CHAPTER 2

COPYRIGHT BASICS

Article I of the US Constitution gives Congress "the 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." Promoting the creation of literary works and inventions in the new republic was important to the Founding Fathers, but they also worried about the effect that "exclusive rights" would have on other citizens' freedoms. Letters between Thomas Jefferson and James Madison express their ambivalence about the wisdom of granting a "private monopoly" to anyone. In the end, they acknowledged that copyright was necessary to promote creativity and that exclusive rights granted to private citizens were acceptable because they would be time-limited.

In 1790, Congress used its constitutional power and enacted the first federal copyright law, giving exclusive rights to writers and inventors for a term of fourteen years, optionally renewable for an additional fourteen years.[4] In the ensuing two centuries, copyright protection has expanded

[4] Laws protecting literary property rights evolved through English common law and legislation, which the United States adopted. Chapter 6 explores the history of copyright in more detail.

dramatically, far beyond what the Founders could have foreseen. In its current incarnation, copyright covers not just writings and discoveries, but many other kinds of original work product, including software. The length of the term of a copyright is now the life of the author plus 70 years, or at least 95 years for certain works.

Copyright in the United States is designed to give creators an economic incentive by letting them benefit from the fruits of their talent and labor, but its ultimate objective is to promote progress by allowing society to enjoy and build on their creations. The United States Supreme Court has described copyright as grounded in the economic philosophy that the "sacrificial days" devoted to creativity ultimately benefit the general public and therefore must be encouraged by commensurate personal profit. The ongoing struggle by legislators (and the lobbyists who woo them) and courts to keep these private and public interests in balance is the driving force behind the development of copyright law.

THE VALUE OF COPYRIGHT

Think of copyright as the means by which a creative work realizes economic value. Subject to certain specified exceptions, the Copyright Act gives exclusively to the "author"[5] of a work the right to capitalize on it by any of the following methods: reproduction, distribution of copies, public display, public performance, and the creation of derivatives, or adaptations, of the work. Only the author may use or give license to others to use any of these rights, individually or in combination. Publishing contracts are essentially licenses of one or more of the author's exclusive rights under copyright.

THE GOVERNING COPYRIGHT LAW

Until January 1, 1978, copyright in the United States existed in two distinct varieties: common law, which governed unpublished works, and statutory, which governed published works. Common law copyright grew out of judge-made precedent and protected works as soon as they were

[5] In the Copyright Act, "author" refers to the creator of any work covered by copyright, and it is used the same way in this chapter.

created, without the need for publication, copyright notice, or registration. Statutory copyright was embodied in federal legislation and protected works only when registered with the Copyright Office or published with a correct copyright notice. Common law copyright lasted for as long as a work remained unpublished or unregistered; statutory copyright lasted for a finite term, whether or not the work was published. Under this system, any work that was published without a copyright notice forfeited copyright protection and entered the public domain.

On January 1, 1978, the current law, known as the Copyright Act of 1976, replaced both the common law and the federal copyright statute that had been in effect since 1909. The 1976 Act significantly reformed the previous system. It eliminated and preempted common law copyright. Most dramatically, the 1976 Act gives automatic copyright protection to any original work created on or after January 1, 1978, from the moment it is fixed in tangible form.[6] Copyright protection is immediate, whether or not the creator wants it, and whether or not she registers the copyright or publishes the work. The 1976 Act, still the exclusive law of copyright in the United States, has constantly evolved since its passage, as courts and Congress attempt to address the challenges of new technologies and new economic realities.

By superseding common law copyright and protecting works without requiring registration, the 1976 Act simplified the copyright system and made it more consistent with the laws of most other developed nations. At the same time, by automatically covering all works that are fixed in a tangible medium, the Act exponentially expanded the universe of works that are exclusively owned by private citizens and therefore not in the public domain. It has been estimated that today, more than 95 percent of the works covered by copyright are not commercially available to the public.

The 1976 Act covers all works created on or after January 1, 1978. If copyright in a pre-1978 work had not expired as of January 1, 1978, the 1976 Act governs the treatment of that copyright.[7] With a few exceptions

[6] The statutory language is: "Copyright protection subsists . . . in original works of authorship fixed in a 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."

[7] Certain transactions made before January 1, 1978, including grants, licenses, registrations, and renewal registrations, are still governed by the 1909 Act.

explained below, if a work covered under the 1909 law entered the public domain, the 1976 Act did not revive its copyright.

WHAT WORKS ARE COVERED BY COPYRIGHT?

The following kinds of works of original authorship are protected by copyright: literary (i.e., written works, including computer programs), musical (including lyrics), dramatic, architectural (if created on or after 1990), cartographic (i.e., maps), choreographic, pantomimic, pictorial, graphic, sculptural, sound recordings, and audiovisual (including motion picture) creations. With the exception of works made for hire and joint works, explained in chapter 4, the creator of an original work owns the copyright, and only the creator may use or allow others to use the exclusive rights under copyright.

IDEAS AND FACTS

Copyright does not protect ideas (including concepts, principles, general topics, common plots or themes, and stock characters),[8] facts (including discoveries), or any procedure, process, method of operation, or titles, names, slogans, and short phrases.[9] These things are in the public domain, free for the taking by anyone.[10] In contrast, the original *expression* of any of these, an author's creative realization of her ideas or of facts, her fleshing out of common themes or stock characters, is protected. To illustrate, a written description of a discovery is covered by copyright, as is an author's selection, coordination, and arrangement of facts, but anyone else may write about the same discovery and set forth the same facts, independently arranged and coordinated, without infringing on the first writer's copyright.

ORIGINAL WORKS

Copyright protects only "original" works. "Originality" under the Act means simply that the author created the work and did not copy it from another work. One author's work might be similar, or even identical, to

[8] But idea theft might be remedied under contract theory, as discussed in Chapter 7.

[9] Titles, slogans, and short phrases might earn trademark protection as explained in Chapter 7.

[10] Works created by the US government (but not works commissioned by the government from private contractors) are also in the public domain.

another's, but if she independently created it and did not actually copy the first work, her creation is "original" and fully protected by the Act. Even if part of a work is not original because it infringes another's copyright or contains public domain material, the author still owns copyright in the part that is original.

The work need not rise to any particular level of quality, but it must show a modicum of creativity or artistic qualities to be considered original and covered by copyright. In 1991, the US Supreme Court held that a residential telephone directory containing nothing more than an alphabetical listing of all the names and addresses in a particular area code failed to demonstrate a "constitutionally mandated" minimum level of originality. *Feist Publications, Inc. v. Rural Telephone Service Company, Inc. Feist* was important in recognizing that some creativity is needed to warrant copyright protection, but the bar it set to demonstrate originality is very low.

COMPILATIONS

Although copyright does not protect the discovery of objective facts, it does protect the original way facts are selected, arranged, and coordinated in a compilation. A copyrightable compilation is formed by collecting and assembling preexisting material in such a way that the result is to some extent original. Examples are magazines and newspapers, the "yellow pages," a selection of poems (even if the poems are all in the public domain), and a list of the best restaurants in a city. Whether copying a compilation is an infringement of the copyright depends on the nature of the collection, the originality of its presentation, and the nature of the appropriation.

The *Feist* ruling overturned a long-standing doctrine protecting "the sweat of the brow." Under that theory, courts recognized a proprietary interest in facts and prohibited others from saving time and effort by copying the facts contained in prior works. After *Feist*, copyright no longer protects raw data, regardless of the time and effort involved in finding and compiling it. Writers can freely copy facts from prior works without infringing copyright, although they should verify the facts copied and must, to avoid infringing, select, arrange, and coordinate them independently.

The Copyright Office can refuse to register a work on the ground that it is not copyrightable, but the federal courts, having exclusive jurisdiction over copyright disputes, may reverse this exercise of the Copyright Office's discretion.

CHARACTERS

The popularity of prequels, sequels, spin-offs, "fan fiction," and retellings raises the question whether specific characters are copyrightable apart from the story containing that character. The courts have determined that stock characters or literary "types"—the superhero masquerading as an ordinary citizen, the hard-bitten private eye, or the wry and resourceful valet—are not copyrightable. But there are many characters in literature and culture—a certain boy wizard, for example—that might be copyrighted. The distinction rests on how well developed the character is, and the bar is higher when the character appears only in literature and not in a visual work. As one court put it in 1931: "The less developed the characters, the less they can be copyrighted: that is the penalty an author must bear for marking them too indistinctly." *Nichols v. Universal Pictures Corp.* A later court went further, holding that a character appearing in literature must have actually "constituted the story being told" to have copyright independent of the story. *Warner Bros. v. CBS.* The bottom line is that the law is still unsettled in this area. Cases considering whether copyright should be recognized in a character require a factual analysis and consideration of the equities involved.

DURATION OF COPYRIGHT

The Constitution mandates that copyright in a work is to exist for *a limited time*. After that time, the work enters the public domain and can be freely used by anyone. When Congress passed the first copyright law, it provided a term of fourteen years and a renewal term of fourteen years. Since then, Congress has extended the term of copyright many times. In 1998, the Copyright Term Extension Act (the "CTEA") extended the term of copyright in the United States for works published on or after January 1, 1978, to the length of the author's life plus 70 years.[11] For works owned by an entity other than a person (such as a corporation) and for pseudonymous or anonymous works, the term is the shorter of 95 years from first publication or 120 years, if not published.[12] The CTEA increased the term by

[11] Terms run through December 31 of the year they are scheduled to expire.

[12] If the name of the author of an anonymous or pseudonymous work is recorded with the Copyright Office, the term runs for the writer's life plus 70 years.

20 years, making it match many other countries' terms. A presumption exists that a copyright has expired if 95 years have passed and the records disclose no information indicating that copyright might still be in effect. This does not mean, however, that copyright has expired; the presumption can be rebutted with evidence of the author's continued existence or date of death. The term of copyright for a joint work created by two or more writers with the intention that their contributions be merged is the life of the last surviving writer plus 70 years.

The 1909 Copyright Act provided an original term of 28 years and a second term, called the "renewal term," of 28 years, which arose only if the author filed a renewal registration in the twenty-eighth year of the first term. If the owner did not renew the registration before the original term ended, the work entered the public domain after the first term expired. For the most part, the terms of copyrights that existed on January 1, 1978, were increased to 95 years from first publication (28 years in the first term, 67 years in the renewal term). All works copyrighted between January 1, 1964, and December 31, 1977, automatically had their terms extended to 95 years.

With common law copyright in unpublished works eliminated by the 1976 Act, all works that were protected under common law as of January 1, 1978, were given a copyright term equal to the author's life plus 70 years, except that in no event would a copyright previously protected under common law expire prior to December 31, 2002. If a common law copyrighted work was published, the term was extended until at least December 31, 2047. Appendix C is a chart showing when copyright expires for written works published or created in particular years.

THE EXCLUSIVE RIGHTS OF COPYRIGHT

Prior to passage of the 1976 Act, a copyright owner who licensed her work for any purpose had to transfer the entire copyright to the buyer; she could not license only selected rights. The "indivisibility" of copyright led to unfair results for creators. For example, if a writer sold the right to publish a story to a magazine, the magazine legally became owner of the entire copyright exclusively. If a motion picture studio wanted to purchase the rights to the story, it did so from the magazine publisher; the writer was cut out. The 1976 Act addressed this injustice by making copyright

divisible into specific exclusive rights, and the exclusive rights of copyright subdivisible.

The Act gives the owner of a copyright the exclusive rights to exploit the work's value by doing, or authorizing others to do, any of the following: reproduce the work, sell and distribute copies, perform the work publicly, display the work publicly, and prepare derivative works. Copyright is now often described as a bundle of rights, each of which may be licensed separately, exclusively or nonexclusively, by the owner.

In order to best capitalize on the value of your work, you should know how to subdivide the rights you grant to publishers and other parties. Appropriately limiting rights you license can allow you to earn more from your work by granting others the rights to make secondary uses. For example, freelance writers typically license certain rights to publish their stories to periodicals and retain other rights. The writer may subdivide the exclusive publication rights by territory, such as "first North American serial rights," divide them further, for example granting "English-language first North American serial rights" (note that "first publication" rights are exclusive rights), or divide them into nonexclusive rights. All other rights are reserved to the writer.

The 1976 Act contains several exceptions to the exclusive rights of the copyright owner. The most important of these is "fair use," discussed in chapter 5, which allows others to copy and adapt copyrighted works without permission in appropriate cases. Another exception is the "first sale" doctrine, which allows anyone who has purchased a lawfully made copy of a work to resell, trade, or give away that copy (but not to make additional copies). Another exception allows the owner or consignee of an original or copy of a work, such as a museum or art gallery, to display it directly or with the aid of a projector to people present at the place of display. The owner of a copy of an audiovisual work such as a motion picture may publicly *display* the copy without permission defined as showing its images nonsequentially, but may not publicly *perform* it, which means to show its images sequentially.

DERIVATIVE WORKS

Derivative works are defined as distinguishable variations of existing works, including abridgements, adaptations, translations, and renderings in another format. A motion picture version of a book, a revised or expanded edition

of a textbook, and a "cover" recording of a song are all derivative works.[13] To the extent they include original contributions, derivative works are themselves distinctly copyrightable. An author who adds new elements to a previously copyrighted work would own the copyright in the new elements. If a work is in the public domain, anyone can create a copyrightable work by adding original elements to it, but only the new elements are protected; others may still freely use the public domain portion.

TRANSFERS AND LICENSES

The 1976 Act requires transfers and licenses of exclusive rights to be made in a writing signed by the licensor (that is, the owner of the rights). An exclusive license, like a transfer, grants to the licensee a right that no one else may exercise. Book, magazine, and newspaper publishers rarely accept rights that are not exclusive. Copyright owners may vary the scope of the rights granted according to the duration of the license, the geographic extent of the license, specific formats, languages, and other limitations that the parties negotiate. A typical book publishing contract, described in chapter 11, contains many specifically delineated licenses.

Nonexclusive licenses allow more than one licensee to exploit a work in the same way, at the same time, in the same place, and are therefore less valuable than exclusive rights. For example, a writer could give two magazines the simultaneous rights to publish an article. Syndication rights, described in chapter 12, are analogous to simultaneous, nonexclusive licenses. Nonexclusive licenses need not be made in writing to be valid and enforceable, so take care not to inadvertently grant to a prospective publisher an implied or verbal nonexclusive license to use your work. Be wary of statements made in conversation, unsigned writings (such as a memorandum on a publisher's letterhead), or email that suggests a party has the right to exploit your work unless you so intend. Before entering a writing competition, scrutinize the application form and contest literature to understand whether the contest organizer is requesting any rights to your entry; it might need limited-time nonexclusive rights to copy and publish the entries, but you should generally not transfer any exclusive rights to

[13] The distinction between creating a derivative work, which requires the owner's permission, and making fair use of a work to create a "transformative work," which does not require permission, is discussed in Chapter 5.

the sponsor. In general, make sure any license agreement you enter clearly specifies the rights you are granting and reserves all other rights to you.

An exclusive licensee may file records of transfers of copyrights or exclusive licenses with the Copyright Office, but it is not mandatory to make the license valid. Doing so, however, does help others find the owner of rights in a work.

TERMINATION RIGHTS

In 1940, Jerry Siegel and Joe Schuster sold the rights to their story and character called Superman for $130. Their unfortunate situation is not unusual; most authors sell their rights without knowing their ultimate worth, and many have been excluded from the extraordinary profits their licensees earned from their creations. To right this injustice, the 1976 Act gave authors the right to terminate any grant or transfer of their rights after many years. Under the Act, all authors have an inalienable right to terminate any grant of rights under copyright after 35 years (for post-1977) works or 56 years (for pre-1978 works). If the license is properly terminated, the licensee may no longer exploit the author's work unless it negotiates anew, but sublicenses made while it had the rights remain in force.

The purpose of the termination right is to give creators a second chance to benefit from work they sold or licensed years before they knew its long-term value. The right to terminate a grant is inalienable; in the words of the Act, it belongs to the original author "notwithstanding any agreement to the contrary." Therefore, an agreement made today in writing and for additional compensation not to exercise the termination right is not enforceable. Should your work succeed beyond your expectations, your termination right could prove extremely valuable to you or your family years from now. The termination right does not apply, however, to works "made for hire" or to transfers made in a will.

Any author who grants exclusive or nonexclusive rights in a copyright after January 1, 1978, may terminate the license(s) during the five-year period starting at the end of 35 years after the execution of the grant (if the grant includes the right of publication, the five-year window begins at the end of 35 years from the date of publication or 40 years from the date of execution of the grant, whichever ends sooner). If before 1978 an author (or her heirs) granted a license for the renewal term of a copyright,

that grant may be terminated during the five-year period beginning 56 years after the copyright was first obtained. The mechanics of termination involve giving notice from two to ten years prior to the termination date and complying with requirements listed in Copyright Office Circular 96, *Notice of Termination of Transfers and Licenses*.

The clear-cut mandate of the inalienable termination right is soon to be tested. Recording artists who transferred their copyrights to their record companies in 1978 will be entitled to terminate the transfers beginning in 2013. A number of artists, including Billy Joel and Bruce Springsteen, have signaled their intention to send termination notices. The artists' record companies will understandably be tempted to fight to keep those immensely profitable rights. If the courts recognize any legal theory that weakens the termination right, it could well affect all creators. See Scorpio v. Willis, United States District Court for San Diego California, May 7, 2012 ("Village People" case).

COPYRIGHT AND PERIODICALS AND OTHER COLLECTIVE WORKS

Magazines, newspapers, anthologies, encyclopedias—anything in which a number of separate contributions are combined—are defined in the 1976 Act as "collective works." The law provides that the copyright in each contribution is distinct from the copyright in the entire collective work, and belongs to the author of the contribution. Until the mid-1990s, newspapers and magazines commonly published freelance contributions as part of their collective works without an express agreement on the scope of the rights. The 1976 Act addressed this situation by providing a default license: "In the absence of an agreement, the collective work publisher has only the privilege to reproduce the contribution in (1) the issue of the collective work for which it was contributed, (2) any revision of that collective work, or (3) any later collective work in the same series."

Under this default term, when a freelancer contributes to a magazine based on an editor's verbal assignment, the publisher may use the article in one issue and again in later issues, but it may not publish the piece in a different magazine. In a collective work such as an anthology or an encyclopedia, the publisher may use the article in the original issue and later revisions, but may not include it in a new anthology or different encyclopedia. As well, only nonexclusive rights are transferred, so a writer could theoretically sell the nonexclusive right to publish the work to another publisher at the same time.

After an eight-year legal battle, the Supreme Court ruled in 2001 that the scope of this default license does not give a collective work publisher the right to include the contributions in an electronic database that disaggregates the contributions from the original collective work. Other courts have inferred from this holding that publishers may reproduce a collective work contribution in digital form without the author's permission, if the digital copy appears as it originally appeared in the collective work. Rather than allowing your freelance work to be governed by the Copyright Act, which might not satisfy either your needs or your publisher's needs, it makes better sense to have your work governed by terms agreed upon by both parties. Chapter 12 covers how to negotiate contracts with periodicals.

FOREIGN WORKS AND INTERNATIONAL COPYRIGHT

Most foreign works are protected under US copyright law. If a work is published,[14] US copyright law protects it if one or more of its authors are:

A national or permanent resident of the United States; or

A stateless person; or

A national or a permanent resident of a nation that is a party to a copyright treaty with the United States or covered by a presidential proclamation.

If a work is unpublished, US copyright law protects it regardless of the author's nationality or place of residence. The work need not have been created in the United States to have copyright protection here.

Likewise, works created in the United States or by a US national are protected in most other nations under their national copyright laws.

The United States is a party to several treaties (formally called "conventions") in which the participating nations agree to apply their copyright protection to works published in the other participating nations. Authors automatically obtain protection in the treaty nations when they publish a

[14] The definition of "publication" is important because the Copyright Act treats published works differently from unpublished works in several situations. The Copyright Act defines "publication" as public distribution, i.e., when one or more copies of a work are distributed to people who are not restricted from disclosing the content to others. "Distribution" can take place through sale, rental, lending, or other transfer of copies to the public. Offering copies to a group of people for the purpose of review, further distribution, public performance, or public display also constitutes "publication" under the Act.

work in the United States. The Universal Copyright Convention, which dates from 1955, provides that publication in any treaty nation bestows copyright in the United States, and vice versa. Under this treaty, there is one special requirement: the works must contain a copyright notice that includes the symbol ©, the author's full name, and the year of first publication. The author's initials will not suffice for protection under the Universal Copyright Convention. Under an older treaty, the Buenos Aires Convention, which still covers many Western Hemisphere countries, the notice must also contain the phrase "All rights reserved."

The United States joined the larger Berne Convention as of March 1, 1989. As a result, it is no longer necessary for US writers to publish simultaneously in a Berne country to gain protection under the Berne Convention. Indeed, the Berne treaty forbids member countries from imposing copyright formalities—including registration and publishing with notice—as a condition of copyright protection for the works of foreign writers. Joining Berne required the United States to enact changes in its law that favor creators, including eliminating copyright notice as a prerequisite to full protection. Copyright Office Circular 38a, *International Copyright Relations of the United States,* details the international copyright relations of the United States, including a list of every nation and the copyright conventions to which they belong. Many countries belong to both Berne and the Universal Copyright Convention, and some to one or the other, but not both. American authors are automatically protected under both conventions when they publish a work in the United States.

CONCLUSION

The subject of copyright is highly complex and acutely relevant to working writers. The volumes of case law and writings about copyright would probably fill a small library. The following four chapters attempt to provide a comprehensive but necessarily abbreviated survey of the topic, so you can have a workable knowledge of the basics.