

COPYRIGHT LAW SUMMARY

A. **"Copyright:" the *Right to Control Copying of Certain Works*.** Copyright owner has six exclusive rights:

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. To *perform* the copyrighted work publicly in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works
5. To *display* the copyrighted work publicly 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
6. In the case of sound recordings, to *perform* the copyrighted work publicly by means of a digital audio transmission

B. ***Right to Control Copying Applies To***

1. *Original*
 - a. independently created, not copied
 - b. at least some small measure of creativity
2. *Works of authorship*, including
 - a. *Literary* works (including computer programs)
 - b. *Musical* works, including accompanying words
 - c. *Dramatic* works, including accompanying music
 - d. *Pantomimes* and *choreographic* works
 - e. *Pictorial, graphic, and sculptural* works
 - f. Motion pictures and other *audiovisual* works
 - g. *Sound recordings*
 - h. *Architectural* works
3. *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

4. Copyrightable works include *compilations*
 - a. Defined: a Work formed by the collection and assembling of pre-existing 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.
 - b. The "unassembled" materials and data included in the compilation (e.g., facts) need not themselves be copyrightable.

C. Not Protected by Copyright

1. Ideas
2. Facts (but see "compilation," above)
3. Titles, names, short phrases, slogans
4. Lists of ingredients or contents
5. "Blank forms and similar works designed to record rather than convey information" (See Circular 32 and 37 C.F.R. § 202.1)
6. U.S. Government Publications
7. Public domain works

D. Exceptions to Owner's Exclusive Rights Include

1. "Fair Use" (e.g., *criticism, news reporting, teaching, research*)
 - a. purpose and character (*e.g.* whether such use is commercial or is for nonprofit educational purposes)
 - b. nature of the copyrighted work
 - c. amount and substantiality of portion used
 - d. effect upon potential market
2. Archival copy of computer program and copy as an essential step in using the program in conjunction with the computer
3. Certain rights of libraries and archives to make copies
4. Owner of copy may sell or otherwise dispose of the copy except that phonorecords and computer programs may not be rented, leased or loaned for commercial purposes

5. Certain performances and displays in nonprofit, educational setting.

E. Owner of Copyright

1. Author (creator)
2. Employer is "author" of "works made for hire"
 - a. a work prepared by an employee within the scope of his or her employment
 - b. a work *specifically ordered* or *commissioned* 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*, if the parties expressly agree in a *written instrument* signed by them that the work shall be considered a work made for hire.
3. *Not* one who is merely *owner* of a *copy*

F. Copyright Protection

1. Copyright arises on creation; neither legend (for works created after March 1, 1989) nor registration is a prerequisite to existence of copyright
2. Legend is best practice: © [name of copyright owner] [date of publication]
E.g., © Briggs and Morgan, P.A. 2001
3. Registration with Library of Congress
 - a. Prerequisite to infringement suit
 - b. Attorneys' fees and statutory damages recoverable if registered before infringement occurs or within 3 months of publication in case of published work or before infringement in case of unpublished work

G. Infringement

1. Civil remedies
 - a. Statutory damages (\$500 to \$20,000; \$200 if innocent; up to \$100,000 if willful)
 - b. Injunction
 - c. Impoundment and/or destruction of infringing articles
 - d. Actual damages and "additional" profits of infringer
 - e. Costs and attorneys' fees
2. Criminal penalties

FAIR USE EXCEPTION
(17 U.S.C. §107)

The "fair use" of a copyrighted work for such purposes 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;

Use of copies for sale, fund raising or other revenue producing purposes is a commercial use. Copies made by a professor for use free of charge by students in a college classroom is likely a nonprofit use. Copies made by a corporation for the education of its employees fall in the middle of the spectrum; though not directly revenue producing, to the extent the purpose of the education is ultimately to further the business interests of the corporation, the character of the use is commercial.

Another aspect of the "purpose and character" factor is whether the use is "productive" or "transformative" as opposed to "non-productive." In other words, is the copy nothing more than a substitute for the original (a nonproductive use) or is the copy used for (transformed into) a different purpose than the original (a productive use)? Examples of the latter would be where small portions, quotations or excerpts of works are used in a biography, criticism, or other commentary. A productive use is more likely to be a fair use than a nonproductive use.

2. The nature of the copyrighted work;

Copyright protects expression of ideas and facts but not the facts and ideas themselves. A factual work is given less protection than a work that involves a great deal of creativity and original thought. Factual works are also thought to have greater value to the public generally because of their potential use in future research and scholarly writing. In addition, the purpose for which a work was created also impacts whether its use is a "fair use." For example, a book of forms by its very nature anticipates the copying and use of its contents.

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

Both the quantity of a work used and the subjective quality of the portion of the work used impact whether use of a work is fair use. A short excerpt that appropriates the core of a work may be not be a fair use even if it is only a small portion of the total work.

4. The effect of the use upon the potential market for or value of the copyrighted work.

The effect on the original author's potential economic market (including the market for derivative works) is a key consideration in determining whether a use of a copyrighted work is a fair use. Generally, a use that supplants any part of the normal market for a copyrighted work would not be a fair use. Several recent cases have involved institutional subscribers to periodicals who regularly made one or more copies of articles or entire issues for circulation to employees. Under such circumstances, subscribers are generally obliged either to purchase additional subscriptions or obtain permission which may be conditional upon payment of some amount. No single factor is dispositive, although the fourth has generally been held to be the most significant.