



Copyright Law for Creative Industries

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General guidelines on copyrightable subject matter

- a. There are eight general categories of works that can be copyrighted. These are defined by the Copyright¹ statute as:
 - i. literary works (e.g., books and website pages);
 - ii. musical works (e.g., sheet music), including any accompanying words;
 - iii. dramatic works (e.g., plays), including any accompanying music;
 - iv. pantomimes and choreographic works;
 - v. pictorial, graphic, and sculptural works;
 - vi. motion pictures and other audiovisual works;

¹ 17 U.S.C. §101 et seq.

- vii. sound recordings; and
- viii. architectural works.²

b. There are also categories of works that cannot be copyrighted. These include ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries. None of these can be copyrighted, regardless of the form in which it is described, explained, illustrated, or otherwise used in a work.³

- i. This means that, for example, a process of doing something is not copyrightable. But, a description of that process in, for example, an article would be copyrightable as a literary work. That copyright would only cover the article, not the process. Thus, anyone would be free to use the process. However, they could not copy the article that described the process.

Copyright protections for reproducible works

a. Techniques

The copyright statute does not allow techniques, procedures, processes, and methods of operation to be copyrighted.⁴ However, an article about a technique could be copyrightable as a literary work. The copyright protection would not prevent someone from following the technique. Instead, the copyright would only protect the article from being copied.

b. Performances

Public performance of a copyrighted work, such as a song is protected by copyright. Without permission of the songwriter, public performances are not permitted.⁵

There are exceptions for private performances, such as singing a copyrighted song at home or other private place, which is permitted.⁶ Also permitted is

² 17 U.S.C. §102(a).

³ 17 U.S.C. §102(b).

⁴ 17 U.S.C. §102(b)

⁵ 17 U.S.C. §106(6).

⁶ 17 U.S.C. §107.

limited use of a song or other copyrighted work for educational purposes or critique, or news reporting.⁷

c. Dances

Dances can be copyrighted as a choreographic work, but only a dance as a whole, such as a musical dance video or a ballet. Individual dance moves cannot be protected by copyright.⁸

d. Artistic Styles

Artistic styles cannot be copyrighted. Only completed works of art fixed in a tangible form of expression can be copyrighted. A work is considered to be “fixed” when it is captured (either by or under the authority of an author) in a sufficiently permanent medium such that the work can be perceived, reproduced, or communicated for more than a short time.⁹ The work of art may be in a certain style, such as Cubism or stop-motion animation, but the copyright protection only covers the work of art, not the style of the work or art.

e. Recipes

While most recipes are written down, like Grandma’s chocolate chip cookies, unfortunately recipes are not protected by copyright. They are viewed as a set of facts, ingredients, and facts by themselves are not copyrightable. Similarly, the procedure to combine the ingredients in a certain way is not copyrightable.¹⁰

f. Patterns

Generally, patterns such as sewing patterns, knitting patterns, cross-stitch patterns have very limited copyright protection. The copyright protection covers *only* the drawings. It does not cover the directions for the pattern because the directions are considered a process or procedure, which is not

⁷ 17 U.S.C. §107.

⁸ For more explanation of copyright protection for a choreographic work, see the U.S. Copyright Office Circular 52 that can be found at <https://www.copyright.gov/circs/circ52.pdf>.

⁹ Full definition from U.S. Copyright Office Circular 1 Copyright Basics that can be found at <https://www.copyright.gov/circs/circ01.pdf>

¹⁰ 17 U.S.C. §102(b).

copyrightable.¹¹ Because the copyright protection covers *only* the drawings, the copyright for the pattern does *not* cover works made or based on the pattern or design. Dresses, models, or products can be made based on the pattern or design without infringing the copyright on the pattern or design. That is true, however, so long as the original copyrighted pattern or design is not copied in the process of making the product. As an example, suppose a person buys a copyrighted dress pattern. Any dress made using the pattern is not a copyright infringement. However, suppose that in order to use the pattern again, that person makes a copy of the pattern before using it to make a dress. That is copyright infringement. To copy the actual pattern or design, permission of the copyright owner is needed.

g. Video tutorials/“How to” guides

Videos can be protected by copyright as audiovisual works.¹² The copyright protection, however, only covers the video itself, not the “how-to” underlying the video. Thus, others are free to take the “how-to” advice and use it as they wish. They cannot, however, copy the video itself.

Who owns the copyright?

The Copyright statute defines copyright ownership. The most common situation is for an individual author or the creator of the work. That author or creator owns the copyright.¹³ If there are multiple authors or creators, each is a co-owner of the copyright.¹⁴ In addition, each co-owner can license the copyright as he or she wishes, but only on a non-exclusive basis to a third party. For example, any of the co-owners can license a third party the right to reproduce the copyrighted work on a non-exclusive basis, and without regard to the other co-owners.

Another circumstance is a “work for hire,” such as someone working for a company who writes an article or other work. The company owns the copyright.¹⁵

The Copyright statute also defines ownership for collective works, such as contributing a chapter to a book or a photograph to a collection of photographs. In this circumstance, the person or company submitting the work to the collection owns the copyright to the submitted work (chapter, photograph, etc.)¹⁶ The person or company that

¹¹ 17 U.S.C. §102(b).

¹² 17 U.S.C. §102(a).

¹³ 17 U.S.C. §201(a).

¹⁴ 17 U.S.C. §201(a).

¹⁵ 17 U.S.C. §201(b).

¹⁶ 17 U.S.C. §201(c).

is assembling the collection of, for example, articles, or photographs owns only the copyright in the collection as a whole, not in any of the individual submissions.¹⁷ Consequently, the person or company assembling the collection has the right to, for example, reproduce the entire collection or to distribute the entire collection.¹⁸

To find out if a work is registered at the U.S. Copyright Office, the Office maintains a list of all U.S. copyright registrations. The list is searchable and can be found on the U.S. Copyright office website at <https://www.copyright.gov/public-records/>.

How long does a copyright last?

The length of copyright protection depends upon whether the work was created before or after 1978. For works created before 1978, the copyright duration depends on which prior Copyright statute the work was created under, and such things as whether the copyright registration was renewed. U.S. Copyright Circular No. 15 describes some of the details that go into the analysis of a pre-1978 copyright, and can be found at <https://www.copyright.gov/circs/circ15a.pdf>.

For works created after 1978, determining the duration of a copyright is a bit simpler. The duration is generally the life of the author plus 70 years. If there are multiple authors or creators, then the duration is 70 years after the death of the last surviving author or creator.

If the work is what is called a “work for hire,” such as articles written for a magazine, the duration is 95 years from the first publication or 120 years from the creation of the work, whichever expires the earliest.

How much control do I have over others' use of my copyrighted material?

A copyright owner has a great deal of control over uses of the copyrighted work by others. In cases where the use of a copyrighted work is an unauthorized use, the copyright owner should contact the infringer as outlined in the FAQ discussing copyright enforcement.

For authorized uses, the copyright owner has many rights under the Copyright statute that it can license to others. Those rights include the right to:

- a. to reproduce the copyrighted work in copies or phonorecords;

¹⁷ 17 U.S.C. §201(c).

¹⁸ 17 U.S.C. §201(c).

- b. to prepare derivative works based upon the copyrighted work;
- c. 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;
- d. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- e. 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, to display the copyrighted work publicly; and
- f. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.¹⁹

The copyright owner can license each of these rights as the copyright owner wishes.²⁰

What is a derivative work?

The Copyright statute defines a “derivative work” as a

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.²¹

¹⁹ 17 U.S.C. §106.

²⁰ 17 U.S.C. §201(d).

²¹ 17 U.S.C. §101.

Essentially all works that are created after seeing someone else's work are derivative works. However, only the copyright owner of the original work has the right to create a derivative work.²² All derivative works should therefore be authorized, such as by agreement with the copyright owner of the original work.

Fair use and transforming a work into a new original work

Fair use of and transforming someone else's copyrighted work are gray areas in copyright law. But, there are some clear boundaries set by the Copyright statute. The statute allows the use of a copyrighted work, without permission of the copyright owner "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."²³ That said, there are limits. For example, an entire book, article, or video cannot be copied,²⁴ especially when the purpose of the book, article, or video is for education, copying for educational purposes would likely be copyright infringement.²⁵

On the other hand, a teacher's use of excerpts from a book or article, or video clips from a video is likely fair use, particularly given the educational, non-profit use, and use of only a limited portion of the copyrighted work.

Generally, the more of a copyrighted work that is copied, and the commercial nature of the use, the more likely the use is not a fair use. That would be true also for a non-profit use of a copyrighted work. For example, a non-profit organization reproducing a copyright book and giving it away would undermine the commercial opportunities of the copyright owner, and most likely, not a fair use, even though no profit was being made.²⁶

Sometimes a derivative work so transforms a copyrighted work that the transformed becomes a new original work. The distinction between an infringing derivative work and a transformed work is a matter of judgment. One guideline that has been used is whether the new, transformed work so alters the original work with a new expression, meaning or message so that it is itself a new original work. Courts contrast such significant transformation with a typical derivative work that adapts recasts an original work, including a new presentation, such as making a story into a video, or translating into a different language.

²² 17 U.S.C. §106(2).

²³ 17 U.S.C. §107.

²⁴ 17 U.S.C. §107(3).

²⁵ 17 U.S.C. §107(4).

²⁶ 17 U.S.C. §107(3) and §107(4).

Using a copyrighted work to make another work

Generally, use of another's copyrighted work is copyright infringement. For example, a news outlet publishes a story about a car accident and includes a photograph of an accident. If someone else writes an article about safe driving and copies the photograph, that copying infringes the copyright for the photograph. That is also the case if a copyrighted work such as a photograph or cartoon character is used in another work without permission of the copyright owner. Personal photographs of a copyrighted work can be taken, but not sold. However, making a painting of a photograph or a sculpture of a copyrighted work is copyright infringement because such alterations would likely be considered derivative works, that is, recasting the original work in a different form. Giving credit to the copyright owner does not avoid the need to have the copyright owner's permission.

How to enforce a copyright

Enforcing a copyright usually refers to enforcing a copyright that has been registered at the U.S. Copyright Office. Enforcement approaches vary from doing nothing to spending a great deal of money to file a lawsuit in Federal court and litigate the matter to a judgment.

Initially, however, a letter to the infringer is generally used as a starting point. Many people that may be infringing a copyright may not know about the copyright registration and may agree to stop using the copyrighted material or agree to pay some reasonable amount to continue to use that material.

Absent agreement with the infringer, the copyright owner can file a suit in Federal court to enforce the copyright.

The situation is different for music. The U.S. Copyright Office has a licensing program. Information on that program can be found at the U.S. Copyright Office webpage <https://www.copyright.gov/music-modernization/115/>.

What should I do if I have been accused of copyright infringement?

Copyright infringement is serious. For a copyright registered at the U.S. Copyright Office, the Copyright statute allows what are called statutory damages that can range between \$750 and \$30,000 for each infringing work.²⁷ The first thing to do when accused of copyright infringement is to immediately cease all accused infringing activity. Once the

²⁷ 17 U.S.C. §504(c).

accused infringing activity is stopped, you can see if the accuser has a registered copyright by searching the U.S. Copyright Office's database of registered copyrights. The U.S. Copyright Office database search capability can be reached at website at <https://www.copyright.gov/public-records/>.

If there is no registration, there still can be copyright infringement. The infringement would not be covered by the statutory damages. The best course of action is to see if the copyright owner is willing to license your activity. If not, then the accused activity should not be resumed.