COPYRIGHTS

1. Introduction

Copyright has been grouped with other forms of legal protection under the general term "intellectual property". It is a means of protecting that particular form of creativity that has been variously referred to as originality of authorship, expression of ideas, or writings of an author. It is distinct from other forms of intellectual property that do not protect original expression of authorship, eg, patents, that protect novel inventions or discoveries; trademarks that protect terms and symbols identifying the source or origin of goods and services; and trade secrets that protect confidential, proprietary information.

2. Historical Background

Although there is considerable scholarly speculation on ancient precursors of copyright, the fact is that no significant copyright protection existed in theory or practice until the technological development of a means of mass duplication of creative works—the printing press. The law did not need a coherent protective structure for written and graphic works when the only means of copying them, by hand, was so labor-intensive as to require an investment potentially far in excess of the worth of the copy.

The invention of the printing press meant that written and graphic works could be duplicated and disseminated in vast numbers. Hence, the necessity of protecting the right to copy—the "copyright"—arose. Interestingly, copyright

protection in England emerged in the fifteenth and sixteenth centuries as a means of censorship and control, rather than as a means of encouragement of authorship. The Crown feared the dissemination of treasonous writings; the Church feared the spread of heretical writings. And so, no work could be published other than through the Stationers' Company—the printers' trade guild, which was under the control of the Crown. Those who were allowed to publish through the Stationers' Company gained copyright protection for their works.

That was the case until the late seventeenth century, when the exclusive grant of copyright through the Stationers' Company expired. In 1710, Parliament enacted the first true copyright statute, the Statute of Anne. This law was noteworthy in two respects. First, and perhaps most significantly, it granted copyright protection to the author, as creator of the work, rather than to the printer, as exploiter of the work. Second, it limited the duration of copyright protection to a fixed term of years, after which the work would go into the public domain, and be free for all to use.

In the United States, immediately after independence, 12 of the 13 original states enacted their own copyright statutes (in part as a result of lobbying and efforts by Noah Webster and James Madison). But, as was the case in many other areas, the need for a uniform, national copyright law became apparent, as copyright easily transcends state borders—it is a simple matter to bring a book from one state to another and copy it. This ease of piracy, coupled with the lack of effective enforcement and the inhospitability of state courts to out-of-state copyright owners were obvious problems.

Thus, the Constitutional Convention, with little debate, included the power to enact a national copyright (as well as patent) law among the enumerated powers of Congress:

The Congress shall have the Power . . . to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries (1).

The purpose of copyright, then, is to "promote progress" in learning (the eighteenth century sense of the word "science"), for the good of all society. The way to do so is to grant economic property rights to creators, as the incentive to pursue their vocation and so enrich society. But there are limitations on those property rights: they may only endure for "limited times," and may only be granted for "writings" of "authors".

The First Congress after the Constitution was adopted enacted a national copyright statute in 1790. Thereafter, the development of federal copyright law followed a pattern that endures to this day. As developments in technology and forms of mass entertainment, communications, scholarship, and the arts occurred, the copyright law would be amended to accommodate them. Periodically, a total revision of the copyright statute would become necessary. Such complete revisions occurred in 1831, 1870, 1909, and 1976.

The 1976 Copyright Act is the basic law governing copyright today (2). But the principles and, to a degree, provisions of the 1909 Act are still of importance, eg, in the provisions regarding duration. The process continues: There have been many significant amendments to the 1976 Act since it went into effect on January 1, 1978.

3. Copyrightability

Under United States law, a work is either protected (copyrighted), or unprotected and free for all to use (in the public domain). But what sorts of works may be protected—are "copyrightable"?

The Copyright Act specifies that copyright extends to "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" (3). Many of the requirements for copyrightability may be gleaned from this provision:

- The work must be an "original work of authorship". Thus, unlike patent rights, originality, and not novelty, constitutes the touchstone of protection. Courts have defined what makes a work "original" both positively (the "spark of creativity," or "something . . . which is one man's alone") and negatively (as constituting that which has not been copied from another, even if not unique or novel) (4,5).
- The work must be the product of an "author". At base, this means that a human being, at some point, has created the work, even if at the behest or for the ownership of a corporate entity, and even if the creative process uses a machine or device (such as a camera or a computer program) as a tool in the creative process.
- The work must be "fixed in a tangible medium of expression". To a very limited extent, there are some works that are not so fixed, such as purely improvised and unrecorded pieces of music or choreography, extemporaneous speeches, or live, unrecorded and ephemeral broadcasts. Unfixed works are protected, but by state common law copyright, and not the federal statute. All works that are "fixed" are governed exclusively by the federal statute.

3.1. The Subject Matter of Copyright. The law goes on to specify, by way of example, the types of works that are covered: literary works, musical works (including lyrics), dramatic works (including accompanying music), pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works. This list is nonexhaustive (3).

The test for copyrightability is nonsubjective. It matters not whether the work is "good" or "bad" art, or even obscene. Such considerations are not relevant to copyrightability.

The law also specifies that works of the United States Government are not subject to copyright protection (6), which is not to say that the United States may not own copyrights, but only that works created by Government employees are common property, and so are not copyrightable. However, works created pursuant to Government grants or using Government funds may be copyrightable, and owned by those outside the Government who receive the funds, depending on the regulations of the particular Government agency making the grant. Indeed, if both parties so agree, the copyright in those works may be transferred to, and owned by, the Government.

3.2. The Idea/Expression Dichotomy. Copyright protects the expression of ideas, but not ideas themselves. Thus, copyright will not protect any procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied (7). From this principle many others are derived.

- Copyright does not extend to titles, phrases, or, as a general rule, forms. Such items do not have the requisite originality of expression to distinguish them from the ideas they represent.
- Copyright does not extend to facts or news, but only to the particular form of expression of those facts. Thus, eg, the fact that a particular chemical causes a particular reaction may not be protected by copyright. But the text of an article describing that reaction and describing the experimental procedure to elicit it will be protectable, for those textual descriptions will constitute the expression of the fact, and not the fact itself. That copyright protection will not prevent anyone from recreating the experiment, but only from copying the article about it.
- Similarly, copyright does not protect research. As the Supreme Court has said, copyright protects creativity, not effort, no matter now significant that effort is (4).
- There are circumstances where the idea and expression are not distinguishable. It has been held, eg, that such "merger" of idea and expression occurred in a jewelry pin made in the exact form of a honeybee, or in simple sweepstakes rules. There was no other way (or only a very limited number of ways) to depict a bee in gold, or to express those contest rules. In such cases, copyright will not protect the work, for that would protect not only the expression, but the idea itself.

3.3. Utilitarian Works. Utilitarian works may be copyrightable, but only to the extent that they contain copyrightable subject matter (8). The copyrightable subject matter must be physically or conceptually separable from the purely utilitarian object. Thus, eg, a common straight-backed chair will not be copyrightable, for there is nothing about it that is physically or conceptually separable from its "chair-ness", its purely utilitarian function. But if that chair contains a carved lion's head on its back, the lion's head is physically or conceptually separable and, therefore, copyrightable.

3.4. Compilations. Copyright extends not only to works that can exist on their own, but to compilations of such works or even of public domain material. The Copyright law imposes a three-step test for such copyrightable compilations. They must first constitute the collection and assembling of preexisting data or materials. Second, those materials must be selected, coordinated or arranged in a particular fashion. And, third, that selection, coordination or arrangement must itself possess sufficient originality and creativity to constitute an original work of authorship. Thus, eg, the alphabetical listing of all subscribers to a telephone company's service, as in an ordinary "white pages" telephone directory, does not constitute a copyrightable compilation—no selection was made (all subscribers were listed) and no arrangement or coordination rose to

the level of original expression (the listings were merely ordered alphabetically). On the other hand, the anthologizing of articles on a particular subject such as in an encyclopedia does constitute a copyrightable compilation. (Compilations of materials which can each stand on their own as copyrightable works, such as an encyclopedia, journal, or newspaper, are called "collective works.")

In no event will copyright in a compilation extend to, affect, or enlarge the protection of the underlying preexisting materials. Rather, it is only the original expression contributed by the author of the compilation—such as the selection of articles in an encyclopedia—to which the compilation copyright extends.

4. Copyright Ownership

Copyright is a property right. Although it differs from most other forms of property in that it is intangible, it nevertheless has the essential elements of property, and is governed by the principles of property ownership.

At the outset, the intangible nature of copyright requires a distinction between the intangible property of the copyright (called a "work") and the material object in which the copyrighted work is, quite literally, embodied (termed a "copy" or "phonorecord," terms that include such diverse media as paper-and-ink, computer disks, and audiotapes). Ownership of the copyrighted work does not constitute ownership of the material object in which it is embodied, and vice versa. Copyright ownership vests initially in the author or authors of the work.

4.1. Joint Authorship. When more than one author has created a work, the work is said to be a "joint work". Under the law, such a joint work is one prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. Thus, joint authorship can occur when a composer and a lyricist collaborate on a song: Even though their contributions, the music and lyrics, can exist independently of each other (the music as an instrumental, the lyrics as a poem), they were created as interdependent parts of a unitary whole (the song). Two scientists collaborating on an article for a scientific journal are similarly joint authors: their contributions cannot be "teased out" of the article they have written, and so are inseparable parts of a unitary whole. But note that the test of joint authorship is intention: The creation must be made with the intention that the contributions be merged into one work, and that intention cannot be imputed after the fact of creation if it was not there to begin with. Case law has held that each contribution on its own must constitute copyrightable subject matter.

4.2. Joint Ownership. Joint ownership of copyright occurs when there is joint authorship. But it may also occur in other ways—eg, by transfer of a copyright to two or more individuals (such as when an author bequeaths his copyright to two children).

As is the case with other forms of property, joint ownership of copyright is legally termed a tenancy-in-common: Each joint owner is presumed to own an undivided proportional interest in the entire work. For example, if there are three joint owners, each is presumed to own one-third of the entire work. The presumption may be defeated by an express agreement of the parties.

4.3. Works-Made-for-Hire. There are many instances when, although a person has created a work, that creation has been made at the behest of another. In many such circumstances, common sense tells us that the person doing the creation should not own the copyright. As an easy example, consider a company that manufactures an appliance, and has one of its employees write an instruction manual for the appliance. Logically, the company, and not the employee, should own the copyright in the instruction manual.

Such situations are governed by the work-made-for-hire doctrine of the Copyright law. Remember that, under the Copyright law, copyright ownership vests initially in the author of a work. In cases of works made for hire, the law specifies that the employer or other person for whom the work is prepared is deemed to be the author (9). Thus, in our example, the appliance company would be deemed to be the author, and hence the initial copyright owner, of the copyrighted instruction manual.

The law very specifically defines what is, and therefore what is not, a work made for hire, in allowing for two, and only two, possibilities.

First, a work made for hire is a work prepared by an employee within the scope of his/her employment. As the law does not define "employee" or "employment", there were differences of opinion over the meaning of these terms until the Supreme Court resolved the matter. Employment, the court ruled, has the same meaning as is commonly understood under the law of agency (10). Thus, while many factors determine "employment", such as the method of payment for services, whether taxes and the like are withheld, where the work is done, who supplies the tools and instrumentalities for the work, the duration of the engagement, and so on, it is safe to say that a relatively formal and commonly understood employment relationship is required, as distinguished from a situation of special commission or independent contractor. It is also worth noting that, in a work-made-for-hire situation, the parties may nevertheless agree in writing that the work is not a work made for hire.

Second, a work may be a work made for hire if it is specially ordered or commissioned, but only if it meets both of the following requirements: It must be a work that falls into one of these nine categories: (*1*) a contribution to a collective work; (*2*) part of a motion picture or other audiovisual work; (*3*) a translation; (*4*) a supplementary work; (*5*) a compilation; (*6*) an instructional text; (*7*) a test; (*8*) answer material for a test; or (*9*) an atlas. And, the parties must expressly agree in a written instrument signed by them that the work is to be considered a work made for hire.

Thus, the circumstances under which an independently commissioned work is considered a work made for hire are limited indeed. As a result, the commissioning party is likely to seek a transfer of copyright, in the form of an assignment or license.

5. Transfers and Licenses of Copyright

Copyright, as we have seen, is a form of property. Like other forms of property, it may be freely transferred. There are, however, certain special rules for the

transfer of copyrights, and certain aspects of the law concerning transfer of property are of special importance to copyright.

Ownership of the copyright in a work is distinct from ownership of the material object (the copy or phonorecord) in which the copyrighted work is embodied. So, too, the transfer of one does not constitute transfer of the other. For example, if a painter sells her painting (ie, the material object, such as canvas and oils), she does not automatically transfer the copyright in it. And sale of that copyright (eg, so as to allow reproduction of the oil painting in printed posters) does not transfer the material object.

It has often been said that copyright is a bundle of many different rights. As we shall see, there are many different ways in which a particular copyright may be exploited. The law allows copyright ownership to be virtually infinitely divisible. That is, each of those rights, in any subdivision conceivable, may be sold separately. The owner of any particular exclusive right is deemed to be the owner of copyright for that right. Thus, eg, the author of an article may sell the exclusive right of first publication of that article, but nothing else, to another, and that will result in two "owners of copyright" in that article—the purchaser of the right of first publication, who will own only that right, and the author, who will own all other rights.

As a practical matter, an important distinction must be made between two methods by which copyrights are exploited. On the one hand are assignments or transfers of ownership of the copyright, either in whole or in part. In such case, the purchaser becomes the outright owner of the copyright or the particular right at issue. On the other hand are licenses of copyright, either in whole or, more likely, in part. A license is merely the permission to use the copyrighted work in the particular manner specified. While exclusive licenses constitute transfers of copyright ownership for the particular rights involved, nonexclusive licenses do not. The distinction is of importance because the Copyright Act requires that transfers of copyright ownership must be in writing to be valid, whereas nonexclusive licenses need not be reduced to writing.

It will also be remembered that, in the case of joint ownership of works, the joint owners were treated as tenants-in-common. For purposes of transfer of the copyright, this means that each coowner may only transfer his own interest in the copyright, and not his coowner's interest. Thus, a coowner may not grant an exclusive license (which constitutes a transfer of copyright ownership) without his coowner's permission. But any coowner may grant a nonexclusive license to use the copyright without his coowner's permission. If he does so, however, he is subject to a duty to account to his coowners for their proportional shares of the profits realized by the nonexclusive license.

It was thought that, due to unequal bargaining power, authors would not be able to realize the true ultimate value of their works in initial transfers of copyright. Accordingly the law provides to authors or, if they are dead, their surviving spouses and children (or, if they have none, their executors or administrators), a "termination right" (11). Any transfer of copyright made after January 1, 1978 by an author may be terminated between 35 and 40 years after the transfer is made, and the copyright "recaptured". The technical formalities concerning such terminations are intricate.

6. Copyright Formalities

Changes to the Copyright law, starting with the 1976 Copyright Act and continuing with the Berne Convention Implementation Act of 1988, have radically changed United States Copyright law regarding copyright formalities. It is safe to say that many formalities that previously were of paramount importance have now been eased or entirely eliminated.

6.1. Copyright Notice. In the past, the law contained an absolute requirement that each copy of a published work bear a proper copyright notice. This notice formality was a major trap for unwary copyright owners. Failure to comply with the technicalities of the law's notice provisions resulted in the unintentional loss of protection for many works.

However, an amendment to the law abolished the notice requirement for all works first published on or after March 1, 1989. For such works, no copyright notice is required. Notice, however, is still required on all copies of works publicly distributed before that date. And, notice will still be widely used even when it is not required, so as to inform the world of the copyright status of the work. Notice consists of three elements: (*1*) the symbol © (the letter "c" in a circle) or the word "Copyright" or the abbreviation "Copr."; (*2*) the name of the copyright owner; and (*3*) the year date of first publication.

Although copyright notice is no longer a prerequisite to copyright protection, it is still valuable as a nonlegal matter. It serves to warn off infringers, and to identify the copyright owner to those seeking a license.

6.2. Copyright Deposit. The law requires that copies of every published work be submitted to the United States Copyright Office, which is a branch of the Library of Congress. The purpose of this requirement is to stock the shelves of the Library. This requirement is usually satisfied as part of the registration process; failure to make deposit may ultimately lead to a fine, but will not affect the existence of the copyright.

6.3. Copyright Registration. Although one hears about "copyrighting a work", the term is usually inexactly used. Although the speaker is referring to registering the work with the Copyright Office, the fact is that copyright registration is not required for copyright protection. To the contrary, federal copyright protection exists from the moment a work is created, that is, fixed in a tangible medium of expression, even if it is never registered.

Although copyright protection is not dependent on registration, registration does have important advantages. First, in the case of works of United States authors, no lawsuit for copyright infringement may be brought until a work is registered. Second, many important remedies in a lawsuit, such as recovery of statutory damages and attorneys' fees, are not available to a copyright owner unless registration has preceded the infringement (there is a 3-month grace period from the publication date for published works). Third, the certificate of copyright registration that the Copyright Office provides is *prima facie* evidence of the facts it contains, and shifts the burden of proof concerning those facts from the copyright owner to the defendant in a lawsuit.

Copyright registration is easily accomplished, even by non-attorneys. The copyright claimant completes a relatively simple form, and returns it to the Copyright Office with a nominal fee and deposit copies of the work. (Special

provisions allow for nondisclosure of trade secrets or full computer programs and the like in the deposit.)

6.4. Other Formalities. As we have noted, transfers of copyright ownership must be in writing to be valid. The Copyright Office will record any documents pertaining to copyrights, including transfers. Such recordation sometimes has important consequences, as in the perfection of security interests in copyrights.

7. Copyright Duration

Two different regimes of copyright duration apply in the United States: one for works first created, published or registered for copyright on or after January 1, 1978 (new law works), and one for works published or registered before that date (old law works) (12). In all cases, copyright terms run through December 31 of their anniversary year. (The terms given below embody a 20-year extension of all existing copyrights which became effective October 27, 1998.)

7.1. New Law Works. For new law works, the basic copyright term is the life of the author and 70 years after the author's death. In the case of joint authors, the "life" in question is that of the longest surviving joint author.

For works where the duration of the author's life is not known—anonymous and pseudonymous works, and works made for hire—the term is 95 years from publication or 120 years from creation, whichever expires first.

7.2. Old Law Works. Protection for pre-1978 registered or published works endures under a system of dual terms. There is an initial term of 28 years from the earlier of publication or registration, followed by a renewal term of an additional 67 years, for a total of 95 years of protection. For works first published or copyrighted before 1964, renewal required registration in the Copyright Office in the last year of the initial term. If renewal was not made, the work fell into the public domain. For works first published or copyrighted from 1964 to 1977, renewal is automatic, but, in the last year of that initial term, an application for renewal of copyright may be filed in the Copyright Office, which will provide certain benefits to the renewal claimant.

The law contains a complicated provision, which case law has further elaborated, concerning ownership of renewal rights. As a general matter, renewal rights do not vest until the last year of the initial term, and then vest in the following individuals: (*1*) the author; (*2*) if the author is dead, the author's surviving spouse and children, as a class; (*3*) if there are no surviving spouse or children, the author's executor (ie, for the beneficiaries under the author's will); and (*4*) if the author did not leave a will, the author's next of kin under applicable state law.

Further, as a general rule, while these renewal rights may be assigned away in advance, such advance assignments are only binding if those making them survive to the time when renewal rights vest (13,14). For example, if an author assigned their renewal term rights in advance of renewal, but died during the initial term of copyright leaving a surviving spouse at the time of renewal, the surviving spouse owns the renewal rights and the assignment of the renewal term rights is ineffective.

8. Copyright Rights

The Copyright Act grants copyright owners six exclusive rights (15). These rights include not only the right to do the specified actions, but also to authorize them.

8.1. The Right to Reproduce in Copies. The most basic copyright right, of course, is the right to reproduce the copyrighted work in copies or phonorecords. This is the right to prevent unauthorized duplication of the work—eg, the printing of an article without the copyright owner's consent.

8.2. The Right to Prepare Derivative Works. Many copyrighted works serve as the basis for derivative works, in which the underlying work is recast, transformed or adapted. Examples would be translations, motion pictures made from novels, and musical arrangements. This can be a major source of income for copyright owners. Of course, permission is necessary to make a derivative work. The copyright in a derivative work does not affect the copyright status of the underlying work, and the copyright in the derivative work extends only to the material contributed by the author of that work, as distinguished from the preexisting material.

8.3. The Right of Public Distribution. Obviously, the exclusive right to reproduce the copyrighted work also entails public distribution of copies, by sale or other transfer of ownership. This right, too, is the copyright owner's.

8.4. The Right of Public Performance. Certain types of works—eg, musical compositions, plays, or choreographic works—are meant to be performed. Public performance of those works is the copyright owner's exclusive right. This general right is not applicable to sound recordings, as noted below.

8.5. The Right of Public Display. Other types of works, notably pictorial, graphic, and sculptural works, are meant to be displayed. Again, their public display is the copyright owner's exclusive right.

8.6. The Performance Right in Sound Recordings. The right publicly to perform sound recordings is limited to digital subscription transmissions, which are defined in detail. Note that this limitation does not apply to the musical compositions embodied in the sound recording, which are governed by the general performing right discussed above.

9. Moral Rights

In addition to copyright rights, the copyright law was amended effective June 1, 1991 to grant very limited additional rights to authors of certain types of works, even if they have parted with copyright ownership (16). These "moral rights" are applicable only to works of visual art that exist in single copies or multiples of up to 200. Even within this limited category of works, there are many exceptions—eg, moral rights do not apply to works made for hire. The moral rights are those of attribution (the right to have the author's name attached to or deleted from the work) and integrity (the right to prevent mutilation or distortion of the work which would prejudice the author's honor or reputation).

10. Limitations and Exemptions

The law contains several limitations on copyright rights and exemptions for certain uses. We will here touch only on the most important.

10.1. Fair Use. The best known exemption is the fair use doctrine. Certain uses of copyrighted works that would otherwise be infringements are excused from liability because they are "fair". The law gives examples in a non-exhaustive list: uses for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. But, even within those examples, each case must be judged on its particular merits and facts, and no particular use will be presumed to be a fair use.

The Copyright Act requires the courts to consider at least four factors in each case, as follows: (*1*) The purpose and character of the use (including whether it is of a commercial or nonprofit educational nature); even some commercial uses may be fair uses (eg, legitimate parodies which do not take too much of the copyrighted work). Courts frequently focus on the "transformative" nature of the use. (*2*) The nature of the copyrighted work; it has been held, eg, that use of an unpublished work is less likely to be a fair use than use of a published work, and the use of a scholarly or scientific work more likely to be a fair use than the use of works of pure entertainment. (*3*) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; the less used, and the less significant the portion used, the more likely that fair use will be found. (*4*) The effect of the use upon the potential market for or value of the copyrighted work; this has sometimes been said to be the most significant fair use factor, because any real harm to the copyrighted work or its exploitation (via market substitution, rather than criticism or comment) will defeat the purpose of copyright protection (17).

10.2. First Sale Doctrine. Although the copyright owner has the exclusive right to distribute copies to the public, the bona fide possessor of a particular copy may, in most circumstances, further dispose of that copy without the copyright owner's consent. Thus, eg, the purchaser of a book may freely resell the copy she purchased (hence, used book stores do not violate Copyright law). Similarly, a copy of a work legitimately owned may be displayed publicly, as in the case of a picture hung in a museum. The Copyright Act has been amended to prohibit the rental of sound recordings or computer software, even though that rental would have been permitted by the first sale doctrine. Frequently, computer software will be sold under a so-called "shrinkwrap" license, which purports to bind the purchaser to limitations on the use and transfer of the software beyond the requirements of the law.

11. Infringement

Anyone who violates the exclusive rights of a copyright owner is liable for infringement, in a lawsuit brought in federal court. There is a 3-year statute of limitations on copyright infringement actions.

11.1. The Test for Infringement. It is rare that actual evidence of copying exists. Thus, proof of copying is usually circumstantial, and is shown by a two-part test. First, the alleged infringer must be shown to have had access to the copyrighted work. Second, the two works must appear to their hypothetical intended audience to be substantially similar, and that substantial similarity must be of protected expression, not unprotected ideas or concepts. The two parts of the test may be seen to be in balance: while both must be present, the greater the evidence of substantial similarity, the less evidence of access is necessary, and vice versa.

Infringement of rights other than that of reproduction (such as the rights of public performance or display) are more easily proven directly by evidence of the infringing acts (for example, by a tape recording of the infringing public performance).

11.2. Remedies. A copyright owner successfully proving infringement has three types of remedies available: recovery of monetary damages, injunctive relief, and recovery of costs including attorneys' fees.

Damages may be recovered in two alternative measures, at the choice of the copyright owner. First, the copyright owner is entitled to his actual damages and the infringer's profits that result from the infringement. These measures of damage are often difficult to prove, and so the law allows for statutory damages in the alternative (provided copyright registration has been timely made). Statutory damages are assessed by the court, in its discretion, between $750 and 30,000 for each work infringed (and not for each act of infringement). The limits may be lowered to $200 for truly innocent infringement, or raised to $150,000 for willful infringement.

Injunctive relief—making the infringer stop infringing—is often more important to the copyright owner than recovering damages. The court may craft appropriate injunctive relief.

Within the court's discretion, and again subject to timely registration, the prevailing party in an infringement suit may be awarded the costs of the litigation, including a reasonable attorney's fee.

11.3. The Internet. The Digital Millennium Copyright Act, enacted on October 28, 1998, affected the liability of service providers when their services are used to distribute copyrighted works on the Internet. The DMCA protects against anti-circumvention technologies, which are designed to frustrate the electronic protection of copyrighted works, and also prohibits modification of copyright management information, which identifies copyrighted works electronically. It also clarifies the liability of on-line service providers and Internet access providers, by limiting the remedies against certain such providers, and providing "notice and takedown" remedies for copyright owners.

12. International Copyright

Because copyright easily transcends national boundaries, several international copyright conventions have been developed to protect copyrights internationally. The best known and most widely effective conventions are the Berne Convention for the Protection of Literacy and Artistic Works and the Universal Copyright

Convention; the United States is a signatory to both. More recently, two treaties dealing with the use of copyrighted works in the digital environment have been created, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. In varying degrees, the treaties specify minimum standards which each member country's copyright law must meet. Even with adoption of those minimum standards, national copyright laws vary significantly from country to country.

International copyright treaties generally follow the principle of national treatment. Each member country treats nationals of other countries at least as well as it treats its own nationals.

BIBLIOGRAPHY

"Trademarks and Copyrights," in *ECT* 3rd ed., Vol. 23, pp. 348–374, by J. A. Baumgarten and C. H. Lieb, Paskus, Gordon & Hyman.; "Copyrights and Trademarks," in *ECT* 4th ed., Vol. 7, pp. 521–547, by L. H. Deinard, N. J. Stathis, and M. E. Rosenberger, White & Case; "Copyrights and Trademarks, Copyrights," in *ECT* (online), Posting date: December 4, 2000, by I. Fred Koenigsberg, White & Case.

CITED PUBLICATIONS

1. U.S. Const., Art. I, Sec. 8, Cl. 8.
2. 17 U.S.C. §§101 et seq. (1988).
3. 17 U.S.C. §102(a) (1988).
4. *Feist Publications, Inc.* v. *Rural Telephone Serv. Co.*, 499 U.S. 340 (1991).
5. *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903).
6. 17 U.S.C. §105 (1988).
7. 17 U.S.C. §102(b) (1988).
8. *Mazer v. Stein*, 347 U.S. 201 (1954).
9. 17 U.S.C. §201(b) (1988).
10. *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989).
11. 17 U.S.C. §203 (1988).
12. 17 U.S.C. §§302–305 (1991).
13. *Fred Fisher Music Co.* v. *M. Witmark &* Sons, 318 U.S. 643 (1943).
14. *Stewart* v. *Abend*, 495 U.S. 207 (1990).
15. 17 U.S.C. §106 (1988).
16. 17 U.S.C. §106A (1991).
17. 17 U.S.C. §107 (1988).

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