Copyright Basics
IP to IP / CINF Program
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Copyright Basics
United States Copyright Law

• United States Constitution
  Article I, Section 8 (Copyright Clause)

• Title 17 – United States Code

• Major Legislation / Historical Highlights
  1790 – 1st © law; revisions in 1831, 1870

• The Federal Courts
  US Copyright Law is federal law
United States Constitution
Copyright (and Patent) Clause

“The Congress shall have Power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”

• A property right (hence Intellectual property)
• Incentive to create in granting authors “exclusive rights” (not a monopoly – subject to exceptions)
• Copyright does not protect ideas or facts
• “Limited Times” not defined; steady increases over the years since 1790
Definition of Copyright

Section 102(a) of Copyright Act:

- Copyright protection subsists, ..., in 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.
Definition of Copyright

- Key elements: original work and fixed in a tangible medium of expression.
- Copyright ownership begins as soon as a work is created and fixed in tangible form.
- Ownership vests with the author, except in cases where the work has been created under a ‘work made for hire’.
Copyright protects...

Section 102(a) of Copyright Act:

• Literary Works (including compilations)
• Musical Works (including accompanying words)
• Dramatic Works (including accompanying music)
• Pantomime and Choreographic Works
• Pictorial, Graphic, and Sculptural Works
• Motion Picture and Other Audio Visual Works
• Sound Recordings
• Architectural Works
• Computer Programs (generally considered literary works)
Copyright does not protect…

Section 102(b) of Copyright Act:

- works not fixed in a tangible form of expression
- titles, names, short phrases, slogans, familiar symbols or designs (these items may be protected under trademark or service mark laws)
- listings of ingredients or contents (trade secret law)
- ideas, procedures, methods, systems, processes, concepts, principles, discoveries, devices (these items may be protected under patent law)
- standard calendars, rulers, lists or tables taken from public domain documents or sources and other works containing no original authorship
Duration of Copyright

Under current law:

- When vested in the author – life of the author plus 70 years.
- When work for hire or in scope of employment – 95 years or 120 years from date of creation (whichever expires first).

Note – There have been a number of increases in duration since 1790.

Most recent update -- Sonny Bono Copyright Term Extension Act of 1998 (CTEA) was upheld as constitutional and within Congress’ authority by Supreme Court in *Eldred v. Ashcroft*, a challenge to CTEA.
Notice of Copyright

• Works published prior to March 1, 1989 must contain a copyright notice to avoid loss of copyright. For works published after that date, copyright notice is voluntary, although it is still recommended for some legal, but mostly commercial, purposes.

• A proper copyright notice must include the symbol “©” or word “Copyright” or abbreviation “Copr.”; the copyright year (year of first publication); and the name of copyright owner.
Definition of ‘Work made for hire’

A work made for hire can be a work created within the scope of employment or specially ordered or commissioned and falling within one of nine specific categories:

- a contribution to a collective work;
- a translation;
- a supplementary work;
- a compilation;
- an instructional text;
- a test;
- answer material for a test;
- or an atlas;
- AND the parties expressly agree in a written instrument (signed by both parties) that the work shall be considered a work made for hire.
Compilations & Collective Works

- **Compilation**
  - 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.

- **Collective Work**
  - a compilation of materials that separately constitute independent works, such as an anthology, encyclopedia, or periodical issue.

- **Facts & Compilations**
  - facts alone are not protected
  - facts within a compilation may be protected -- it depends:

  Feist case 1991 – Supreme Court held telephone directory not subject to © protection
Derivative Works

• **Derivative Works** (recasting, adapting, transforming already existing work)

  Derivative Works include but are not limited to the following:
  
  – translations
  
  – musical arrangements
  
  – dramatizations
  
  – motion picture versions
  
  – abridgements
Exclusive Rights of Copyright

Author’s exclusive rights under Copyright (Section 106 of Copyright Act):
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of 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, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

*Note – It is helpful to think of copyright rights as a “bundle of rights” under the statute, and in terms of different formats/media that works appear in*
Limitations of Exclusive Rights
Fair Use

Uses generally recognized as eligible for fair use defense under Section 107:

• criticism
• comment
• news reporting
• teaching (NOTE: not all teaching uses constitute fair use)
• scholarship
• research
Limitations of Exclusive Rights
Fair Use

Four factors to consider in determining if use is fair use:

• purpose and character of use
• nature of work
• amount and substantiality of portion used
• effect of use on potential market for value of copyrighted work

• Note – USSC upheld fair use argument in *Sony* (1984); similar type of argument not persuasive for 9th Circuit in *Napster* (2001). *Sony* also distinguished by USSC in *MGM v. Grokster* (2005). The *Sony* case dealt with home use of VCR’s, held to be non-infringing.
Limitations of Exclusive Rights
Library Exceptions

• Section 108 of Copyright Act (not fair use per se), but related in so far as allowing certain library exceptions or limitations to copyright.
• Backup copies of works
• Photocopying for personal use/research purposes
• Multiple and systematic photocopying not permitted.
• Interlibrary Loan; also part of Section 108.
Registration / Renewal

• Registration of Copyright
  --Not mandatory under law
  --Required to obtain statutory damages; for official recognition of ownership; to institute an infringement suit, etc.

• Renewals no longer required
  --Law amended in 1992 to make renewal automatic for all works published between 1/1/64 and 12/31/77
Transfer / Termination

• Transfer of Rights – Section 201(d)
  --any of the exclusive rights may be transferred
  --must be in writing, signed by author
  --may be recorded in US Copyright Office

• Termination of Rights – Section 203
  --rights may be terminated by © owner
Remedies

Sections 501-511 of Copyright Act

• 501 – Infringement (violations of any of the exclusive rights)
• 502 - 503 – Remedies for Infringement (injunctions or impounding/disposition)
• 504 – Damages (actual or statutory)
• 505 – Costs and attorney’s fees
• 506 – Criminal Liability
• 507 – 3 year statute of limitations for civil proceedings; 5 years for criminal
Current issues

• Section 108 Study Group – will likely lead to legislation.

• Fee increase effective 7/1/06; another to become effective 8/1/09. See http://www.copyright.gov/reports/fees2009.pdf.

• Preregistration of certain classes of works. See http://www.copyright.gov/prereg/help.html.

Note: the above not legislation per se, but reflect related issues.
Current legislation

• Orphan Works (OW) -- Efforts in 2006 and 2008 unsuccessful, bills introduced both sessions – reintroduced in 2009?

• OW Key elements:
  -- reasonably diligent search
  -- infringing use okay w/ attribution
  -- limitation of remedies
  -- “reasonable compensation”
**Current legislation**

- Fair Copyright in Research Works Act (HR 801)
  -- Purpose is to repeal the mandatory NIH Public Access Policy. Publisher focus on “extrinsic works” (added value not paid or contracted for government, e.g., peer review, editing, etc.).
  -- AAP and publishers attempting to introduce a separate provision that would function as a companion bill based on America COMPETES Act.
Google – two cases settle

- **Authors Guild v. Google**, a class action lawsuit seeking damages for infringement, was filed September 2005 in the SDNY.

- **McGraw Hill v. Google**, a non-class action suit that seeks a declaratory judgment and injunctive relief regarding Google’s infringing activities, was filed October 2005 in the SDNY, with John Wiley & Sons, Simon & Schuster, Pearson Education, and Penguin Group USA as co-plaintiffs.

- After 3 years of discovery in which millions of pages of documents changed hands, settlement agreement announced October 31, 2008.

- Under terms of the settlement, Google will pay $45 million to establish centralized royalty collection organization and to compensate authors of scanned books. Each book stands to earn at least $60 for the scanning; ongoing royalties will be paid via other methods. Rightsholders must file claims with settlement administrator by January 5, 2010. See [http://books.google.com/booksrightsholders/agreement-contents.html](http://books.google.com/booksrightsholders/agreement-contents.html).
“Movements” affecting copyright/permissions/licensing

Note: Definitions from Wikipedia (http://en.wikipedia.org/wiki/Main_Page)

- **Open Access** – free online availability of digital content.
- **Creative Commons** – a non-profit organization devoted to expanding the range of creative work available for others legally to build and share.
- **Institutional repositories** – an online locus for collecting and preserving digitally the intellectual output of an institution.
“Movements” and challenges facing publishers

Some possible “theories”:

- Grantors of research funds wanting those papers freely accessible (NIH-PMC, Wellcome Trust).
- Institutions wanting free availability of employee/author works.
- OA movement in general (incl. Creative Commons) advocating greater author rights, leading to greater accessibility of content.
“Movements” and challenges
Resistance from Publishers

Why are many publishers fighting OA and related movements?

Reasons include:

- Business models not set up for free access.
- Many STM and scholarly publishers are nonprofit.
- “Value added” benefits, e.g., peer review, editing, etc.

However, there can be compromise, in the form of publishers adjusting their business models, discussion amongst interested/affected parties, etc.
Copyright Basics

• Thank you for your attention!
• Copyright Resources:
  -- www.copyright.gov (US Copyright Office)
  -- www.publishers.org (Association of American Publishers)
  -- www.copyright.com (Copyright Clearance Center)
• Contact Information:
  – 202-872-4367 / e_slater@acs.org