(and a short lesson in US Civics)

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Intellectual Property - Copyright

Sec. 102. Subject matter of copyright: In general
(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.
A Closer Look At What It Covers

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  —Works of authorship include the following categories:....

What An Odd Idea - Why Does It Exist?

- Not A Natural Right

- The Right To Intellectual Property Is A So-Called “Legislated Right”
  —Exists Only As A Matter Of Law
  —Among the Most "Strictly Constructed" of Rights

- Has Led To An Interesting History

- Inextricably Tied Up In Technology, Starting With The Printing Press

- Also Inextricably Tied Up In Concepts Of Distribution

- Finally, A Construct Of Government Policy
  —In Fact, Derives Specifically From A Specific Constitutional Mandate

- All The Elements!!!
Preamble to the US Constitution

- We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Form of Government - US

- The United States, under its Constitution, is a federal, representative, democratic republic, an indivisible union of 50 sovereign States.
- With the exception of town meetings, a form of pure democracy, we have at the local, state, and national levels a government which is:
  - "federal" -- because power is shared among these three levels;
  - "democratic" -- because the people govern themselves and have the means to control the government; and
  - "republic" -- because the people choose elected delegates by free and secret ballot.

From Our American Government, HDoc 106-216, p. 1
Basic Principles of US Constitution

- All States are equal
  - National government cannot give special privileges to one State

- Three branches of government
  - one to make the laws (Legislative Branch)
  - another to execute them (Executive Branch), and
  - a third to interpret them (Judicial Branch).

- "A government of laws, not of men."
  - No one is above the law
  - No officer of the Government can use authority unless and except as the Constitution or public law permits

- All men are equal before the law
  - Anyone can demand the protection of the law.

- The authority of the Government can be changed by changing the Constitution.

- That the Constitution, and the laws of the United States and treaties made pursuant to it, are "the supreme Law of the Land."

From Our American Government, HDoc 106-216, pp 2-3

Derives From The Revolutionary Document
Declaration of Independence, Paragraph 2

- We hold these truths to be self-evident,
  - that all men are created equal,
  - that they are endowed by their Creator with certain unalienable Rights,
    - that among these are Life, Liberty and the pursuit of Happiness.
  - --That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,
  - --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

  - Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.
Legislative Branch - US Congress

- The Congress of the United States
  - Legislative and oversight duties
  - Consists of two Houses
    - The Senate and the House of Representatives

- Other organizations
  - Architect of the Capitol
  - Government Printing Office
  - Library of Congress
    - (supervises the implementation of copyright laws)

- Support agencies
  - Congressional Budget Office
  - Congressional Research Service
  - General Accounting Office

75. How does a bill become law?
(from Our American Government, 2000 version; H.Doc. 106-216; p. 30)

 Measure introduced in the House
 Measure referred to committee(s) which holds hearings and reports measure to the House
 or
 Leadership schedules measure for floor consideration

 House debates and can amend measure
 House passes measure

 Measure introduced in the Senate
 Measure referred to committee which holds hearings and reports measure to the Senate

 Leadership schedules measure for floor consideration

 Senate debates and can amend measure
 Senate passes measure

 All measures must pass both the House and the Senate in identical form before being presented to the President
Executive Branch

- Headed by the President
- Consists of various entities and organizations of largely an administrative, regulatory, or policy-implementing character.
- Most prominent are the 14 departments, whose heads comprise the Cabinet
- A number of agencies (such as the Central Intelligence Agency and Environmental Protection Agency) plus separate smaller boards, committees, commissions, and offices created by law or Presidential directive.
- Immediately assisting the President are the agencies and entities of the Executive Office of the President.
Historical Context - Where Does Copyright Come From?

- Printing Invented: 1445; Gutenberg press
  - Wide dissemination of ideas;
  - not always those that supported the government or the church
- Middle of 16th century - Legislation to prevent the publication and distribution of seditious, heretical or treasonable works
  - 1547 - Edward VI grants monopoly to King's printer for certain works
  - 1556 - the Stationer's Company established
    - Charter granted monopoly over printing and powers to enforce
    - Inspection of content, customs officials, etc.
  - 1637 - codification of printing by Star Chamber
    - Registration of works
    - Certification of legitimacy and lack of heretical content
    - Attribution of author and publisher
    - Copies of the book must be supplied to Bodley Library at Oxford
  - 1694 - expiration of monopoly grant
    - Collusion among the Stationer's Council to limit output, what was printed
- 1707+ - External Competition from the Scots to break the monopoly
- New law - English Copyright - Statute of Anne - 1709

Innovations in the Statute of Anne

- Legal protection for consumers of copyrighted works
  - Curtailment of the term of copyright
    - (Stationer's Company Essentially Held Copyright In Perpetuity)
    - Effective Monopoly On What Would (and Could) Be Published
  - Creation of a "public domain" for literature
    - Copyright Only For New Works
    - Limited Term
    - Limited Copyright To Power To Print, Publish and Sell (i.e., control of the copy is relinquished once sold)
  - Copyright Belonged To The Author/Creator

- Essential Principles Maintained To Date
Intellectual Property - Constitutional Basis

- Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
- To borrow Money on the credit of the United States;
- To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
- To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
- To establish Post Offices and post Roads;

- 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;

Founding Fathers - Washington

- The advancement of agriculture, commerce, and manufactures by all proper means will not, I trust, need recommendation; but I can not forbear intimating to you the expediency of giving effectual encouragement as well to the introduction of new and useful inventions from abroad as to the exertions of skill and genius in producing them at home, and of facilitating the intercourse between the distant parts of our country by a due attention to the post-office and post-roads.

- Nor am I less persuaded that you will agree with me in the opinion that there is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impressions so immediately from the sense of community as in ours it is proportionately essential.

First Inaugural Address
Founding Fathers - Jefferson

It would be singular to admit a natural and even an hereditary right to inventors... It would be curious... if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it.

Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.

Society may give an exclusive right to the profits arising from, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody... The exclusive right to invention [is] given not of natural right, but for the benefit of society.
Title 37, Part 255: Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords

Sec. 255.3  Adjustment of royalty rate.

- (a) For every phonorecord made and distributed on or after January 1, 1983, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 4.25 cents, or 0.8 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (b) through (m) of this section.

- (b) For every phonorecord made and distributed on or after July 1, 1984, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 4.5 cents, or 0.85 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (c) through (m) of this section.

- (c) For every phonorecord made and distributed on or after January 1, 1986, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 5.0 cents, or 0.95 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (d) through (m) of this section.

- .....
From A Small Dictum, A Mass Of Laws and Legislation

- Copyright Is Older Than The US
- Would Expect It To Be Complicated
- The Complexities, However, Come From A Surprising Number Of Sources
- As A Legislated Right, Formal Declarations Are Required

What Is Covered?

- 1790 - Books, Maps and Charts
- 1802 - Prints
- 1831 - Music
- 1865 - Photographs
- 1870 - Drama, Paintings, Drawings and Sculpture
- 1912 - Movies
- 1964, 1976 - Computer Programs
- 1971 - Records and Tapes
- 1976 - Dance
- 1990 - Architecture
- 1998 - Boat Hull Designs
Key Copyright Rights

- 1790 - Right To Copy
- 1790 - Right To Distribute
- 1870 and 1909 - Right to Make Derivative Works
- 1856 and 1897 - Right to Public Performance (what is public)
- 1976 - Right to Public Display
- 1990 - Rights of Attribution and Integrity
- 1994 - Fixation and Trafficking in Sound Recordings and Music Videos
- 1998 - Right to Incorporate Technological Protection Measures
- 1998 - Right to Include Copyright Management Information

Infringement Remedies

- 1790 - Forfeiture of Infringing Copies
- 1790-1909 - Fixed Fines
- 1819 - Injunctions
- 1897 - Criminal Liability
- 1909 - Lost Profits
- 1909 - Infringer's Profits
- 1831 - Costs of Lawsuits
- 1909 - Attorney's Fees
- 1909 - Discretionary Remedy
Limitations, Exclusions and Compromises

- Nonprofit Musical Performances
- Radio Musical Performance in Restaurants and Small Businesses (1976)
- Compulsory Licenses (a taking of works for a predetermined fees) - music
- "Works of utility" (a chair)
- Expressions of fact (phone books)
- Ideas vs. Expression of Ideas
- Fair Use
  - Originally a judicial exception
  - Written into the statute
- Parody and Commentary
- Compromises
  - Betamax Case (Home VCR)

Why Is Copyright Law So Tortuous?

- History Is Vital To Understanding
- First US Copyright Law - 1790 - "maps, charts and books"
- 1831 - Sheet music added
  - Player Pianos (White-Smith vs Apollo - 1908)
- 1897 - exclusive right to perform
- 1909 - Compulsory licensing (First sale vs. subsequent)
  - Radio - for profit?
- 1923 - Bamberger case - ASCAP - yes, for profit
- 1972 - Recordings can be copyrighted - "phonorecordings" (versus "music")
- 1984 - Digital recordings
- 1992-Fair use; fees on digital recording media and devices
- 1994-Internet Issues

- A race between legislated rights and technological advance
Another Reason - Process Of Copyright Legislation

- Not Quite As Outlined In Earlier Slide

- Small, But Vocal Constituency With Each Rewrite
  - Whose Ox Is Gored?

- Congress Largely Referees The Making Of The Legislation

- Actually Written By Committees Composed Of Affected Members
  - Publishers
  - Distributors
  - Others As Specified By Congress

- A Negotiated Document

Evolution Of The Governing Principle

- Early Copyright
  - Protection of Distribution
  - Assurance of Dissemination of Ideas
  - Enrichment of the "Intellectual Commons"

- Distribution Has Increasingly Been The Focus
  - Lots Of Money To Be Made

- Increasingly, Copyright Arguments Have Suggested The Need To Provide Economic Incentives For Innovation and Innovative Works
  - Subtle Change
  - Changes The Nature Of The Debate
  - At The Margin, A More Protective Scheme Will Always Add A New Innovator
  - Loss Of "Intellectual Commons"
ARL Copyright Timeline

- 1790 - US Constitutional Mandate
  - Act of 1790
- 1841 - "Fair Use" - Folsom v Marsh
- 1909 Revision - "authorship", compulsory license, extension of term
- 1973 - Photocopies litigated and found OK given dissemination of information
- 1976 Revision - Preempted earlier acts to meet Berne Convention - Fair Use made a part of the law - photocopying for scholarship okayed - libraries a focus
- 1976 - Not in law, but agreement that classroom/educational copying okayed
- 1976 - CONTU Process - New technologies and fair use
- 1990 - Prohibition of commercial lending of computer software
- 1991 - Basic Books v Kinko's - classpack photocopying for profit is not fair use
- 1991 - Feist v Rural - copying information from one phone book to make another is not infringement
- 1992 - Copyright renewal automatic
- 1994 - Parody upheld as fair use
- 1998 - Digital Millenium Copyright Act
  - Anti-circumvention
  - Digital Copies