

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The top bulb is dark blue, and the bottom bulb is light blue. The hourglass is light gray. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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*General Overview of U.S. Copyright Law*

Brian T. Yeh, American Law Division

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# CRS Report for Congress

## General Overview of U.S. Copyright Law

Brian T. Yeh  
Legislative Attorney  
American Law Division

### Summary

This report provides a general overview of copyright law and briefly summarizes the major provisions of the U.S. Copyright Act.

### Constitutional Basis

The source of federal copyright law originates with the Copyright and Patent Clause of the U.S. Constitution, which authorizes Congress “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.”<sup>1</sup>

### What Subject Matter is Eligible for Copyright Protection?

The Copyright Act<sup>2</sup> offers legal protection to creators of original works of authorship that are fixed in a tangible medium of expression.<sup>3</sup> Such original works<sup>4</sup> must be captured in some form that is sufficiently permanent or stable for it to be perceived, reproduced, or otherwise communicated for a period beyond a transitory duration.<sup>5</sup> The types of creative works that are potentially eligible for copyright protection fall into several categories, including literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>2</sup> 17 U.S.C. §§ 101 et seq.

<sup>3</sup> 17 U.S.C. § 102(a).

<sup>4</sup> “Original” means that the author must have independently created the work, as opposed to copying something from a pre-existing work. In addition, an “original work” also must possess a minimal amount of creativity. *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 345 (1991).

<sup>5</sup> 17 U.S.C. § 101 (definition of “fixed”).

audiovisual works; sound recordings; and architectural works.<sup>6</sup> In addition, copyright protects compilations and derivative works.<sup>7</sup> However, copyright protection does not extend to any underlying abstract idea, procedure, process, system, method of operation, concept, principle, or discovery, but rather it only protects the manner in which those ideas are expressed.<sup>8</sup>

Works of the federal government are statutorily excluded from the scope of copyright protection.<sup>9</sup> This includes the written opinions of federal courts, federal reports and documents, administrative regulations, and public laws. These materials are considered to be in the public domain. Works in the public domain are available for anyone to use without concern of infringement.

## Exclusive Rights of a Copyright Owner

The grant of copyright bestows several rights upon the creator of a work (or the individual having a legal interest in the work) that permit the copyright holder to control the use of the protected material. These statutory rights allow a copyright holder to do or to authorize the following:<sup>10</sup>

- the reproduction of the copyrighted work;
- the preparation of derivative works based on the copyrighted work;
- the distribution of copies or phonorecords<sup>11</sup> of the copyrighted work;
- the public performance of the copyrighted work; and
- the public display of the copyrighted work, including the individual images of a motion picture.

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<sup>6</sup> 17 U.S.C. § 102(a).

<sup>7</sup> 17 U.S.C. § 103. A “compilation” is a work formed by the collection and assembling 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. A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. 17 U.S.C. § 101 (definition of “compilation” and “derivative work.”).

<sup>8</sup> Baker v. Selden, 101 U.S. 99 (1879); 17 U.S.C. § 102(b).

<sup>9</sup> 17 U.S.C. § 105. The Copyright Act defines a “work of the United States Government” to mean “a work prepared by an officer or employee of the United States Government as part of that person’s official duties.” 17 U.S.C. § 101.

<sup>10</sup> 17 U.S.C. §§ 106(1)-(5).

<sup>11</sup> The U.S. Copyright Act frequently uses many “terms of art” throughout its provisions; these terms often have meanings that differ from ordinary usage in everyday language. For example, a “copy” is a material object, other than a phonorecord, that embodies a fixation of an original work of authorship. A “phonorecord” is a material object in which sounds are fixed and from which the sounds can be perceived, reproduced, or otherwise communicated directly or with the aid of a machine or device. These definitions and others are found in 17 U.S.C. § 101.

The Copyright Act contains several statutory limitations on the copyright monopoly. These include the “first sale doctrine”<sup>12</sup> that limits the copyright owner’s exclusive control over distribution of the material objects in which a work is expressed. The “first sale doctrine” permits the owner of a particular copy of a copyrighted work to sell or dispose of that copy without the copyright owner’s permission.<sup>13</sup> Other limitations involve allowing certain reproductions by libraries and archives,<sup>14</sup> limited performances and displays for educational purposes or in the course of services at a place of worship,<sup>15</sup> and certain performances for non-profit, charitable causes.<sup>16</sup>

The doctrine of “fair use” in copyright law recognizes the right of the public to make reasonable use of copyrighted material, under particular circumstances, without the copyright holder’s consent. For example, a teacher may be able to use reasonable excerpts of copyrighted works in preparing a scholarly lecture or commentary, without obtaining permission to do so. The Copyright Act mentions fair use “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.”<sup>17</sup> However, a determination of fair use by a court considers four factors:

- the purpose and character of the use including whether such use is of a commercial nature or is for nonprofit educational purposes,
- the nature of the copyrighted work,
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
- the effect of the use upon the potential market for or value of the copyrighted work.<sup>18</sup>

Because the language of the fair use statute is illustrative, determining what constitutes a fair use of a copyrighted work is often difficult to make in advance — according to the

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<sup>12</sup> 17 U.S.C. § 109(a).

<sup>13</sup> For example, when a person purchases copyrighted works such as books, CDs, or DVDs, the purchaser becomes the owner of those particular material objects that embody the underlying artistic and literary works, but he gains no authority to exercise the exclusive copyright rights of the creator of those works (such as reproduction or public performance) — with the exception of further distribution through sale, rental, or other transfer of ownership, which is a right provided by the first sale doctrine to the purchaser of those material objects. However, there are two express statutory exceptions to the first sale doctrine for sound recordings that embody musical works and for computer programs. The Record Rental Amendment Act of 1984, P.L. 98-450 (1984), and the Computer Software Rental Amendment Act of 1990, P.L. 101-650 (1990), prevent owners of phonorecords embodying musical works or persons possessing copies of computer programs, from renting, leasing, or lending those material objects, for the purposes of direct or indirect commercial advantage, without the authorization of the copyright owners of those works. 17 U.S.C. § 109(b)(1)(A).

<sup>14</sup> 17 U.S.C. § 108.

<sup>15</sup> 17 U.S.C. § 110(3).

<sup>16</sup> 17 U.S.C. § 110(4).

<sup>17</sup> 17 U.S.C. § 107.

<sup>18</sup> *Id.*

U.S. Supreme Court, such a determination requires a federal court to engage in “case-by-case” analysis.<sup>19</sup>

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA).<sup>20</sup> Section 1201(a)(1) of the DMCA prohibits any person from circumventing a technological measure that effectively controls access to a copyrighted work.<sup>21</sup> This newly created right of “access” granted to copyright holders makes the act of gaining access to copyrighted material by circumventing digital rights management (DRM) security measures, itself, a violation of the Copyright Act. Prohibited conduct includes descrambling a scrambled work; decrypting an encrypted work; or avoiding, bypassing, removing, deactivating, or impairing a technological measure, without the authority of the copyright owner.<sup>22</sup> In addition, the DMCA prohibits the selling of products or services that circumvent access-control measures, as well as trafficking in devices that circumvent “technological measures” protecting “a right” of the copyright owner.<sup>23</sup>

In contrast to copyright infringement, which concerns the unauthorized or unexcused use of copyrighted material, the DMCA’s anti-circumvention provisions prohibit the act of DRM circumvention, as well as the design, manufacture, import, offer to the public, or trafficking in technology used to circumvent those copyright protection measures, regardless of the actual existence or absence of copyright infringement activity.

## Duration of Copyright Protection

The rights conferred on a copyright holder do not last forever. Copyrights are limited in the number of years a copyright holder may exercise his/her exclusive rights. In general, an author of a creative work may enjoy copyright protection for the work for a term lasting the entirety of his/her life plus 70 additional years.<sup>24</sup> At the expiration of a term, the copyrighted work becomes part of the public domain.

## Enforcement of Copyright

**Copyright Infringement.** The unauthorized use of one of the exclusive rights of the copyright owner constitutes infringement.<sup>25</sup> For example, unauthorized copying of a copyrighted work is an infringement of the copyright owner’s exclusive right of

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<sup>19</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

<sup>20</sup> The DMCA added a new chapter 12 to the Copyright Act, entitled “Copyright Protection and Management Systems.” 17 U.S.C. §§ 1201-1205.

<sup>21</sup> Technology-based measures to thwart copyright infringement (usually unauthorized reproduction and distribution) include Internet video streaming protections, encrypted transmissions, and Content Scrambling Systems (CSS) on DVD media.

<sup>22</sup> 17 U.S.C. § 1201 (a)(3).

<sup>23</sup> 17 U.S.C. §§ 1201(a)(2), (b).

<sup>24</sup> 17 U.S.C. § 302. Other terms have been established for different works and different periods of time. For a concise chart explaining the different terms, *see* [[http://www.copyright.cornell.edu/public\\_domain](http://www.copyright.cornell.edu/public_domain)]

<sup>25</sup> 17 U.S.C. § 501.

reproduction. Anyone interested in doing anything with a copyrighted work that implicates one of the holder's exclusive rights must either (1) obtain the permission of the copyright holder,<sup>26</sup> (2) comply with the terms of compulsory licenses established by law,<sup>27</sup> or (3) assert that such use falls within the scope of certain statutory limitations on the exclusive rights such as the "fair use" doctrine.<sup>28</sup>

The Copyright Act has both criminal and civil provisions for infringement.<sup>29</sup> Civil copyright infringement involves a violation of any of the exclusive rights of the copyright owner that are provided by 17 U.S.C. §§ 106-122, 602, including the right to control reproduction, distribution, public performance, and display of copyrighted works.

Criminal copyright infringement includes the following offenses:<sup>30</sup>

- copyright infringement for profit, 17 U.S.C. § 506(a)(1)(A), 18 U.S.C. § 2319(b);
- copyright infringement without a profit motive, 17 U.S.C. § 506(a)(1)(B), 18 U.S.C. § 2319(c);
- pre-release distribution of a copyrighted work over a publicly accessible computer network, 17 U.S.C. § 506(a)(1)(C), 18 U.S.C. § 2319(d);
- circumvention of copyright protection systems in violation of the Digital Millennium Copyright Act, 17 U.S.C. § 1204;
- bootleg recordings of live musical performances, 18 U.S.C. § 2319A;
- unauthorized recording of motion pictures in a movie theater (camcording), 18 U.S.C. § 2319B; and
- counterfeit or illicit labels and counterfeit documentation and packaging for copyrighted works, 18 U.S.C. § 2318.

The direct infringer is not the only party potentially liable for infringement; the federal courts have recognized two forms of secondary copyright infringement liability: contributory and vicarious. The concept of contributory infringement has its roots in tort law and the notion that one should be held accountable for directly contributing to

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<sup>26</sup> Explicit permission voluntarily granted by the copyright holder to use protected material in a particular manner is one of the most effective ways for a user to avoid infringement liability. Such permission may be expressed through a private licensing agreement whereby the copyright holder agrees to the particular use, often in exchange for a negotiated fee.

<sup>27</sup> The Copyright Act provides several "compulsory licenses" for certain uses of music, in which the third party need not seek the authorization of the copyrighted holder, but rather simply pays a statutorily prescribed royalty rate for the privilege of using the work in particular, limited ways. For example, 17 U.S.C. § 115 allows a user to pay a statutory fee to a songwriter for the right to reproduce and distribute his/her musical composition, in a manner that may be heard with the aid of a mechanical device, for songs that have been initially distributed publicly under the authority of the copyright holder. Thus, a band that wants to record a "cover" version of a Rolling Stones song need not get permission to do so, but rather pays the § 115 royalty rate to the Rolling Stones.

<sup>28</sup> 17 U.S.C. § 107.

<sup>29</sup> See 17 U.S.C. § 501 (civil) and § 506, 18 U.S.C. § 2319 (criminal).

<sup>30</sup> For a detailed explanation of these statutes and their corresponding remedies, see CRS Report RL34109, *Intellectual Property Rights Violations: Federal Civil Remedies and Criminal Penalties Related to Copyrights, Trademarks, and Patents*, by Brian T. Yeh.

another's infringement.<sup>31</sup> For contributory infringement liability to exist, a court must find that the secondary infringer "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."<sup>32</sup> Vicarious infringement liability is possible where a defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."<sup>33</sup>

**Remedies for Copyright Infringement.** The statute of limitations for initiating a civil action for copyright infringement is within three years after the claim accrued, while a criminal proceeding must be commenced within five years after the cause of action arose.<sup>34</sup> Federal courts determine the civil remedies in an action for infringement brought by the copyright owner, among those statutorily authorized. If the federal government chooses to prosecute individuals for copyright violations, the imprisonment terms are set forth in the statutes describing the particular copyright crime (mostly in 18 U.S.C. § 2319), while the criminal fine amount is determined in conjunction with 18 U.S.C. § 3571 (specifies the amount of the fine under Title 18 of the U.S. Code).

For a copyright owner who prevails in a copyright infringement lawsuit, the court may approve the following legal remedies:

- injunctions, 17 U.S.C. § 502;
- impounding, destruction, or other reasonable disposition of all copies made in violation of the copyright owner's rights, as well as all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies may be reproduced, 17 U.S.C. § 503;
- actual damages suffered by the copyright owner due to the infringement, and any profits of the infringer attributable to the infringement, 17 U.S.C. § 504(b);
- statutory damages (at the copyright owner's election to recover in lieu of actual damages and profits), in the amount of not less than \$750 or more than \$30,000 as the court deems just, 17 U.S.C. § 504(c)(1). For willful infringement, a court may increase the statutory damages award to a sum of not more than \$150,000, 17 U.S.C. § 504(c)(2); and
- costs and attorney's fees, 17 U.S.C. § 505.

Willful infringement of copyright for purposes of commercial advantage or private financial gain is subject to criminal prosecution, and is punishable by up to 10 years in prison and a fine of up to \$250,000.<sup>35</sup> Another additional remedy for criminal copyright infringement is civil and criminal forfeiture of all infringing copies and all devices and equipment used in the manufacture of such infringing copies.<sup>36</sup>

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<sup>31</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9<sup>th</sup> Cir. 1996).

<sup>32</sup> *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9<sup>th</sup> Cir. 2001).

<sup>33</sup> *Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1162 (2d. Cir. 1971).

<sup>34</sup> 17 U.S.C. § 507.

<sup>35</sup> 18 U.S.C. § 2319(b)(2).

<sup>36</sup> 17 U.S.C. §§ 506(b), 509.