# Introduction to Copyright Law

**Arizona Archives Alliance**
**February 24, 2012**

**Dennis S. Karjala**
**Jack E. Brown Professor of Law**
**Sandra Day O'Connor College of Law**
**Arizona State University**
**dennis.karjala@asu.edu**

# General Principles

- United States Constitution
  - "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"
- Congress is not *required* to adopt patent or copyright legislation at all
- We have had such statutes, however, since the First Congress (1790)
- The Supreme Court (in its infinitesimal wisdom) has ruled that even *limitations* on congressional power (like "limited times") are for Congress to determine
- Therefore, copyright is a creature of federal statute

# Copyright Subject Matter

- Section 102 of the Copyright Act:
  - (a) Copyright protection subsists, in accordance with this title, 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. Works of authorship include the following categories:
    - (1) literary works;
    - (2) musical works, including any accompanying words;
    - (3) dramatic works, including any accompanying music;
    - (4) pantomimes and choreographic works;
    - (5) pictorial, graphic, and sculptural works;
    - (6) motion pictures and other audiovisual works;
    - (7) sound recordings; and
    - (8) architectural works.
  - (b) In no case does copyright protection for an original work of authorship 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.

# Basic Requirements

- To hold a copyright in a work, the work must be *original* to the purported author
  - This means that the protected elements in the work (the "expression") must arise out of the purported author's own intellectual processes
  - Anything copied from other sources cannot be protected by the copyright in the work in which the copied material appears (although someone else may own a copyright in such copied material)
- In addition, the work must show a "modicum of creativity"
  - This requirement rarely comes up with traditional works of art, literature, and music
  - It usually arises only with fact-related works, like factual compilation
  - Maps can be a problem under the Supreme Court's analytical scheme, because many show no "creativity" in the copyright sense but have been a part of copyright subject matter from the beginning
    - Usually, lower courts just wave their hands and say that original maps are protected
  - Most letters and legal documents will evince the required level of creativity and will be protected at least against verbatim copying

# Rights Held by the Copyright Owner

- The copyright owner has the exclusive right to make copies of or derivative works based on the work, to publicly distribute or display copies of the work, and to publicly perform the work
- Presumably, making copies or public displays are the rights that most concern archivists
- If someone else owns the copyright, making copies or public displays of copies by archivists would infringe, unless the particular act constituted a "fair use" (which may often be the case for state records and similar works)
- So, who owns the copyright is an important question

# Authorship

Generally, the author is the human person whose creative intellectual efforts lead to fixation of the work

- Usually, the person who fixes the work into a tangible medium (e.g., writes a text on paper or into computer memory, puts paint on canvas, or sculpts a statue) is also the author
- A minor exception occurs where the author only directs the details of fixation and someone else actually does the physical work (e.g., a paralyzed writer who dictates a literary work to a scribe)
- By far the most important exception is the so-called "work made for hire"

# Works Made for Hire

- The *author* (not just the copyright owner) of a work made for hire (WMFH) is the employer or other person for whom the work was prepared
  - The copyright can, of course, be transferred to the human being who actually creates the WMFH, but this must be negotiated
  - No termination rights attach to WMFHs
- WMFHs fall into two classes:
  - Those made by employees in the course of their employment
    - The copyright in works made by state employees in the course of their employment belongs to the state, so copyright would not be a great concern for state archivists
  - For a limited set of works, those made by independent contractors provided that parties have agreed in writing that the work is to be deemed a WMFH
    - This set of works is limited to those designed for use as a "contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas"
    - The creating author is also the author under copyright law for ALL OTHER types of works
    - If the hiring party wants to own the copyright (as opposed to the physical copy), he or she must negotiate a transfer of the copyright from the creating author

# Independent Contractors Hired by the State

- If private a private party is hired by the state to perform a specific task (e.g., a lawyer hired to act as special prosecutor in a particular case), the copyright in all materials created by the lawyer during the litigation will belong to the lawyer
- If the state wishes to own the copyright in such materials, it must negotiate with the lawyer for a copyright transfer
- Even if the copyright is transferred, the transfer can be terminated after 35 years (likely rare for state documents)

# Joint Authorship

- The copyright statute defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"
  - This covers most traditional collaborations, such as Rodgers & Hammerstein and Lerner & Lowe
  - It is more troublesome when the hiring party contributes expressive content to the final product (e.g., homeowner and architect)
- The crucial point is that all joint authors have the right to exploit the work as they choose, subject only to accounting to their joint authors for any profits made
  - This means that any coauthor can give a royalty-free license, for example, so the other co-authors get nothing
  - If a state employee has participated in creation of the work with, say, an independent contractor, the state will be a joint author and can exploit the work as it chooses, which presumably includes most of the things archivists would lke to do with it

# Copyright Registration

- Copyright protection arises *automatically* upon fixation of the work
  - No registration or other action is required
  - The term of copyright is life of the author plus 70 years (or 95 years from publication for works made for hire)
  - There is no longer any notion or requirement for *renewal* of the copyright, although transfers of copyright ownership can often be terminated 35 years after transfer
  - Therefore, the word "copyright" is not a verb (although many use it that way)
- For US works, registration is a condition to bringing an infringement suit
- One can always register and then bring the lawsuit
  - Early registration has the advantages, however, that neither statutory damages nor attorneys fees are available for pre-registration infringements
- Registration is a fairly simple process and can now be effected online
  - The next slide gives some information on a seminar covering online registration

# Copyright Transfers

- First, distinguish between transfer of a *copy* and transfer of the *copyright*
  - A physical copy of, say, a painting can be transferred without transferring the copyright. [N.B. Even the "original" of a painting is deemed a "copy" of the work under copyright law.]
  - In that case, the owner of the painting would control access to the physical painting but would have no right to make or distribute photocopies or posters
  - The copyright owner (often the author) would control the making and public distribution of any new copies as well as many forms of public display
- Next, transfer of the physical copy is made pursuant to state laws relating to personal property transfers
- Finally, transfer of the copyright (except by inheritance or similar "operations of law") is not effective without a written instrument of transfer that is signed by the copyright owner
- A nonexclusive license is not a "transfer of copyright ownership" and may be effected by oral agreement
  - Even an oral agreement from the copyright owner to make, say, archival copies or public displays of the work is sufficient (but may be hard to prove if a dispute arises)

# Copyright Term

- For current works, copyright extends for the life of the author plus 70 years, except that WMFHs have a term of 95 years from publication (or 120 years from creation)
- Works published before 1923 are in the public domain and can be freely used
- Works created but not published before 1978 are in the public domain unless they were published before 2003
- Works published between 1923 and 1963 are in the public domain unless their copyright was renewed in the 28th year after publication
- Works published after 1963 should be assumed to be under copyright (although determining who owns the copyright can be difficult)

# Works of Visual Art

- These include limited edition paintings, sculptures, prints, and photographs, but WMFHs are *not* included
- The author of a work of visual art (WVA) has the right to
  - Be acknowledged as author of the work
  - To prevent being associated of with a work that the author did not create
  - To prevent intentional distortion, mutilation, or modification that would be prejudicial to the author's honor or reputation
  - To prevent the destruction of any work of "recognized stature"
- These rights are nontransferable, but they may be waived by a written and signed agreement specifying the work and the uses to which the waiver applies
- Paintings, photographs, or sculpture that have been commissioned by the state may well fall into the WVA category
  - Archivists would have to use care in public displays not to damage the work and not to add their own "touches" to it

# Fair Use

- Section 107:
  - Notwithstanding the provisions of sections 106 and 106A, 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. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
    - (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;
    - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
    - (4) the effect of the use upon the potential market for or value of the copyrighted work.
  - The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

# Fair Use

- Fair use is a crucial "safety valve" allowing courts to deny infringement where the basic policies of copyright – to promote the creation and dissemination of desirable works – would not be served
- The difficulty is that fair use is nearly always fact intensive, which means that outside the classic cases, like quoting a few paragraphs from a novel in a book review, one is often unsure whether it will apply in a given case
- This means that a full trial is required, and that can be *very* expensive

# Special Provisions for Libraries and Archives

- Section 108 of the Copyright Act gives libraries and archives some special privileges to reproduce works and distribute copies. It is a somewhat complex provision but probably should at least be alluded to in a presentation to archivists.

# Fair Use – The Google Book Project

- This case has been settled (in the U.S.), which raises a number of its own problems, but had it gone to trial the case would have raised an interesting fair use issue
- There is no doubt that Google was making copies of entire works, without permission. (They would not make copies where copyright owners affirmatively "opted out.")
- However, searchers would only see 50 or so words around their search terms and could not access, without copyright owner permission, the entire work
- The "copying" therefore could not harm any copyright owners but might help them, by making people aware of their works
- Moreover, no single entity owned all the rights to do what Google wants to do, so if Google cannot do this, nobody can
- On the other hand, Google expected to make money based on these works, all written by others – is this a "fair use"?