

# Copyright for Archivists: An Introduction

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## Ten Things Every Archivist Needs to Know About Copyright

1. The **purpose** of copyright.
2. **Ownership** of copyright. Initial ownership is in the author or joint authors. (§ 201 a) Works Made for hire are owned by the employer if the work is within scope of the employee's responsibilities. (§ 201 b)
3. **Transfer** of ownership. Copyright may be transferred, but transfers should be recorded in writing. (§ 201 d and § 204). Transfers of ownership can be terminated according to specific conditions generally starting 35 years after the transfer (§ 203 and § 304 c).
4. What is **“copyrightable”**: “original works of authorship fixed in any tangible medium of expression,” including: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. (§ 102 a) Sound recordings made before 1972, not covered until 2067. (§301 c)
5. What is **not “copyrightable”**: ideas, procedures, processes, systems, method of operations, concepts, principles, or discoveries.” Patents, trademarks, and trade secrets are something different. (§ 102 b)
6. **Exclusive rights** conferred by copyright:
  - 1) to reproduce or make copies;
  - 2) to prepare derivative works based upon the copyrighted work;
  - 3) to distribute copies by sale, rental, lease, or lending;
  - 4) to perform the copyrighted work publicly (for literary, musical, dramatic, choreographic, pantomimes, and motion pictures and other audiovisual works);
  - 5) to display the copyrighted work publicly (for literary, musical, dramatic, choreographic works, pantomimes, pictorial, graphic, or sculptural works); and
  - 6) to perform the copyrighted work publicly by means of a digital audio transmission (for sound recordings). (§106)
7. **Limits on the exclusive rights** of copyright (§ 107 **Fair Use**). It is not an infringement on the rights of the copyright holder to use the work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. To determine whether a use is “fair,” the courts consider:
  - 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - 2) the nature of the copyrighted work [unpublished nature is not a *per se* reason to find against fair use];
  - 3) the amount and substantiality of the portion used; and
  - 4) the effect of the use upon the potential market for or value of the copyrighted work.

Fair use is an "equitable rule of reason," for which "no generally applicable definition is possible." The four factors should not "be treated in isolation, one from the other. All are to be explored, and the results weighed together, in light of the purposes of copyright." (*Campbell v. Acuff-Rose Music*, 510 U.S. at 578.)
8. **Limits on the exclusive rights** of copyright: (§ 108 **Library and Archives Copying**). Libraries and archives whose collections are open to the public may make copies of copyrighted works provided that it is not for commercial advantage and that the copy carries a notice.  
§ 108 rights apply to specific kinds of copying:
  - 3 copies for preservation purposes (but digital copies not allowed outside the library or archives);
  - reference/interlibrary loan copies if the copies become the property of the user;
  - for published works in last 20 years of their term, preservation copying and distribution, including digitally, provided the works are not subject to “commercial exploitation.”

Important limits on § 108 exemptions:

- ❑ not allowed if reason to believe that copying is a concerted attempt to make multiples of the same work.
  - ❑ do not apply to musical, pictorial, graphic or sculptural works, or motion pictures or other audiovisual works (except for preservation copying and for user copies of audiovisual works dealing with news; pictorial works published as illustrations in works being distributed according to reference users).
9. **Term** of copyright: generally life of the author plus 70 years, or in case of works-for-hire, 95 years from publication or 120 years from creation. Any work published before 1978 is subject to different terms, see Peter Hirtle's chart: [http://www.copyright.cornell.edu/training/Hirtle\\_Public\\_Domain.htm](http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm)
10. **All copyright questions** can be reduced to two answers.

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### BIBLIOGRAPHY

- Coombe, Rosemary J. *The Cultural Life of Intellectual Property: Authorship, Appropriation and the Law*. Durham, N.C.: Duke University Press, 1998.
- Crews, Kenneth D. *Copyright Advisory Office* at Columbia University (A leading website with many good links.) <http://www.copyright.columbia.edu/> [Previously IUPUI's *Copyright Management Center*]
- \_\_\_\_\_. *Copyright Notices for Private Study*  
<http://copyright.columbia.edu/copyright/libraries-and-copyright/copies-for-private-study/>
- \_\_\_\_\_. "Fair use of Unpublished Works: Burdens of Proof and the Integrity of Copyright," *Arizona State Law Journal* 31 (September 1999).
- \_\_\_\_\_. "Fair Use Checklist," Kenneth D. Crews, Director of Columbia University's Copyright Advisory Office (New York: Columbia University, 2008) <http://www.copyright.columbia.edu/fair-use-checklist>
- [Harper, Georgia.] "Copyright Crash Course"  
<http://copyright.lib.utexas.edu/>
- \_\_\_\_\_. "Fair Use of Copyrighted Materials,"  
<http://copyright.lib.utexas.edu/copypol2.html>
- Hirtle, Peter. *When Works Pass Into the Public Domain in the United States: Copyright Term for Archivists and Librarians*, [http://www.copyright.cornell.edu/training/Hirtle\\_Public\\_Domain.htm](http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm)
- Hirtle, Peter B., Emily Hudson, and Andrew T. Kenyon *Copyright and Cultural Institutions: Guidelines for U.S. Libraries, Archives, and Museums*, (Ithaca, New York: Cornell University Library, 2009). Available at: [http://ecommons.library.cornell.edu/bitstream/1813/14142/2/Hirtle-Copyright\\_final\\_RGB\\_lowres-cover1.pdf](http://ecommons.library.cornell.edu/bitstream/1813/14142/2/Hirtle-Copyright_final_RGB_lowres-cover1.pdf)
- Maher, William J. "Current Issues in Copyright Law and Archival Administration" *Archival Issues*, 26:1 (2001) 63-75.
- Mann, Charles C. "Who Will Own Your Next Good Idea." *Atlantic Monthly* (September, 1998): 57-82.
- Nimmer, Melville B. and David Nimmer. *Nimmer on Copyright*. (New York: Matthew Bender and Lexis Publishing, 2000+).
- Patterson, L. Ray. *Copyright in Historical Perspective*. (Nashville: Vanderbilt University Press, 1968)
- United States Copyright Office. (2000). *Circular 22: How to Investigate the Copyright Status of a Work*. <http://www.copyright.gov/circs/circ22.pdf>
- \_\_\_\_\_. *Circular 92: Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code*. <http://www.copyright.gov/title17/>
- WATCH, *Writers, Artists, and Their Copyright Holders*. <http://tyler.hrc.utexas.edu/> [A searchable database for the holders and addresses for permission requests for prominent authors.]

**DISCLAIMER:** *The presenter is not a lawyer, and is not offering legal advice, but an overview of copyright issues. Copyright law is very case specific--consult your institutional legal counsel for particular questions.*

- 1 The **purpose** of copyright.
  - 1.1 A constitutionally based right provided for in federal statute
  - 1.2 Not a natural right but a social construction for a purpose.
  - 1.3 Constitutional provision key parts:
    - 1.3.1 states purpose—promote the progress of science and the useful arts;
    - 1.3.2 defines objects of protection—authors and inventors and their works (not facts, ideas, or reputations);
    - 1.3.3 stipulates a limited term for the monopoly rights provided.
  - 1.3.4 Contrast between the 18th century idea that intellectual property was for the purpose of enlightenment and emerging view that the mantle of authorship is proclaimed for the purpose maintaining the exchange value of entertainment in an environment where authors rights are transferred and managed by a legal fiction—the corporation.

2 **Ownership** of copyright. Initial ownership is in the author or joint authors. (§ 201 a) Works Made for hire are owned by the employer if the work is within scope of the employee's responsibilities. (§ 201 b)

- 2.1 Ownership or copyrightability is automatic
- 2.2 Belongs to the author/joint authors
- 2.3 May be transferred or assigned
- 2.4 Belongs to an employer when work is made within the scope of the employee's responsibilities.

3 **Transfer** of ownership. Copyright may be transferred, but transfers should be recorded in writing. (§ 201 d and § 204). Transfers of ownership can be terminated according to specific conditions generally starting 35 years after the transfer (§ 203 and § 304 c).

- 3.1 CAUTION: donor can only grant you what is his or hers, e.g., not:
  - 3.1.1 ownership in works of others received as incoming correspondence
  - 3.1.2 own works if completed as a work for hire

4 What is **“copyrightable”**: “original works of authorship fixed in any tangible medium of expression,” including:

- 4.1 literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.
- 4.2 tangible media of expression includes paper, stone, metal, audio tape, photographic film, computer diskettes, computer RAM.
- 4.3 do not include: memory, oral tradition, or traditional knowledge.

5 What is **not “copyrightable”**:

- 5.1 ideas,
- 5.2 procedures,
- 5.3 processes,
- 5.4 systems,
- 5.5 method of operations,
- 5.6 concepts,
- 5.7 principles, or
- 5.8 discoveries.”

Copyrights should not be confused with patents, trademarks, or trade secrets.

copyright: a federal grant of exclusive rights over copying and use which continues whether dormant or used.

patent: a federal grant of exclusive rights to the use of a process, invention, design, or plant following a formal registration and demonstration of innovation.

**trademark:** words, slogans, designs, pictures, symbol, or dress for a commercial product to indicate its as identification, source, quality, and/or advertising. They must be used and protected or they are subject to abandonment.

**trade secret:** critical business information that is the subject of reasonable efforts to preserve confidentiality. Managed through state law.

6 **Exclusive rights** conferred by copyright:

- 6.1 to reproduce or make copies;
- 6.2 to prepare derivative works based upon the copyrighted work;
- 6.3 to distribute copies by sale, rental, lease, or lending;
- 6.4 to perform the copyrighted work publicly (for literary, musical, dramatic, choreographic, pantomimes, and motion pictures and other audiovisual works);
- 6.5 to display the copyrighted work publicly (for literary, musical, dramatic, choreographic works, pantomimes, pictorial, graphic, or sculptural works); and
- 6.6 to perform the copyrighted work publicly by means of a digital audio transmission (for sound recordings).

Except for the special category of works of visual art, which are narrowly defined, continental schemes of “moral rights” do not have U.S. federal copyright protection. These rights are typically categorized as:

- 1) *droit de divulgation*-right of authors to control the circumstances in which the work will be released to the public.
- 2) right to withdraw a work from circulation;
- 3) *droit de paternité* or right to claim attribution as the author to right of freedom to be falsely being names as author;
- 4) integrity right or the right to prevent mutilation of a work; and
- 5) *droit de suite*-the right to share the proceeds of future sales, as might pertain to works of art.

7 **Limits on the exclusive rights** of copyright:

**§ 107 Fair Use.** It is not an infringement on the rights of the copyright holder to use the work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. To determine whether a use is “fair,” the courts consider:

- 7.1 the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 7.2 the nature of the copyrighted work [unpublished nature is not a *per se* reason to find against fair use];
- 7.3 the amount and substantiality of the portion used; and
- 7.4 the effect of the use upon the potential market for or value of the copyrighted work.

Fair use is an “equitable rule of reason,” for which “no generally applicable definition is possible.” The four factors should not “be treated in isolation, one from the other. All are to be explored, and the results weighed together, in light of the purposes of copyright.” (*Campbell v. Acuff-Rose Music*, 510 U.S. at 578.)

In a sense, fair use is the right to hire a lawyer—determination as to whether a use is fair comes only with a court decision. Nevertheless, subsection 504 (c) 2 provides some encouraging cover: “The court shall remit [pardon or abate] statutory damages if infringer had reasonable grounds to believe that the use of the copyrighted work was a fair use under section 107.” This provision applies only in the case of nonprofit educational institutions, libraries, or archives and public broadcasting entities.

8 **Limits on the exclusive rights** of copyright: **§ 108 Library and Archives Copying.** Libraries and archives whose collections are open to the public may make copies of copyrighted works provided that it is not for commercial advantage and that the copy carries a notice.

8.1 § 108 rights apply to specific kinds of copying:

- 8.1.1 3 copies for preservation purposes (but digital copies not allowed outside the library or archives);
- 8.1.2 reference or interlibrary loan copies if the copies become the property of the user;

8.1.3 for published works in last 20 years of their term, preservation copying and distribution, including digitally, provided the works are not subject to “commercial exploitation.”

8.2 Important limits on § 108 exemptions:

8.2.1 not allowed if reason to believe that copying is a concerted attempt to make multiples of the same work.

8.2.2 do not apply to

8.2.2.1 musical,

8.2.2.2 pictorial,

8.2.2.3 graphic or sculptural works, or

8.2.2.4 motion pictures or other audiovisual works

8.2.2.5 (except for audiovisual works dealing with news; preservation copying; or to pictorial works published as illustrations in works being distributed according to reference and interlibrary loan provisions

9 **Term** of copyright: generally life of the author plus 70 years, or in case of works-for-hire, 95 years from publication or 120 years from creation.

9.1 Copyright exists from the moment that a work is “fixed in any tangible medium of expression.”

9.2 CTEA did not change anything already in the public domain before October 27, 1998.

9.3 The 1909 rules apply to works *published* or *registered* before the effective date of the 1976 act. Three differences of the 1909 act:

1) term was measured from publication or registration, not creation.

2) copyright was for a stated term, not a contingent term of life plus 50, or 70.

3) term included mandatory publication and renewal procedures, and failure to comply meant that the work entered the public domain (28 years plus 28 years)

Best guide is a public domain chart, see Peter Hirtle’s chart: <http://cidc.library.cornell.edu/copyright/>

10 **All copyright questions** can be reduced to two answers.

10.1 Yes, provided that. . . , or

10.2 No, not unless . . . . .

"the more certain you are about a hunch on a copyright matter, the closer you are to being wrong." –James Hilton, University of Michigan.