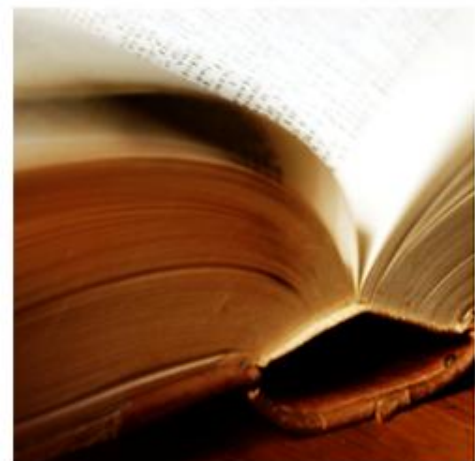


Copyright for Libraries

A Roadmap of Copyright Law



Agenda



When Is A Work Protectable?

Rights in a Copyrighted Work

Who Owns a Work?

“Passing Into The Public Domain”

Use of a Copyrighted Work - Contracts

Copyright Infringement Claims

The Library/Archive Exception

Defenses to Copyright Infringement

Issues When Putting Works Online

Potential Damages for Libraries

When A Work is Protectable Under Copyright Law

- What is a Copyright?
 - An Original Work of Authorship Fixed in a Tangible Means of Expression
- When Does Copyright Protection Arise?
 - As Soon As The Work is “Fixed” in That Tangible Means of Expression.
 - No Filing is Required!

When A Work is Protectable Under Copyright Law

- What Does it Mean to Be Original?
 - Doesn't Have to Be Something "New" or "Novel" Like in Patent Law
 - Must Have Been Created by the Author(s) Though!
 - Cannot Be Copied from Preexisting Source
 - Courts Will **Not** Judge "Quality"

When A Work is Protectable Under Copyright Law

- Does a Work Need to Be “Creative?”
 - YES!
- Must have a “Modicum” of Creativity
 - The Arrangement of a Phone Book Can Be “Creative” Enough for Copyright Protection

When A Work is Protectable Under Copyright Law

- What Does “Fixed in a Tangible Means of Expression Mean?”
 - No longer just an idea, but put on paper, recorded on a DVD, drawn, typed out, etc.
 - Must be stable enough to be perceived, reproduced, and communicated

What is Not Protectable?

- Ideas and Concepts are NOT Protectable
- Examples:
 - Rap Music
 - I Dream of Jeannie / Bewitched
 - 90210 / The OC / Gossip Girl / 90210

What Else is Not Protectable?

- Facts
- Words and Short Phrases Like Names, Titles and Slogans
- Familiar Symbols or Designs
- Listings of Ingredients or Contents

But What About Research?

- Copyright will **only** protect the author's "original expression of facts" in non-fiction works like histories or biographies.
- ***You Can Only Copyright Your Expression or Interpretation of the Facts***

Agenda



When Is A Work Protectable?

Rights in a Copyrighted Work

Who Owns a Work?

“Passing Into The Public Domain”

Use of a Copyrighted Work - Contracts

Copyright Infringement Claims

The Library/Archive Exception

Defenses to Copyright Infringement

Issues When Putting Works Online

Potential Damages for Libraries

Rights in a Copyrighted Work

- The “Bundle of Sticks”
 - (1) Reproduce/Copy the Work
 - (2) Prepare Derivative Works Based on the Work
 - (3) Distribute Copies or Phonorecords of the Work to the Public
 - (4) Publicly Perform the Work
 - Not Applicable to Pictorial, Graphic, Sculptural, and Architectural Works or Sound Recordings
 - (5) Publicly Display the Work
 - Not Applicable to Architectural Works or Sound Recordings
 - (6) Perform the Work Publicly By Means of a Digital Audio Transmission
 - Sound Recordings Only

What is a Derivative Work?

- A Work Based On One or More Preexisting Works
 - Consisting of Editorial Revisions, Annotations, Elaborations and Other Modifications
 - As a Whole The Changes Represent a New Original Work of Authorship
 - Cannot Be Trivial Changes, But a Substantial Change

Rights in a Copyrighted Work

- The “Bundle of Sticks”
 - (1) Reproduce/Copy the Work
 - (2) Prepare Derivative Works Based on the Work
 - (3) Distribute Copies or Phonorecords of the Work to the Public
 - (4) Publicly Perform the Work
 - Not Applicable to Pictorial, Graphic, Sculptural, and Architectural Works or Sound Recordings
 - (5) Publicly Display the Work
 - Not Applicable to Architectural Works or Sound Recordings
 - (6) Perform the Work Publicly By Means of a Digital Audio Transmission
 - Sound Recordings Only

What About Live Musical Performances?

- In 1994 Congress Enacted Protection for Live Musical Performances
- Prohibits:
 - (1) Unauthorized Broadcasts of Live Musical Performances
 - (2) Unauthorized Fixation of Live Performances
 - (3) Reproduction of Unauthorized Fixation
 - (4) Offers to Distribute an Unauthorized Fixation
 - (5) “Trafficking” of Unauthorized Fixations
- Violators Subject to Civil Remedies and Sometimes Even Criminal Penalties!

Exception: Non-Profit Performances

- Copyright Act Allows Persons to Provide Non-Profit Performances of Non-Dramatic Literary and Musical Works in School and Benefit Concerts
- Must Have the Following:
 - (1) Performance Directly to Public
 - (2) No Purposeful Direct or Indirect Advantage
 - (3) Persons Not Paid Specifically for Performances
 - (4) No Direct or Indirect Admissions Charge **Except** Used Exclusively for Educational, Religious, or Charitable Purposes

Rights in a Copyrighted Work

- The “Bundle of Sticks”
 - (1) Reproduce/Copy the Work
 - (2) Prepare Derivative Works Based on the Work
 - (3) Distribute Copies or Phonorecords of the Work to the Public
 - (4) Publicly Perform the Work
 - Not Applicable to Pictorial, Graphic, Sculptural, and Architectural Works or Sound Recordings
 - (5) Publicly Display the Work
 - Not Applicable to Architectural Works or Sound Recordings
 - (6) Perform the Work Publicly By Means of a Digital Audio Transmission
 - Sound Recordings Only

Agenda



When Is A Work Protectable?

Rights in a Copyrighted Work

Who Owns a Work?

“Passing Into The Public Domain”

Use of a Copyrighted Work - Contracts

Copyright Infringement Claims

The Library/Archive Exception

Defenses to Copyright Infringement

Issues When Putting Works Online

Potential Damages for Libraries

Ownership of a Copyrighted Work

- Who Owns a Copyrighted Work?
 - The Author
- The Author is Generally the Person Who Comes Up With the Idea and then “Fixes” it in a Tangible Form
 - Eg. Writer of the Book/Script; Singer Who Records or Writes Out the Song

“Joint Authorship”

- A Work **Can** Have More Than One Author
- Joint Authorship Exists Where:
 - Both Have Intent to Be Co-Authors and Have Work Merged Into One Work
 - Both Contribute Copyrightable Expression to the Work
 - Audience Appeal Turns On Contributions from Both

“Joint Authorship”

- Who Owns What in Joint Authorship?
 - Each Owner Owns an Undivided Interest in the Copyright
 - Each Owner Can Exercise Any of the Rights Discussed Previously and License Others to Do So

Ownership of a Copyrighted Work

- What if the Author is An Employee or An Independent Contractor?
 - The Work May Belong to Employer Depending Upon the Circumstances

Author Is An Employee

- Work Belongs to Employer If:
 - The Creation of the Work Was Within the Scope of Employment
 - “Within Scope of Employment”
 - Work is the Kind He/She Employed to Prepare
 - Use of Employer’s Time and Space
 - Work Creation Was Partly Motivated to Serve Employer

Author Is An Independent Contractor

- Work Belongs to Employer If:
 - (1) Signed Contract Provides for Assignment
 - OR
 - (2) Signed “Work for Hire” Agreement in One of Nine Categories in Copyright Act
- Nine Categories
 - (1) Contribution to Collective Work; (2) Atlas; (3) Part of a Motion Picture or Audiovisual Work; (4) Supplementary Work; (5) Compilation; (6) Instructional Text; (7) Test; (8) Answer Material for Test; (9) Translation

Employee vs. Independent Contractor

Employee

- Tools Used to Perform Work Come from Employer
- Work Performed at Employer Location
- Typically Longer Relationship With Employer
- Paid Like Other Employees
- Receiving Employee Benefits
- Work is Part of Regular Business of Employer
- Not Running Own Business

Ind. Contractor

- More Skill Required to Do Work
- Tools Used to Perform Work Come From “Employee”
- Work Performed on “Employee” Premises
- Short Relationship With Employer
- More Discretion Over Hours of Work, Hiring of Assistants

What if the Author is a Government Employee?

- Not Protectable Under Copyright
 - Copyright Protection is **Not** Available for Any Work of the U.S. Government
- **However!**
 - The U.S. Government Can Receive and Hold Copyrights Transferred to It By Assignment, Bequest, or Otherwise

What if the Author is a Government Contractor?

- **Depends on the Circumstances!**
 - However, Contractor Will Generally Be Able to Claim Some Copyright Rights Unless Assigned to the Government
- **Often Independent Contractors Will Be Asked to Waive Any Copyright Rights in a Government Work Though**



When Is A Work Protectable?

Rights in a Copyrighted Work

Who Owns a Work?

“Passing Into The Public Domain”

Use of a Copyrighted Work - Contracts

Copyright Infringement Claims

The Library/Archive Exception

Defenses to Copyright Infringement

Issues When Putting Works Online

Potential Damages for Libraries

“Passing Into Public Domain”

- What does it mean to “pass into the public domain?”
 - No longer protected by Copyright
 - Now it is “owned” by the “public”

How Long Does Copyright Protection Last?

- Works Created After 2002
 - Life of the Author + 70 Years
 - OR
 - If a Work Made for Hire:
 - 95 Years from Publication
 - OR
 - 120 Years from Creation
 - Whichever Expires First

What About Earlier Works?

- Depends on the Following Factors:
 - (1) When Work Was Published
 - (2) If It Was Published With Copyright Notice
 - (3) If Work Was Registered
 - (4) If Registration was Renewed
- <http://copyright.cornell.edu/resources/publicdomainmain.cfm>
 - Excellent Resource but Keep in Mind That Special Rules and Exceptions May Apply That Are Not Listed on the Site!

What About Earlier Works?

- Unpublished Works
 - Sole Author
 - **Life of the Author + 70 Years**
 - If Date of Death is Unknown – 120 Years from Creation
 - **Public Domain**: Author Died Before 1941
 - Work Made for Hire
 - **120 Years from Date of Creation**
 - **Public Domain**: Works Created Before 1891

What About Earlier Works?

- Published Works
 - Published Before 1923 – **Now in Public Domain**
 - Published in 1923 through 1977
 - Depends On Whether It Was Published With or Without Notice and Subsequently Registered
 - Example:
 - No Notice = **Public Domain**
 - Published Between 1923 and 1964 With Notice + Registration + Renewal = **95 Years from Publication**
 - Same Facts No Renewal = **Public Domain**

What About Earlier Works?

- **Published Works**
 - **Published Between 1978 and 2002**
 - Depends on Nature of Publication and Whether Notice was Given
 - **Generally These Works Will Still Be Protected**
 - Likely to Pass Into Public Domain Sometime After December 2047

What About Foreign Works?

- Published Before 1923
 - Generally In Public Domain
- Published Between 1923 and 1977
 - Generally 95 Years After Publication
 - Depends on Compliance with U.S. Formalities, Whether It was Republished in U.S., and Whether it is in the Public Domain at Home
- Published After 1978
 - Published Without Notice + Public Domain in Home Country = **Public Domain**
 - Published + Not in Public Domain in Home Country = **70 Years After Death of Author OR 95 Years from Publication if Work for Hire**
- ***Special Cases May Exist Though That Will Change These General Rules!***

What About Sound Recordings?

- Unpublished Sound Recordings
 - “Fixed” Prior to Feb. 15 1972
 - ***Subject to State Common Law Protection***
 - ***Enters Public Domain on Feb. 15, 2067***
 - “Fixed” After Feb. 15, 1972
 - Life of the Author + 70 Years; OR
 - 120 Years from Date of Fixation (If Work for Hire)
 - No Public Domain Until At Least Feb. 15, 2067

What About Sound Recordings?

- Published Sound Recordings
 - “Fixed” Prior to Feb. 15 1972
 - ***Subject to State Common Law Protection***
 - ***Enters Public Domain on Feb. 15, 2067***
 - “Fixed” Between Feb. 15 1972 and 1978
 - Without Notice = Public Domain
 - With Notice = 95 Yrs. From Publication
 - “Fixed” Between 1978 and March 1989
 - Without Notice + Without Registration = Public Domain
 - Published With Notice =
 - Life of the Author + 70 Years; OR
 - 120 Years from Date of Fixation (If Work for Hire)

What About Sound Recordings?

- **Published Sound Recordings**
 - “Fixed” After March 1989
 - Life of the Author + 70 Years;
 - OR
 - If Work for Hire, The Shorter Of:
 - 120 Years from Date of Fixation; OR
 - 95 Years from Publication
 - Earliest Public Domain Will Be in 2049
- **Special Rules Can Also Apply to Foreign Recordings!**

Finally - What About Blueprints?

- Special Laws Put Into Place to Protect Architectural Works
 - Building Can Be Protected and Architectural Plans and Drawings May Be Protected as Textual / Graphical Works
- Constructed After Dec 1, 1990
 - Life of the Author + 70 Years;
 - OR
 - If Work for Hire, The Shorter Of:
 - 120 Years from Date of Fixation; OR
 - 95 Years from Publication
- Constructed Before Dec 1, 1990
 - Likely Only Protected as Plans or Drawings, But Some Limited Exceptions May Apply Depending on Date of Construction!

Ownership After the Author Passes

- Who Owns the Work After the Author Passes for Those 70 Years?
 - The Work Passes According to the Author's Will or State Succession Laws if No Will Exists



When Is A Work Protectable?

Rights in a Copyrighted Work

Who Owns a Work?

“Passing Into The Public Domain”

Use of a Copyrighted Work - Contracts

Copyright Infringement Claims

The Library/Archive Exception

Defenses to Copyright Infringement

Issues When Putting Works Online

Potential Damages for Libraries

Use of a Copyrighted Work

- Everything Is About *What* The Contract Says!
 - Governs What Rights You Have
 - Governs What Use You Can Make
 - Governs What Distribution You Can Make

Use of a Copyrighted Work

- Copyright Licenses
 - The Copyright Owner Can License Out **Any** Of the “Bundle of Sticks” to Anyone
- Restrictions Available
 - Geography
 - Exclusiveness
 - Types of Use Permitted
 - Anything Else You Can Legally Think Of!



When Is A Work Protectable?

Rights in a Copyrighted Work

Who Owns a Work?

“Passing Into The Public Domain”

Use of a Copyrighted Work - Contracts

Copyright Infringement Claims

The Library/Archive Exception

Defenses to Copyright Infringement

Issues When Putting Works Online

Potential Damages for Libraries

Copyright Infringement Claims

- To Bring a Claim It Must Appear That:
 - (1) The Defendant's Work Was Copied from the Plaintiff's Work
 - AND
 - (2) The Defendant's Work Is Substantially Similar to the Plaintiff's Work

Copyright Infringement Claims

- Copying Can Be Proven By Either:
 - Direct Evidence of Copying
 - Ex. Copying Pages from a Book
 - Access + Similarity = Inference of Copying
 - Where Work Was Generally Available to the Public or Specifically Available to the Defendant
 - Reasonable Opportunity to Copy
 - The Works Are Similar With No Apparent Explanation Apart from Copying

Contributory or Vicarious Infringement

- You Can Also Be Guilty of “Helping” Someone Infringe
- Two Types
 - (1) Contributory Infringement
 - (2) Vicarious Infringement

Contributory Infringement

- Arises Where You Have:
 - (1) Knowledge of The Infringement
 - AND
 - (2) Active Participation
 - You Induce, Materially or Contribute to the Acts
 - Ex. Providing Space, Utilities, Monetary Help, Etc.

Vicarious Infringement

- Arises Where There Is:
 - (1) Control
 - You Can Control Infringing Activity in Some Way
 - E.g. You Have Supervision or Control Over Person or Premises
 - (2) Direct Financial Benefit
- No Knowledge Required!
 - All That Matters Is That You Profit!



When Is A Work Protectable?

Rights in a Copyrighted Work

Who Owns a Work?

“Passing Into The Public Domain”

Use of a Copyrighted Work - Contracts

Copyright Infringement Claims

The Library/Archive Exception

Defenses to Copyright Infringement

Issues When Putting Works Online

Potential Damages for Libraries

The Library/Archive Exception

- Exempts Libraries and Their Employees From Liability
 - Does Not Apply Though to Individuals Who Use Library's Reproducing Equipment or for Whom the Library Makes a Copy
- Does Not Foreclose "Fair Use" Defense
 - It is an Additional Defense!
- Contractual Obligations Still Apply
 - If You Agreed Not to Copy Something, This Exemption Cannot Save You!

The Library/Archive Exception

- Requirements to Claim Exception:
 - (1) No Commercial Advantage
 - (2) Open Collections
 - (3) Notice of Copyright
- Limited to Single Copy or Phonorecord
 - However This Does Not Mean That One Copy Is It!
 - Multiple Copies Must Simply Be “Isolated and Unrelated” To Other Reproductions and Distributions of the Work!

No Commercial Advantage

- **Reproduction Itself Must Not Have Commercial Advantage for Library or Archive**
 - Does Not Mean Library Cannot Profit As A Whole Though!
- **Simply Cannot Profit from the Act of Copying!**

Open Collections

- Collections Must Be Open to Either:
 - (1) The General Public
 - (2) Persons Doing Research in a Specialized Field That is the Subject of the Collections and Not to General Researchers Affiliated with the Library
- Sometimes #2 Will Turn on Whether the Criteria for Access is Reasonable
 - And Whether That Criteria Would Result in More than a Token Number of Researchers Gaining Access

Notice of Copyright

- Library Can Discharge Notice Obligation By Providing A Legend That States:
 - “This Work May Be Protected by Copyright”
 - At the Place of Ordering **AND** On Ordering Form
- Notice Is Required On The Work Though:
 - When The Notice Appears on the Copy or Phonorecord That Is Being Copied!
 - Can’t Remove It In Copying!

Works Subject to Exemption

- Literary and Dramatic Works
- Pantomimes
- Choreographic Works
- Sound Recordings

- ***Does Not Apply to Musical, Pictorial, Graphic, Sculptural, Motion Picture, or Other Audiovisual Works***
 - Copying May Fall Under Fair Use Though!

Purposes for “Invoking” Exemption

- There Are Two “Purposes” Recognized:
 - (1) Replacement of Works in Library / Archive Collection
 - Where Work Has Been Lost, Stolen, Damaged, Is Deteriorating, or the Format for Storage is Obsolete (*E.g.* Machine Necessary is No Longer Available or Hard to Obtain)
 - (2) Response to User Requests

Replenishment of Library / Archive

- Unpublished Works
 - Exemption Applies Only to Works Current in Library's Collection
 - Can Only Be Duplicated in Proper Format
 - Three Copies or Phonorecords Can Be Made by the Library for Preservation and Security
 - More Copies Cannot Be Made Until These Have Been Lost or Stolen or Are So Damaged They Cannot Serve Their Purpose

Replenishment of Library / Archive

- Published Works

- Three Copies Can Be Made **if**:

- (1) The Work Has Become Damaged, Deteriorated, Lost, Stolen or The Existing Format is Obsolete
- AND
- (2) The Library Determines, After a Reasonable Effort, That an Unused Replacement Cannot Be Obtained at a Fair Price
 - *E.g.* “Rare” Work May Have a Very High Price

- Unlike Unpublished Works You Can’t Have “Back-up” Copies!

Digital Copies

- Digital Copies **Cannot** Be Made Available to the Public in a Digital Form Outside the Premises of the Library or Archive!!

Response to User Requests

- Allows for One Copy of a Work (Published or Not)
 - Must Already Be Part of Library / Archive Collection or in the Collection of “Another Library”
- Conditions on Copying Based on a User Request Depend on Amount Taken

One Article or Other Contribution to Collection or Periodical Issue

- Copying Falls Within Exemption Unless:
 - (1) Library Fails to Provide Notice Discussed Before – At Place for Ordering and On Form
 - OR
 - (2) The Library / Archive Has Notice That the Copy Will Be Used for a Purpose Other Than Research, Scholarship, or Study.
- The Copy **Must** Become Property of the User – Not the Library or Archive!

Whole Work or Large Portion of Work

- Same Rules for Partial Works
 - (1) Notice Given
 - (2) No Reason to Think Not for Study
- **HOWEVER!**
 - Copying Only Permission if Work **Cannot** Be Obtained at a Fair Price After Reasonable Investigation

Last 20 Years of Protection

- Library or Archive Can Copy and Distribute Works in Digital or Facsimile Form During Last 20 Yrs of Protection If After “Reasonable Investigation:”
 - (1) The Library Determines That The Work is Not Subject to Commercial Exploitation
 - (2) The Library Determines That The Work is Not Obtainable At a Reasonable Price
- Investigation Doesn’t Matter IF:
 - The Copyright Owner or Agent Has Provided Notice That Either of the First Two Conditions Does Not Apply

Audiovisual News Program

- Even Though Audiovisual Works Not Covered, News Programs Are!
- Libraries and Archives Can Make Off-the-Air Videotape Recordings of Daily Network Newscasts for Limited Distribution to Scholars and Researchers for Use with Research



When Is A Work Protectable?

Rights in a Copyrighted Work

Who Owns a Work?

“Passing Into The Public Domain”

Use of a Copyrighted Work - Contracts

Copyright Infringement Claims

The Library/Archive Exception

Defenses to Copyright Infringement

Issues When Putting Works Online

Potential Damages for Libraries

Other Defenses to Claim of Infringement

- Independent Creation
- Consent / License
- Fair Use
- Parody / Satire
- First Sale Doctrine
- Reverse Engineering
- Statute of Limitations

Fair Use

- Generally Four Factors:
 - (1) Purpose and Character of the Use
 - Moral Question -> Non-Commercial Is “More Fair”
 - (2) Nature of the Copyrighted Work
 - More Unfair to Copy Unpublished Work
 - (3) Amount and Nature of Copied Portion
 - Did You Take The “Heart” of the Work?
 - (4) Effect On Market for Work
 - Did You Make the Work Obsolete?

Parody & Satire

- Parody
 - Makes Fun of the Actual Work
- Satire
 - Makes Fun of Society Using the Work
- Court Still Looks at Overall Amount Taken and Effect on Market for Original Work

First Sale Doctrine

- Once Copyright Owner Sells or Transfers Work to Another, That Party is Entitled to Sell or Otherwise Dispose of the Work Without the Owner's Consent or Knowledge
- ***This is Why We Have eBay!***
- Note: This Only Applies to **Lawful** Copies
 - Unauthorized, Bootleg or Stolen Goods Do Not Qualify for This Exception

Reverse Engineering

- Mostly Applies to Computer / HTML Code
- Intermediate Copying of Code That Takes Place in Translating or Decompiling a Computer Program, While Copying, Would Be Excused Under Fair Use

Statute of Limitations

- **Three Years Under Copyright Act**
 - How a Court Counts This is Different In Each Jurisdiction
- **Example: Ohio**
 - Any Infringements that Took Place Over Three-Years Prior to Filing of Suit Are Barred by Statute of Limitations



When Is A Work Protectable?

Rights in a Copyrighted Work

Who Owns a Work?

“Passing Into The Public Domain”

Use of a Copyrighted Work - Contracts

Copyright Infringement Claims

The Library/Archive Exception

Defenses to Copyright Infringement

Issues When Putting Works Online

Potential Damages for Libraries

Issues When Putting Works Online

- Does Not Fall Within “Library Exception”
 - Because You Are Making a NEW Copy of the Work Online and Distributing It To the Public
 - Falls Outside the “Scope” of the Exception
 - Need to Have Permission to Do Such in Licenses

Potential Damages for Infringement

- Actual Damages
 - Actual Harm Caused to the Owner
 - *E.g.* Lost Profits; Profits to the Library / Archive
- Statutory Damages
 - Must Have Registered the Work Within 3 Months of Publication or Prior to the Infringement, Whichever is Earlier
 - Set Level of Damages *Per Work Infringed*
 - Can Be As Low as \$200 and as high as \$100,000+
 - *E.g.* 100 Works Infringed at Rate of \$200 = \$20,000 in Damages

Questions?

- April L. Besl
- Dinsmore & Shohl LLP
- April.besl@dinslaw.com
- 513-977-8527

THANK YOU!!!!