not just a derivative work) is created is unclear. As a result, unless only a *de minimis* amount of the original work is retained in the new work, the altering of a prior work without authorization may constitute an infringement of the owner's rights. Because a derivative work by definition includes some of the original work, an unauthorized adaptation infringes both the adaptation and the reproduction rights.

The Distribution Right

The distribution right gives the owner the exclusive right to control how cópies are first sold, rented, leased, loaned, or otherwise transferred to the public.[54] Distribution may be either direct or indirect. For example, courts have held that a party who posted copyright-protected images owned by others on a computer bulletin board for the public to access constituted an infringement of the image copyright owners' distribution rights, even though the party did not actually distribute the copies directly.[55] An important exemption to the distribution right—the first sale doctrine—will be discussed later.

The Performance Right

Certain works, such as literary, musical, dramatic, choreographic works, pantomimes, and motion pictures, are works that may be performed. The owner of the work has the exclusive right to control their performance in public.[56] The Act states that to "perform" means to "recite, render, play, dance, or act" a work either directly or with the aid of a device or process, and for motion pictures and other audiovisual works, to show images "in any sequence" or to "make the sounds accompanying it audible."[57] To perform the work to the public generally means to perform the work at a place open to the public and to a substantial number of persons outside of the normal family circle and its social acquaintances. This right also extends to transmissions and broadcasts of performances,

such as via the Internet or television. If a significant number of people are capable of receiving the performance at the same or separate places or times, the public performance right is exercised.[58]

The Display Right

The right to control the public display of work is the fifth main exclusive right granted to the copyright owner.[59] The Act states that to "display" a work means to "show a copy of it, either directly or by means of a film, slide, television image, or any other device or process" or with specific reference to a motion picture or other audiovisual work, "to show individual images non-sequentially."[60] "Public" is defined in the same way as for the performance right. The Act extends this right to only certain works (in part different from the performance works).[61] As a result, if a digital copy of a work is made and posted on a web bulletin board for viewing by anyone, the public display right is implicated.[62]

LIMITATIONS ON EXCLUSIVE RIGHTS: IMPORTANT EXEMPTIONS

Without some limitations on the bundle of rights, the copyright owner could prevent others from using the work in many ways that may ultimately benefit the public. To avoid this problem, the Act permits copyright subject matter to be used in certain very specific ways without the owner's permission.

Fair Use

The Act provides that a "fair use" of a copyright-protected subject matter is not an infringement of copyright.[63] This sounds simple enough. However, the fair use exemption is recognized as the most contentious and complex area of copyright law.

One reason for the problematic nature of this defense is the fair use, "four factor" test. The Act states that in determining whether or not a particular use is "fair," four factors need to be considered: the purpose and character of the use; the nature of the work; the amount and substantiality of the portion used in relation to the work as a whole; and the effect of the use on the potential market for the original work.[64] A complete fair use analysis requires a factually intensive, typically time

consuming analysis of each of these four factors. The analysis is not necessarily complete once all four factors have been thoroughly analyzed. The Act states that the consideration must "include," but not necessarily be limited to, these four factors. As a result, courts may consider any other factors that they deem are important.

Another reason why the defense is so difficult is that typically many misconceptions about "fair use" must be overcome before the time consuming analysis can begin in earnest. Certain of these misconceptions arise from the first sentence of the fair use provision: "... the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright...." [65] This sentence simply points out that a work protected by copyright may be used for many purposes including those that are listed. A casual reading of this sentence, however, commonly yields an interpretation that making copies of a work for the purposes listed are always fair uses and that educators, as a result, may freely use any copyrighted work for any of these purposes. This is not correct. [66] As discussed above, the purpose of the use is one, but not the only factor that must be considered.

Reliance on the fair use defense blindly is a high-risk gamble. There are no short cuts to the analysis. The Act does not provide a definitive list of fair uses and there is not likely to be clarifying legislation soon. This issue is hotly debated and years of negotiations between rights holders and those seeking guidelines for fair use limitations failed to yield any useful guidelines.[67] All that can be said with any certainty is that the fair use exemption is not a broad dispensation granted to the academic community. To mount a fair use defense requires a time consuming, detailed analysis that even when complete has a great deal of uncertainty associated with it.

Library Copying

The Copyright Act provides that certain copying by libraries (but not patrons) does not constitute infringement.[68] A library or archival institution may make a single copy of a work in the library collection and provide it to a patron (or another library for interlibrary loan purposes) for the limited purpose of private study, scholarship, or research without

infringing the rights of copyright owners if certain conditions are met. The conditions are that the library must not profit from the copying, the library must be open to the public, and the work copied must contain a notice of copyright.[69] The limited exemption does not apply if additional copies of the same work are made and provided to the same patron or if the copying is part of a "related or concerted" effort to provide multiple copies to the public. Libraries also must remember that some of the contracts into which they have entered may have specifically overridden this exemption. Also, it is important to remember that, unless separate permission is obtained for distribution, materials lawfully obtained from libraries for private study should not be commercialized or distributed on the Internet. Even if the distribution is for a non-commercial purpose, the library exemption does not include such distribution.

First Sale

A copyright owner has the right to distribute copies to the public by sale, gift, or other means. An important modification to this right (note that this provision applies only to the distribution right) is the first sale doctrine. Once a copy has been sold (or, in legal parlance, title to it has been transferred such as by gift), the copyright owner cannot restrict the further distribution of that particular copy.[70] It is important to understand that this doctrine is a limited one. The first sale doctrine does not affect the title to the copyright to the work. So, the purchaser of a lawfully made copy of a copyright-protected work obtains only a limited right to use the work as contemplated by the owner of the work and to dispose of the tangible copy in any manner. If the copy was obtained or produced without authorization, the owner of the copy cannot dispose of the work without infringing the distribution right under this doctrine.

The "rights" of an owner of a copy of a work are further limited if the copy was not obtained in a sales transaction but as part of a license. The first sale doctrine does not apply and the licensee can be restricted from further transfer of the copy. For example, if a diskette or CD-ROM containing a software program is sold to the public, the owner of the program cannot control the disposition of the disk or CD-ROM. However, if the owner did not sell the disk or CD-ROM, but instead licensed it (the more typical case), the end user can be prevented from further transfer of the physical item.

Certain Teaching-Related Activities

The Act provides additional exemptions for certain educational activities involving copyright works. An owner has the exclusive right to perform certain works. An important limitation of the owner's right is the classroom exemption. Instructors and pupils of a "nonprofit" educational institution have the right to perform such works in the context of "face-to-face teaching activities."[71]

A similar, limited exemption applies to the transmission to students at distant locations of performances of non-dramatic literary and musical works provided the transmission emanates from a nonprofit educational institution or a governmental body. This exemption may be utilized if the material to be transmitted is directly related to the course content and the transmission is directed for reception in another classroom or similar setting.[72] Unfortunately, it is not clear whether the Act addresses the current practice of providing course materials in a web-based format for viewing by students at distant locations or outside the class meeting times. Internet-based transmissions are typically not limited to reception in classrooms. As a result, it would appear that this activity falls outside the scope of this exemption. Also, many forms of content that are well suited to web-based transmission—in particular, images of any kind—are specifically excluded from this teaching exemption.

As part of the Digital Millennium Copyright Act,[73] the Librarian of Congress was given the task of preparing recommendations to Congress to revise this section of the Act to encourage the use of new technologies in teaching activities. Many educational institutions and rights holders provided comments and testimony to the Copyright Office in early 1999 and the Registrar of Copyright issued a report to Congress in May 1999. It is likely that this provision will be amended in the near future.

DURATION OF COPYRIGHT

Duration of copyright protection for a work under the current Act is straightforward.[74] If an individual created a work, the copyright lasts for the life of the author plus seventy years.[75] However, if the work was prepared under a WMFH relationship, the copyright extends for ninety-five years after the work is first published or one hundred twenty years after the work was first "fixed," whichever comes first.[76] If two or more creators produce a work as a joint work (not on a WMFH basis), the

copyright lasts for the life of the last surviving author plus seventy years.[77] Under the current statutory scheme, the earliest that a work created in 2000 could enter the public domain because of the expiration of the term is in the year 2070.[78]

COPYRIGHT REGISTRATION AND NOTICE

Registration

Unlike patent law or trademark law, copyright law does not require that a federal agency, i.e., the Copyright Office, approve a copyright before it becomes legally effective. However, registration must be obtained before a copyright owner can file an infringement lawsuit.[79] The law also provides a number of incentives that particularly encourage the early registration of the work. One, it makes a public record of the claim of copyright. Two, if registration is obtained within five years of the first publication of the work, the owner's burden in an infringement action becomes easier.[80] If properly registered, a defendant in an infringement lawsuit has the burden to show that the subject work is not copyrightable subject matter, that it was copied from someone else, or that it does not demonstrate any creativity.

To register a copyright claim, a properly completed application (most often a single, two-sided sheet form) must be filed with the Copyright Office. The Copyright Office uses a variety of different application forms that vary with the subject matter that is the topic of the application. The forms and explanatory information including "Circulars" are available from the U.S. Copyright Office, Publications Section, Library of Congress, Washington, D.C. 20559, or online at the web address: http://lcweb.loc.gov/copyright/circs. The process is relatively simple and legal assistance is not required. The application, a copy of the work to be registered (termed a "deposit" of the work), and the filing fee (currently $30 for most works) must be submitted to the Copyright Office. Upon receipt of a properly completed application, the claim becomes effective.

Notice

A copyright notice contains three elements: the word "copyright" or the symbol "©" or the abbreviation "Copr."; the year of first publication of the work; and the name of the owner (or an abbreviation or a known

alternative, e.g., *nom de plume* or stage name, of the same). At one time, a copyright notice was extremely important. Prior to the "Berne Amendments" to the 1976 Act (that became effective March 1, 1989), a work that was published without a copyright notice fell into the public domain (with few exceptions). Now after the Amendments, it is *not* mandatory to place the notice on a work to obtain or retain copyright.

Although no longer required, it is highly advantageous to place a notice on a work for a number of reasons. One reason is that it quickly advises the public that the work is protected by copyright and identifies the owner of the work. Another reason is that it also prevents infringers of the work from being able to reduce their liability of damages by arguing that their infringement was "innocent."

It is important to remember that copyright is conveyed automatically, and the lack of a copyright notice or registration with the Copyright Office should not be viewed to mean that an owner will not protect the work against infringement. It is also important to remember when dealing with any content, including Internet content, that the unauthorized removal or alteration of the notice or other copyright management information carries civil and criminal penalties.[81]

TRANSFERRING RIGHTS AND OWNERSHIP TO OTHERS

Many situations arise in which the owner is interested in permitting another or others to exercise some or all of the exclusive copyright rights. There are many ways to transfer these rights to others.

The Exclusive License and Other Transfers of Ownership

Even if limited in time or place of effect, an exclusive license as well as an "assignment, mortgage, exclusive license, or any other conveyance..." of the entire copyright to a work or any one of the exclusive rights to the work is a "transfer of copyright ownership."[82] Such transfers are necessary if a contracting party wishes to secure rights to copyrightable subject matter prepared by non-employees outside the WMFH relationship or if joint authors wish to transfer all rights to a joint work to a single new owner. Such a conveyance is necessary also if the copyright owner wishes to license one or more of the exclusive rights on an exclusive basis. For example, an owner of a work can grant someone the

right to copy and distribute the work, but withhold the right to make derivatives. For music, the right to perform a work is often separated from the rights to copy the sheet music or synchronize the music with images under the adaptation right, for good reason. Performers do not generally wish to publish sheet music and, as a result, granting all of the exclusive rights in a song to a performer would probably not be useful to either party.

To be valid, such transfers must be in writing and signed by at least the owner of the rights that are being transferred.[83] The format of such a transfer can range from a formal "instrument of conveyance" to a simple note or memorandum that identifies in writing what is being transferred. A document that is not clear, explicit, or unambiguous may fail to accomplish such transfer.[84] No written document is necessary between employer and employee in the WMFH context because copyright ownership automatically vests in the employer. Similarly, no written document is necessary for joint authors to obtain joint ownership rights because such rights also automatically vest.

The Nonexclusive License

A nonexclusive license is any agreement that does not constitute an ownership transfer.[85] In contrast to an assignment or exclusive license, a non-ownership transfer of copyright through a nonexclusive license requires no signature of the licensor and need not be in writing.

Because so little is required of nonexclusive licenses, they can be formed simply by the conduct of the owner.[86] For example, posting a work on the Internet is often perceived as a nonexclusive grant of copyright rights by the posting party. The question is whether this grant includes any rights beyond the reproduction right (necessary in order to view the posted material on a computer screen). Did the owner intend by posting material on the Internet to give the person viewing the work the right to distribute the material to others (an exercise of the distribution right) or to revise or alter it (an exercise of the adaptation right) or to show it in a public forum (an exercise of the public performance or display rights)? Much can be done to remedy this problem by simply identifying what is and is not permitted by a clear notice accompanying the posted material.

Consequences of Assignment and Exclusive Licenses

The consequences of an assignment are that the assignee becomes the owner but not the author (unlike what occurs in the WMFH context), and the copyright term varies. Also, the assigning party can rescind the copyright after 35 years.[87] It is important to remember that an assignment transfers all rights, but it does not make a work a WMFH if it does not meet the WMFH requirements. This distinction is important in determining the rights of authors and owners and the copyright duration, as will be discussed below.

If an owner transfers to another all of the exclusive rights in a copyrightable work, the recipient can do whatever he or she or it wishes with the assigned rights. Often less obvious, however, is that the grant of an exclusive license to another makes the recipient—i.e., the licensee—the owner of the right or rights licensed to it.[88] Many consequences follow from the grant of an exclusive license. As an owner of a particular exclusive right under an exclusive license, the party is entitled to all of the protections and remedies accorded to any other owner.[89] One such right is the right to bring an action for the infringement of that particular right in the licensee's name and without joining the licensor.[90] This should be of particular importance to academic institutions that have a policy of not transferring ownership in any of the intellectual properties developed on campus. If it is against institution policy to grant such rights or to allow another to bring suit, special attention should be taken in crafting a license agreement for copyright-protected material that accomplishes the particular rights transfer such that the licensee is not the owner of the rights.

Joint Works/Joint Owners and Transfers

If the work is considered a joint work, then each co-author shares equally in ownership of the work and has the right to use the entire work. This includes the right to license the product on a nonexclusive basis without obtaining the consent of the other joint owners. This can be one of the results of not obtaining the necessary rights before the work on a project is begun.

While each joint work owner can use or license the entire work on a nonexclusive basis, the owner must account to the other author/owner for any profits.[91] Because a joint owner does not solely control all the rights

in a work, a single joint owner cannot grant an exclusive license or an assignment of all the copyright rights. All joint authors must convey transfer of all the rights in a joint work.

Shop Rights

Those familiar with patent law may be familiar with the term "shop right." A shop right is an equity concept by which an employer receives a nonexclusive, nontransferable license to use an invention made by an employee using resources (lab space, utilities, tools, etc.) of the employer to develop the invention or the employee acquiesced in the employer's use of the invention. While the shop rights doctrine does not apply to copyright subject matter, some courts have found that employers/hiring parties have similar equitable rights to the copyright expressions of an employee or contractor in similar circumstances.[92] However, if rights to employee copyrights are desired, it is best to obtain these rights through a license or assignment rather than rely on such equitable guesswork.

PUBLIC DOMAIN MATERIALS

Works in which the copyright has expired are said to be in the public domain and the public is free to use these works for any purpose. Copyright has expired for all works published in the U.S. prior to 1923. Copyright may have expired for many works created after that date, depending on whether or not the copyright was renewed and maintained in accordance with the provisions of the copyright laws in effect at the time. Determining whether a work created after 1923 is in the public domain requires a thorough investigation of the particular circumstances of the work in question.

Several works that fall within copyrightable subject matter are excluded from copyright protection and are also included in the public domain. One example is a work prepared by the United States Government.[93] A U.S. government work is one prepared by an officer or employee of the U.S. government as part of that person's official duties.[94] This definition does not prevent the government from "receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."[95] For example, if an independent contractor develops a work as a WMFH for the government, the government can be the author and owner of the work. If the work does not satisfy the WMFH requirements, the government may be the owner of the rights to the work pursuant to an assignment.[96] Also,

this section does not prevent the federal government from seeking the return of a tangible copy of the work as, for example, stolen property[97] or for the trade secrets within a work.

Caution is still necessary with regard to the use of public domain works. They may contain components that are protected by trademark law, such as photographs showing company logos. The copyright in the photograph may have expired, but the trademark may still be in force and use of the trademark may require permission.

CLOSING

Some two centuries ago a learned jurist observed, when confronted with a fair use question relevant to the academic environment, that copyrights "approach, nearer than any other class of cases...to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.[98] You, the reader, may have already reached this same conclusion from your work in this area. The above sought to help you develop an even greater appreciation of some of these subtleties and refinements. But new subtleties and refinements wait just around the bend. Technology is the engine of change. Ask the questions. And take some comfort in knowing that many, many others are struggling to find the answers.

Editor's Note: More discussion on copyright is available in this *Series* through Issue No. 5 entitled, "Development and Deployment of Digital Works in Universities: A Guide for Authors and Licensing Officers." This fifth issue is written by the same authors and expands upon the complexities of copyright through its discussion on ownership and use issues that arise specifically regarding digital works created in the academic environment.

NOTES

1 N. Boorstyn, *Boorstyn on Copyright* (1999); P. Goldstein, *Copyright* (2d ed. 1996); M. Nimmer & D. Nimmer, *Nimmer on Copyright* (1999); W. Patry, *Copyright Law and Practice* (1994).

2 Act of May 31, 1790, ch. 15. An outgrowth of English law dating back to the fifteenth century grants of "patents for printing" and the American Colonies' and the first states' efforts to protect "new books."

3 Section 301. (In this work, we identify the current Copyright Act also as the "Act." This is to distinguish the current body of statutory law from the 1976 Act. Citations to the current Copyright Act—found at Title 17 of the United States Code—will be listed below simply by section number.).

4 Section 102(a).

5 *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 910 (2nd Cir. 1980).

6 *Bleinstein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

7 Section 102(a).

8 Section 102(b).

9 *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823, 836 (10th Cir. 1993) ("main purpose or function of a program will always be an unprotectable idea").

10 Section 102(a).

11 Section 101 (definition of "fixed").

12 *Williams Electronics, Inc. v. Artic Int'l Inc.*, 685 F.2d 870 (3rd Cir. 1982).

13 *Midway Mfg. Co. v. Dirkschneider*, 543 F.Supp. 466 (D. Neb. 1981).

14 *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2nd Cir. 1982).

15 Section 102(a).

16 *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).

17 Section 101 (definition of "fixed").

18 Section 301(b)(1).

19 Section 102(a).

20 Section 101 (definition of "literary works").

21 Section 102(b).

22 Section 101 (definition of "derivative work").

[23] Section 103(b).

[24] Section 106 ("the owner of copyright...has the exclusive rights[s]...(2) to prepare derivative works based upon the copyrighted work....").

[25] Section 101 (definition of "compilation").

[26] Boorstyn on Copyright §2.16[1].

[27] *Id.*

[28] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

[29] Section 101 (definition of "compilation").

[30] Section 103(b).

[31] Section 201(a).

[32] Section 101; *Thomson v. Larson,* 147 F. 3d 195, 200 (2nd Cir. 1998).

[33] However, a person that provides what is considered valuable ideas or assistance to a project can be compensated for such contributions: the other author/owner or authors/owners and the contributor may agree that the contributor receive compensation and/or an ownership interest in the work and execute a Section 201(d) transfer. *Erickson v. Trinity Theater, Inc.*, 13 F. 3d 1061, 1071 (7th Cir. 1994).

[34] Section 201(a); *Thomson,* 147 F. 3d. at 199.

[35] *Weinstein v. Univ. of Illinois*, 811 F.2d 1091, 1095 (7th Cir.1987); *Thomson,* 147 F. 3d. at 199. Please note that while a joint owner may license the work on a nonexclusive basis in the U.S., a license to the use of that work in foreign countries may require that all co-owners of the work execute the license.

[36] Sections 101 and 201(b). This is much like the patent law position that someone who is hired specifically to invent agrees that whatever is invented is owned by the hiring party. *Solomons v. US*, 137 U.S. 3421, 343 (1890); *Teets v. Chromalloy Gas Turbines Corp.*, 83 F. 3d 403, 407 (CAFC 1996).

[37] The *Reid* factors are:
(1) the hiring party's right to control the manner and means by which the work is created;
(2) the skill required;
(3) the source of the "instrumentalities" and tools used;
(4) the place where the work was conducted;
(5) the duration of the relationship of the parties;
(6) whether the hiring party has the right to assign additional projects to the hired party;
(7) the extent of the hired party's discretion over when and how long to work;
(8) the method of payment;
(9) the hired party's role in hiring and paying assistants;
(10) whether the work is part of the regular business of the hiring party;

(11) whether the hiring party is in business;
(12) the provision of employee benefits;
(13) the tax treatment of the hired party.
Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989). See *Graham v. James*, 144 F. 3d 229, 234-35 (2nd Cir. 1998).

38 Boorstyn on Copyright, Section 3.03[2]; *Hi-Tech Video Productions, Inc. v. Capital Cities/ABC Inc.*, 58 F.3d 1093, 1097 (6th Cir. 1995).

39 Factors 1, 2, 6, 12, and 13 were held to be more important in *Aymes v. Bonelli*, 980 F.2d 857, 861 (2nd Cir. 1992); *Graham*, 144 F. 3d at 235.

40 All works produced by an employee are not necessarily the property of the employer and the mere existence of the employment relationship does not make a work a "work made for hire." "[N]o one sells or mortgages all the products of his brain to his employer by the mere fact of employment." *Public Affairs Assoc. Inc. v. Rickover*, F.Supp. 601, 604 (D.C. 1959) rev'd other grnds 284 F.2d 262 (D.C. Cir 1960) vacated 369 U.S. 111(1962); *Dumas v. Gommerman*, 865 F.2d 1093, 1103-4 (9th Cir. 1989).

41 For example, if the contribution consists of suggesting how a computer program functions or what the program causes the computer to do, the party offering the suggestion does not become an author by this. *S.O.S. Inc. v. Payday, Inc.* 886 F.2d 1081, 1086-87 (9th Cir. 1989); *Whelan Assocs. Inc. v. Jaslow Dental Laboratory, Inc.*, 609 F. Supp. 1307, 1318 (E.D.PA 1985) aff'd 797 F.2d 1222 (3rd Cir. 1986).

42 Some courts say that the hiring party obtains a license to use the work to accomplish the task that prompted the commissioning the work. *MacLean Assoc. v. WM. M. Mercer*, 952 F.2d 769, 778-9 (3rd Cir. 1991). See *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558-9 (9th Cir. 1990).

43 The categories are: contributions to a collective work; parts of a motion picture or audiovisual work; compilations; translations; supplementary works; instructional texts; tests; sound recordings; answer material for a test; and atlases. Section 101 as amended by the Intellectual Property and Communications Omnibus Reform Act of 1999, Public Law No. 106-113 (signed 11/29/99). *Schiller & Schmidt v. Nordisco Corp.*, 969 F.2d 410, 412 (7th Cir. 1992).

44 Whether the parties must sign the agreement before the development of the work has begun or during or after the development, is a matter of dispute between the federal courts. The Seventh Circuit, which includes Illinois, Wisconsin, and Indiana, requires that the writing be executed before the work has begun. *Schiller*, 969 F.2d at 412-13 (the requirement of a writing protects against false claims of oral agreements and makes ownership of rights clear and definite; the writing must precede the creation of the work). But see *Konigsberg Intern. Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir. 1996). The Second Circuit states that while the agreement that the contribution will be developed as a work made for hire does need to precede the development work, a written agreement confirming this oral agreement can be signed after the development project proceeds or afterwards. *Playboy Enterprises, Inc. ("PEI") v. Dumas*, 53F.3d 549, 559 (2nd Cir. 1995).

45 Section 302(c).

46 Section 203(a)(3).

47 Section 106. A recently added sixth exclusive right is the right to the public digital audio transmission of a sound recording. Section 106(6).

48 The public performance right applies only to literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works. Section 106(4). The public display right applies only to literary, musical, dramatic, and choreographic works, pantomimes, pictorial, graphic and sculptural works, including the individual images of a motion picture or other audiovisual work. Section 106(5).

49 Section 101 (definition of "copies").

50 *PEI v. Webbworld Inc.*, 991 F. Supp. 543, 551 (N.D. Tex. 1997).

51 *Webbworld*, 991 F. Supp. at 550-551.

52 *S.O.S Inc. v. Payday, Inc.*, 886 F.2d 1081 (license grant of "right to use" does not mean licensee can exercise licensor's exclusive copyright rights).

53 Section 101 (definition of "derivative work").

54 Section 106(3).

55 *PEI v. Frena*, 839 FS 1552 (M.D.FL1993); *PEI v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N. D. Ohio 1997); *Webbworld*, 991 F. Supp. at 551.

56 Section 106(4).

57 Section 101.

58 Section 101.

59 Section 106(5).

60 Section 101.

61 The display right is available only for "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works including the individual images of a motion picture or other audiovisual work...." Section 106(5).

62 *Hardenburgh*, 982 F. Supp. at 513.

63 Section 107.

64 Section 107(1) - (4).

65 Section 107, first sentence.

66 "This amendment is not intended to be interpreted as any sort of not-for-profit

limitation on educational uses of copyrighted works. It is an express recognition that, under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." Section 107 Historical and Revision Notes.

67 The Working Group on Intellectual Property Rights, part of the Information Infrastructure Task Force convened by President Clinton in 1993, convened a Conference on Fair Use (CONFU) to bring together copyright owners and users to discuss fair use and develop guidelines for librarians and educators in 1994. Approximately 100 organizations participated in the discussions over a three-year period. There were several proposals for guidelines. A consensus, however, was never achieved.

68 Section 108.

69 Section 108.

70 Section 109(a).

71 Section 110(1).

72 Section 110(2).

73 Public law 105-304, enacted October 29, 1998.

74 If the work was not created after January 1, 1978, the Copyright Act of 1909 applies. The 1909 Act provided an initial term of twenty-eight years with a right to renew for another twenty-eight years. 17 USC § 24 (1976 ed.) see *Stewart v. Abend,* 495 US 207, 212 (1990). However, the amendments to the 1909 Act by the 1976 Act, readjusted the terms to take into consideration whether the work was ever published or registered. It can be said that, as a general rule, if the work was published before January 1, 1978, the maximum term of protection is seventy-five years. Section 304(6). As another rule, if the work was published or registered prior to 1923, the work is in the public domain.

75 Section 302(a).

76 Section 302(c).

77 Section 302(b).

78 These terms reflect the changes produced by the Sonny Bono Copyright Term Extension Act, signed into law on October 20, 1998.

79 Section 411(a).

80 Registration obtained within this period establishes *prima-facie* evidence of the validity of the copyright and of the facts stated in the certificate. Section 410(c). If the registration is obtained after the five-year period, the court has the discretion to accord whatever evidentiary weights it wishes on the certificate and the facts.

81 Digital Millennium Copyright Act, Section 1202 and 1203.

[82] Section 101 (definition of "transfer of copyright ownership").

[83] Unlike a WMFH agreement involving non-employees, the transfer document need not be signed by both the party receiving the transfer and the transferring party. Section 204(a); *Arthur A. Kaplan Company, Inc. v. Panaria Int'l Inc.* 1998 WL 6032225, 2 (S.D.N.Y. 1998).

[84] *Effects*, 908F.2d at 557; *Johnson v. Jones*, 149 F.3d 494, 500-502 (6th Cir. 1998).

[85] Section 101.

[86] *Micro Star v. Formgen Inc.*, 154 F. 3d 1107, 1113 (9th Cir. 1998).

[87] Section 203 (a)(3).

[88] Section 101 defines a "transfer of copyright ownership" as an "assignment, mortgage, exclusive license, or any other conveyance of a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license [emphasis added]."

[89] Section 201 (d)(2).

[90] Section 501(b); *Eden Toys, Inc. v. Florelee*, 697 F. 2d 27, 36 (2nd Cir. 1982).

[91] See *Weinstein*, 811 F.2d at 1095.

[92] *Yojna v. Am. Med. Data*, 667 F.S. 466 (E.D.Mich. 1987); *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984). But see *I.A.E. v. Shaver*, 74 F.3d 768 (7th Cir. 1996) and *Konigsberg* 16 F.3d 355.

[93] Section 105. The purpose of this provision is to prevent the U.S. government from obtaining an unfair competitive advantage in private markets and to prevent the government from using the copyright to censor government works. Goldstein, Copyright, §2.5.2.2.

[94] Section 101 (definition of "work of the United States government").

[95] Section 105.

[96] *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981).

[97] *Pfeiffer v. C.I.A.*, 60 F.3d 861 (D.C. Cir. 1995).

[98] *Folsom v. Marsh*, 9 Fed.Cas. 342, 344 (C.C.D.Mass. 1841) (No.4901) (J.Storey)