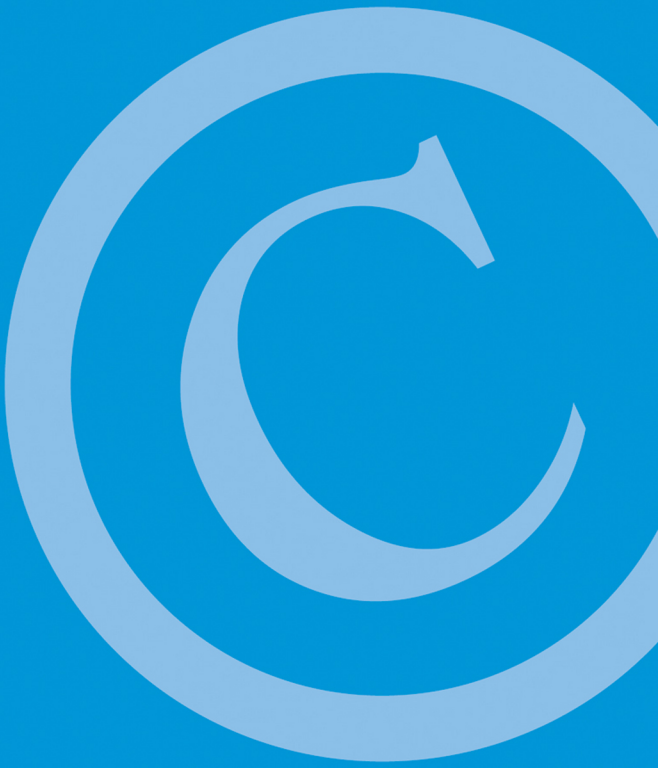

THE COPYRIGHT BOOK

William S. Strong

A PRACTICAL GUIDE

sixth edition

A PLAIN ENGLISH GUIDE FOR WRITERS, SCHOLARS, COMPOSERS, ARTISTS, PROGRAMMERS, ARCHITECTS, LAWYERS, PUBLISHERS, AND ANYONE ELSE WHOSE LIFE OR CAREER IS AFFECTED BY COPYRIGHT LAW

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A Practical Guide

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In memory of my parents

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PREFACE

At their best, our laws embody our deepest assumptions about human beings and what proper relations among human beings ought to be. Copyright is such a law. It springs from the belief that those who try to contribute to our always inadequate store of information and inspiration ought to be paid for their pains. This seems a very creditable attitude.

My purpose in writing this book has been to make available to people whose lives and work are affected by the laws of copyright an understanding of their rights and responsibilities. However, I hope that in doing so I have also managed to communicate some of my own fascination with the subject.

I have found it useful to write much of this book as though from the standpoint of the creator of a work—be it a novel, a painting, a blueprint, a dance. But whatever is not kept safe for the artist is given to the public; if you are a would-be user of an artistic or other creative work, you will know your boundaries by the boundaries drawn for the creator of it.

I have tried to gather material and organize it in a way that will tell the story simply. This has not proved possible in all respects; parts of the law are so complex that no amount of pruning and rearranging could

make them any less dense. Nor has it proved possible at every point to avoid technical language and terms whose legal definition differs from their ordinary meaning. In such places I have given examples to try to make clear what is being said.

Two further comments about organization are in order. First, because the copyright law that went into effect on January 1, 1978, governs all works created after 1977 and many aspects of works created earlier, I have used this law as my guide for most of the book. If you are concerned with pre-1978 works, you should be sure to read chapter 10, which deals with these works. Second, although many rules differ from one art form to another, it became apparent that to deal with various art forms individually would create a great deal of needless repetition. Instead, therefore, I have treated the various aspects of the law as units and within each unit discussed the exceptions pertaining to one art form or another.

Space does not permit me to acknowledge adequately the encouragement that family and friends have given me to write and later revise this book. In earlier editions I gave special thanks to two people, Evie Hanlon and Michelle Kincade, who had given new meaning to the word *secretary* and without whom all encouragement would have been in vain. But times change, and, like most people blessed with the curse of modern technology, I have become my own amanuensis. The focus of my gratitude therefore shifts to my wife Ann, who has put up with many a foregone evening and weekend to enable this sixth edition to see the light of day. I am grateful to her for so many things, though, that this (which would otherwise be enormous) is but a drop in the bucket.

THE SUBJECT MATTER OF COPYRIGHT

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Copyright law is essentially a system of property. Like property in land, you can sell it, leave it to your heirs, donate it, or lease it under any sort of conditions; you can divide it into separate parts; you can protect it from almost every kind of trespass. Also like property in land, copyrights can be subjected to certain kinds of public use that are considered to be in the public interest. I shall explain these various aspects of copyright property through the course of this book.

The province of copyright is communication. It does not deal with machines or processes—those are governed by patent law—though it has been stretched, with a bit of sophistry, to cover computer software. It does not deal with titles, slogans, and the other symbols that businesses use to distinguish themselves in the public eye, for that is the stuff of trademark law. Works of art and literature are what copyright protects, no matter what the medium, and works whose purpose is to convey information or ideas. In the words of the statute, it protects "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."[1]

This seemingly simple bit of language incorporates three of the fundamental concepts of the law, concepts whose meaning must be clearly grasped before all else: fixation, originality, and expression.

Fixation

Fixation is the act of rendering a creation in some tangible form in which, or by means of which, other people can perceive it. Even the word *perceive* has its own special legal meaning; in the law's definition one "perceives" a work of choreography, for example, or a work of music, by seeing on a piece of paper the notation that enables a performer to reproduce the work. Thus a musical work may be fixed in sheet music, as well as on tape. On the other hand performing the musical work, without taping it simultaneously, does not fix it because the performance is not tangible. It is heard and is gone.

The great importance of the act of fixation is that it marks the beginning of your federal copyright. You obtain copyright under the federal law as of the instant that you fix your work in tangible form. Fixation also draws the boundary line between federal copyright protection and so-called common law copyright, which is largely the prerogative of the individual states. (*Common law* is the term for law that is built up over the years by judicial opinions; in the copyright field there has not been a great deal of variation from one state to another.)

Until January 1, 1978, common law copyright protected all unpublished works except those that were registered with the U.S. Copyright Office; now it protects only works that have not been fixed in tangible form.[2] If, for example, you have developed a comedy routine in your head, but have not written any notes about it that would enable another performer to reproduce it, your unfixed work falls under the protection of

common law copyright. You may perform it as often as you like, or you can let others perform it for a fee, and in theory no one else may copy it. Presumably also you can bequeath the right to perform it to your children, and they to their children, although the idea of an intangible right of indefinite duration seems to run counter to all our instincts and legal traditions of property.

Not much more of substance can be said at this point about common law copyright. Rights in works that have not been fixed are difficult to prove and difficult to protect; it is not even easy to prove what the work is if there is no tangible copy of it. Because the expanded federal law has so severely restricted the operation of the common law, this book is devoted to works that are fixed and thus governed by the federal law, except where I specifically state otherwise.

Originality

A work must be the product of your own mind in order to be copyrightable. Originality is not by itself sufficient; facts, even if they are facts that no one else has ever discovered, are regarded as the common property of all of us, as are scientific discoveries, mathematical equations, and historical theories.[3] Facts are not copyrightable because they are not human inventions; theories are not copyrightable because they are ideas, not expression. But although originality is not sufficient in itself, it is essential all the same.

The law follows a highly subjective theory of originality that often surprises, and sometimes shocks, those encountering it for the first time. If asked whether a person can get a copyright for something that has been created by someone else, most people would answer "no," but that answer would not always be correct. It is true that you cannot get a valid copyright in material that you have taken from someone else's

work. But if you have recreated a preexisting work without having had access to it or knowledge of it, you are entitled to your own copyright. The logical extension of this is that you can enforce your copyright against anyone who has actually copied from you, regardless of the fact that that person might have copied with equal ease from the preexisting work. "If by some magic," one distinguished judge has observed, "a man who had never known it were to compose anew Keats's *Ode on a Grecian Urn,* he would be an 'author,' and . . . others might not copy that poem, though they might of course copy Keats's."[4] This is said to illustrate the difference between copyright and patent (which is based on objective originality), and indeed it does on a somewhat impractical level. The likelihood of someone's recreating Keats is vanishingly small, but lesser works—fabric designs, simple tunes, and the like—are often reinvented. Copyright's subjective approach to originality allows them all to flourish, in whatever soil they can find.

That elements of your work may be in the public domain does not invalidate your entire copyright. It only limits your copyright to what is original with you.

An original exposition of public domain material may take the form of arrangement. For example, *The Waste Land* is clearly a copyrightable poem, even though many of its lines are taken from works that are in the public domain. Eliot's originality lies (partly) in the juxtaposition of these public domain elements, and his copyright extends only to the limits of his originality. Similarly, a collage made of newspaper clippings is a copyrightable arrangement.

Derivative Works

Of a slightly different nature, but copyrightable on the same basic principle, are works the law calls "derivative works." Derivative works are those in which

someone else's creation is "recast, transformed, or adapted."[5] Translations, sound recordings that transform musical or other works into digital notation, movie versions of plays or stories, orchestrations of melodies, and dolls based on cartoon characters are all obvious examples of derivative works. Others are less obvious but equally common, such as reproductions of artistic works in different media. A lithographic reproduction of a painting might seem to be a copy rather than a derivative work entitled to a protection in its own right, but in fact it is regarded as a derivative work. The reasoning behind this is that the manufacture of an art reproduction in a medium different from that of the original requires the reproducer to contribute some measure of his own special skill and artistic judgment, and that contribution is entitled to protection. There are limits on this, as I shall discuss shortly.

A derivative work may be made of a copyrighted work or of a work in the public domain. If it is of a copyrighted work, and if the artist or author has not authorized it, the work will constitute an infringement of the artist's or author's copyright. In any event the protection afforded to a derivative work extends only to the original contribution of the maker.[6]

Would Eliot's *The Waste Land* be regarded as a derivative work? Would *West Side Story* be regarded as a derivative work of *Romeo and Juliet?* Would Mussorgsky's *Pictures at an Exhibition* be regarded as a derivative work of the pictures that inspired him? The answer to all three of these questions is "no." It may be helpful to analyze why.

Partly the question is one of motive. Eliot's use of preexisting poems was intended not to recast those works in another medium but to use them, through parody and juxtaposition, as building blocks for a message uniquely his own. It was not Eliot's intent, nor

was it his achievement, merely to create a new version of Marvell's *To His Coy Mistress* when he wrote

> But at my back from time to time I hear
> The sound of horns and motors which shall bring
> Sweeney to Mrs. Porter in the spring.

Similarly, *West Side Story* is not based on *Romeo and Juliet* in the way that the movie *Gone with the Wind* was based on Margaret Mitchell's novel; it attempts not to tell Shakespeare's story in another medium but to tell its own story, which resembles Shakespeare's play in many important respects. (If *Romeo and Juliet* were still under copyright, *West Side Story* might be an infringement, but that is another matter.)

Partly too the question is one of recognizability. Quite simply one does not recognize particular pictures in Mussorgsky's composition. Recognizability is not perhaps a firm and reassuring principle, but it is nonetheless an important one in determining derivativeness.

Another category of derivative works that deserves mention is that described in the statute as works "consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship." What the law protects here is the original contribution of the editor or annotator. The law will not protect trivial modifications, but it will protect modifications that are substantial enough to constitute a "new version" of the preexisting work. The protection given a revision would cover only the work of the editor's own creativity. If a scholar, on the basis of research, revises the text of, say, a poem by Spenser, he cannot get a copyright in the new text because what he has done is to restore Spenser's own words.[7]

The amount of originality required for a derivative work to be eligible for copyright is no different from

that required for any other sort of work, but one must be careful to assess originality only in those elements that are new with the derivative work. The Seventh Circuit Court of Appeals summed it up well in these words: "the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the underlying work in some meaningful way."[8] Thus, the Second Circuit denied copyright to wind-up toy versions of Mickey Mouse, Donald Duck, and Pluto, because apart from the work involved in representing the characters in the form of small wind-up toys, the copyright claimant had added nothing original. (Indeed, Disney would probably have come down hard on the toy manufacturer if it had.) And as with any other sort of work, one must be careful not to give credit for things that are driven by considerations of function or materials. Thus, in another case, the Second Circuit struck down the copyright of an Uncle Sam mechanical bank that was a smaller-scale version of earlier, public domain models but with certain features altered, because (in part at least) it found that most of the variations from the public domain were dictated by plastic molding technology, which reduced the claimant's creativity to near zero.[9]

One court has held, in a questionable decision, that an exact reproduction of a piece of sculpture, substantially reduced in scale, can be copyrighted as a derivative work if the making of it requires great artistic skill and effort.[10] More recently, and correctly I believe, a court denied copyright to straightforward photographs of works of two-dimensional art, on the grounds that the photographer had not added sufficient original expression of his own.[11] Photographs of three-dimensional artworks, on the other hand, will almost always be copyrightable, for there is nearly always some

exercise of judgment in how one photographs a three-dimensional object.

Authors should always bear in mind that the right to create derivative works is part of copyright. Thus, if an author transfers all rights in a work to someone else, this right goes with the rest. The author would no longer be able, for example, to create new versions of his own work. This is often an important negotiating point in copyright agreements.

Copyright in a derivative work is limited, like all other copyrights, to whatever material is original with the creator. An English translation of *Anna Karenina* is a derivative work, and it can be copyrighted, but the copyright will be narrowly defined to avoid giving the translator any kind of rights in what was actually created by Tolstoy. The translator will be protected against someone who copies his translation but not against someone who makes a similar translation by independent effort. Another example is the musical version of *Oliver Twist*. Without doubt the musical *Oliver* is copyrightable, but only to the extent that its characters, its plot, and its dialogue differ from Dickens's novel and are the original creation of its authors. You are at liberty, if it strikes your fancy, to write another musical based on *Oliver Twist*, but you cannot use the variations from Dickens's story that the authors of *Oliver* created, unless you can show that they are absolutely necessary to the task and unavoidable.

If the derivative work you make is of a work still subject to copyright, much the same rules apply. Your copyright in your derivative work covers only your own inventions, variations, and additions. You have no right to authorize someone else to use those parts of your derivative work that you have taken from the original, beyond whatever right your license agreement gives you.[12] Furthermore, when the copyright

term of the original work runs out, everything in your work that you took from the original goes into the public domain, and only what you yourself have created will remain protected. The converse is also true: if a derivative work loses its copyright, the copyright of the original remains unaffected.

Tracing a work through its derivative forms can be like tagging migratory animals. Take the example of the movie *South Pacific*. It started out as a collection of short stories by James Michener. Next, several of the stories were combined and adapted into a musical by Rodgers and Hammerstein. Then the musical was rewritten as a screenplay, and the screenplay was made into a movie. There were thus three layers of derivative works, each cutting old material and adding new. And the movie producer had three different copyrights to worry about: the short stories, the musical, and the screenplay. The movie could not be made without derivative-work licenses covering all three previous forms.

The law regards an object code version of a computer program as a copy of the program, not a derivative work. (See below in this chapter.) The same rationale applies to the making of a computer-readable version of any work. For example, inputting an English-language directory into a computer database would be copying it, not "translating" it into a new language. Thus no one who makes a computer-readable version of any public domain work would have any copyright in it, unless some new elements are added. On the other hand, translating a computer program from one computer language to another *would* create a derivative work—assuming of course that anything survived the process other than the ideas or algorithms of the original.

Compilations

The other category of work in which copyrights can become layered is what the statute calls "compilations." This term covers two very different types of works: so-called "collective works," which are collections of things that could be copyrightable on their own, and databases, in which facts or other uncopyrightable things are collected. I use the computer-age term "databases" for convenience only; databases may in fact be fixed in print and other media as well as on computer tapes and disks.

The original authorship that the law protects in compilations is the selection, coordination, or arrangement of items. This is a separate copyright from any that may exist in the underlying material.

The author of a collective work may be the same, but need not be the same, as the author of the component parts. Anthologies are an example of the type of collective work that is made up of preexisting copyrightable works, often by many different authors. Magazines, newspapers, and encyclopedias are examples of collective works that pull together the fresh labors of numerous writers and photographers. The author of a collective work will often add new material of an editorial or descriptive nature. For example, a coffee table book of Monet's paintings might contain text supplied by the person who chose which paintings to include. Technically, the copyright in that editorial text is separate from the copyright in the collective work, although they are rarely separated in practice. The presence of some small embellishment of text would not affect the "compilation" nature of the work. By contrast, though, a scholarly study of Monet that happened to be illustrated with reproductions from his work would not be thought of as a collective work. Why the difference? The pictorial elements in the scholarly study are subservient to the text, whereas in

the coffee table book the compiling of images, and their arrangement in the book, are what gives the book its shape.

The other kind of compilation is the database. Databases are all around us: telephone books, medical records, sports statistics, mailing lists. In all of these, facts or other data have been assembled, whether through careful thought or sheer drudgery. Not all of them are copyrightable.

It used to be that drudgery (if great enough) sufficed to secure copyright protection in some courts. Judges responded to the perceived unfairness of allowing people a free ride on other people's work, and upheld copyright in things as menial as the telephone white pages. In 1991, however, the Supreme Court put an end to this practice. In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[13] the Court held that industrious labor by itself was not enough; some "spark of creativity" is needed. The Court even went so far as to say that it is constitutionally required. It held that the mere assemblage of people's names, addresses, and phone numbers, and their arrangement alphabetically by name, lacks that necessary spark.

By this long-overdue and potentially far-reaching opinion, the Supreme Court reasserted the importance of originality to copyright. But what kind of originality?

If selection, coordination, and arrangement are to rise to the level of originality, they must have some degree of arbitrariness. The very word "selection" implies a range of choices, all of which may be equally valid. No one, for example, could challenge the copyrightability of a listing of "America's Most Eligible Bachelors." But where a selection is either right or wrong—say, "America's 100 Largest Cities"—the necessary scope for originality is lacking.[14] It has been held that a book compiling the *complete* poems of Dorothy

Parker is not a copyrightable compilation, even though some of those poems had never been included in any previous such collection. A database that includes no selectivity cannot be copyrighted.[15]

What about mailing lists, which are the livelihood of much of America's retail commerce? They, too, present difficult issues. From one point of view, they are (unlike telephone directories) entirely random, consisting of the names and addresses of those who happen to order a company's products. But where is the spark of creativity?

These are issues certain to see a great deal of litigation, and perhaps legislation, in the future. Information has become critical to our economy, and the struggle between those who have it and those who want it is certain to intensify. It is easy to characterize one side as the hardworking, the diligent, and the other side as freeloaders. European countries, in this spirit, have enacted laws protecting databases that copyright cannot protect. The U.S. Congress has from time to time been pressed to follow suit. It should resist. The very premise of our copyright system is that what is not protected is free for all to use, and that society benefits by not forcing people to reinvent such things as the telephone book.

Expression

The third requirement of copyrightability is that the work be "expression" and not "idea." It is an old truism in copyright law that you cannot copyright an idea but only your expression of it: ideas, like facts, are in the public domain. For example, a literary critic who publishes a new theory of the structure of the novel cannot obtain a copyright in that theory; he can copyright only his written expression of that theory. A thief may steal his theory with impunity if the thief expresses the theory in his own words, and the thief,

scurrilous though he may be, can obtain a new copyright in his own written work. Perhaps the first author should have an action for unfair competition if no attribution is made, given the nature of scholarly competition. But such a doctrine, which would be separate from copyright, has yet to develop.

A simple example like this one of literary criticism may make the rule itself seem simple. It is not. In fact it is riddled with ambiguities. What, for example, is a musical "idea" and how is it separable from musical "expression"? How basic must a plot become, how stripped of embellishment, before it ceases to be the writer's own copyrightable expression and becomes mere "idea"? No one really knows the answers to these questions, though many a court has formulated an all-embracing theory, only to see it discarded by the next court. Judge Learned Hand, a man of legendary copyright jurisprudence, essentially threw up his hands: decisions of where to draw the line between idea and expression, he said, must "inevitably be ad hoc."[16]

Renderings of wildlife have led to some interesting cases that turn on the idea-expression dichotomy. For example, the Ninth Circuit found a very "thin" copyright in a glass-in-glass sculpture of a jellyfish. The court said:

> The selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form, considered together, lacks the quantum of originality needed to merit copyright protection. . . . These elements are so commonplace in glass-in-glass sculpture and so typical of jellyfish physiology that to recognize copyright protection in their combination effectively would give Satava a monopoly on lifelike glass-in-glass sculptures of single jellyfish with

> vertical tentacles. . . . Because the quantum of originality Satava added in combining these standard and stereotyped elements must be considered "trivial" under our case law, Satava cannot prevent other artists from combining them.

The court did, however, grant a copyright in the particular sculpture based on "the distinctive curls of particular tendrils; the arrangement of certain hues; the unique shape of jellyfishes' bells."[17]

Photographs of objects in nature are nearly always found copyrightable; courts are reluctant to find that a photograph lacks any sort of original expression. However, courts have denied copyright to photographs that are purely "descriptive" of natural objects—such as photographs of Chinese food for use on a menu—on the grounds of lack of originality.[18] And a court refused to find infringement when an artist created a sculpture that copied from a photograph the pose of a mountain lion holding a cub in her mouth. The pose, said the court, was something that had occurred in nature for which the photographer could not take credit.[19]

The rule that an idea cannot be copyrighted has an interesting corollary: copyright in the expression of an idea will not be enforced so as to prevent other people from putting the idea to practical use. This principle was first stated in the nineteenth century, in the case of *Baker v. Selden*, which involved a book on accounting techniques.[20] The book described a system of bookkeeping and, as illustration of it, contained a page ruled into columns appropriate for the system. When another publisher, impressed by the system, printed and sold copies of the ruled page—without any explanatory material—the original author brought suit.

In a decision that has continued to reverberate through the case law ever since, the Supreme Court

held for the defendant. It said that if a copyrighted work describes a system or process, copyright does not prevent anyone else from making whatever printed works are necessary to use that system. To hold otherwise, the Court said, would be to treat the copyright like a patent.

It is important to understand the limits of this principle. *Baker v. Selden* does not stand for the proposition that forms can never be copyrighted. It does mean, though, that forms will not be protected if protection would prevent other people from using the system they embody. Nor does *Baker v. Selden* apply to forms that are purely arbitrary in their content, such as the answer sheets for copyrighted tests.[21]

A closely related doctrine provides that if a certain order of words is the only reasonable way, or one of only a few reasonable ways, of expressing an idea, that precise order of words will be protected narrowly or not at all.[22] This is called the "merger doctrine" because idea and expression are seen as merged. It has been applied not only to insurance contracts, sweepstakes rules, and other works of a business or commercial nature but also to simple artistic works such as certain pieces of jewelry. It could and probably should have been applied in the *Feist* case: surely there is no scope of expression for the idea of organizing a particular phone book alphabetically by name?

Under certain circumstances an idea may be protected before publication by an agreement to treat it as confidential. (Confidentiality is part of the law of trade secrets and is not a part of the copyright law.) Furthermore, in California there is a long tradition, outside of copyright, that disclosure of an idea in the movie and television industry is subject to an implied contract that the idea will be paid for if used.[23] Unless that narrow exception applies to you, if you wish to submit

an idea for a work or an advertising program or something of the sort, make every effort to get a written or at least oral agreement in advance that it will be treated in confidence and paid for if used. In the absence of such an agreement, the person to whom you have disclosed it will probably not be obligated to pay you. You will have only yourself to blame if you blurt out your idea without getting this protection.

If you are submitting an idea to your employer, the nature of your job may determine whether you have any rights in it. Try to clarify this in advance with the employer. When submitting an idea, whether as an insider or an outsider, be sure also that it is worked out in reasonable detail and described clearly in words or pictures. The vaguer or more general the idea, the less likely will courts be to impose liability on the user.

Scope of Copyright

Once the three basic requirements of fixation, originality, and expression are met, the law's protection, though not universal, is extremely broad. Almost any kind of artistic work or work that communicates a message in any tangible medium can be copyrighted. The statute specifically lists literary works, musical works (including accompanying words), dramatic works (including accompanying music), pantomimes, choreographic works, "pictorial, graphic, and sculptural works" (in other words any visual work, whether two- or three-dimensional), sound recordings, motion pictures and all other audiovisual works, and architectural works—and this list is not complete.[24] None of these categories implies artistic merit; the yellow pages are a "literary work," and road maps are "graphic works."[25] The term "literary work" is hopelessly anachronistic, given that it now includes computer programs. A more accurate if cumbersome phrase

would be "works fixed in letters or other symbols other than works intended for performance."

Although the law does not require that a work have artistic merit, certain works nonetheless do stand outside its shelter, in the cold drizzle of uncopyrightability. They are excluded for one of two reasons: either they are trivial, or they are utilitarian.

In the first category fall, for example, titles and slogans, simple designs, and minor variations on works already in the public domain.[26] Titles and slogans can be protected to some extent by federal trademark law and by state laws against unfair competition and misappropriation; a book title, for example, will be protected by those laws if it has acquired such a reputation in the public mind that the use of it by someone else would amount to taking a free ride on the first user's popularity.[27] This protection, though, exists entirely apart from copyright and is not available for most items that are excluded from copyright on the grounds of triviality. Ballroom or discotheque dance steps, for example, are not considered to rise to the level of choreographic works within the meaning of the copyright statute and are unlikely to find protection under any other legal doctrine.[28]

The exclusion of utilitarian works is considerably less simple a concept. The threshold question is what the term "utilitarian" means in a copyright context. Some answers to that will seem obvious, others less so. Toys and games have been found not to be utilitarian. They serve a function, it is true; they enable a child to play. But playing is not in essence a utilitarian thing to do, and toys and games are routinely given copyright provided they meet the other relevant standards. On the other hand, items of clothing—even strikingly original creations by great designers such as Chanel—are considered utilitarian in the United States (but,

unsurprisingly, not in France), and their designs are not copyrightable. Between these two fairly obvious propositions lies a gray area that has caused some trouble. What is one to do, for example, with Halloween and masquerade costumes?

Courts have upheld copyright in slippers designed to look like bears' feet, and a "Rabbit in Hat" Halloween costume, in which the lower half depicted an inverted black satin top hat and the upper half a rabbit projecting above the brim. These perfectly rational decisions found that the artistic aspects of the slippers and the costume were conceptually separable from the utilitarian aspects of their use as garments. (See discussion a few paragraphs further on.) The Copyright Office takes the same position, refusing registration of fanciful costumes as such but allowing registration for any conceptually separable artwork in them. Yet a case decided by a normally reliable court held that masquerade costumes are useful articles not because they are garments, but because they enable the wearer to masquerade. This is clearly wrong. Granted, one cannot masquerade without a costume, but on what theory is masquerading a *useful* function? How is it any more useful than playing a game with a toy? Going from bad to worse, the court went on to say that the artistic elements of the costumes in question—the elaborate headpieces, the masks, and so on—were not separable from the utilitarian function of the costumes and therefore not protected. In the end, it threw out the entire copyright claim, and in the process appeared to set itself at odds with Copyright Office practice and common sense.[29]

Another interesting conundrum concerns typefaces. Digital fonts—the compilations of data that map the bit points of a letter in a computer font such as the one on this page—are considered copyrightable, on the

theory that in data form they are not useful but merely descriptive. However, the designs of the letters themselves are not protectable; no typeface however fanciful has ever obtained copyright, because Congress regards typefaces as fundamentally utilitarian.

Defining a work as utilitarian does not necessarily end the discussion. The law holds that the design of a useful article may be protected as a pictorial, graphic, or sculptural work if the purely artistic elements of the article can be "identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." The statutory history says that this language permits copyright to those design elements that are "physically or conceptually separable" from the utilitarian aspects—an explanation that has served to complicate, rather than simplify, the matter.[30] One almost needs training in Platonic philosophy to tell when a design element is "conceptually" separable from its utilitarian element. One is being asked, in essence, to discuss the lampness of a lamp, the tableness of a table. I bid you look up from this book for a moment at the lamp beneath which you are reading and identify those parts of its design that may clearly be segregated from its functional requirements. If your lamp is by Tiffany, your task will be relatively easy; if, on the other hand, it is made in the Scandinavian style, the problem is rather more challenging.

After a string of mutually inconsistent decisions in this area, the Second Circuit adopted the following test, focused on the design process. It seems to be the prevailing view and is the approach taken by the Copyright Office in assessing registration applications:

> [I]f design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually

> separable from the utilitarian elements. Conversely, where design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists.

This is an effective way of separating wheat from chaff, even if its effect may occasionally be draconian.[31]

Does this mean that if a lamp cannot be copyrighted, a drawing of it cannot be either? Not so. Even a drawing by a lamp designer, made not as an end in itself but solely as a prelude to manufacture, is copyrightable as a pictorial work because it is not in itself a useful article but only teaches how to make one. No one may publish copies of the drawing without the designer's permission. However, the copyright does not prevent someone from actually making a lamp that embodies the functional parts portrayed in the drawing. (Here again you hear the echo of *Baker v. Selden*.) The designer's right to control manufacture based on his drawing extends only to those parts of his drawing that depict nonfunctional things.[32]

Architectural Works

Architectural works present special complications. An architect's plans, like any other drawings, have long been copyrightable as pictorial or graphic works. No one may copy or publish those drawings without the architect's permission. However, until July of 1991 U.S. law did not protect buildings from being copied, or prevent anyone from erecting a building from copyrighted plans, except insofar as an unauthorized building might copy "nonfunctional" or "monumental"—i.e., nonutilitarian—features.[33] (In practice this exception was rarely if ever invoked.) On the same basis, a landscape architect's drawings would be protected by copyright, but not the landscape created from them, and

copyright in the drawings would not prevent anyone else from planting a garden that embodied those plans.

In July 1991, copyright was extended to the architectural design as such—but not to landscape design as such. The only court to have dealt with protection of an actual installed landscape found it uncopyrightable because the constant workings of nature deprive it of "fixation" and its creator of "authorship." This was a questionable holding, influenced perhaps by the fact that the plant materials had not remained constant over the years, and that the installation consisted simply of wildflowers arranged in two ellipses.[34] Surely there are landscape designs that qualify as pictorial or sculptural works? In Europe the copyrightability of landscape design is widely acknowledged. We shall have to await the appropriate case to establish this.

As a result of the 1991 change in the law, architectural plans are now protected against unauthorized construction, and buildings against unauthorized reproduction, to the extent that the plans or the building contain copyrightable elements. Of these two protections, the former is likely to be of greater significance. It gives architects a stick to wield against deadbeat or unscrupulous clients. Formerly, if a builder failed to pay his bill, the architect's sole remedy was to sue for breach of contract. Now, if the copyright license to build has been made contingent on payment in full, the architect can sue for copyright infringement, with the possibility of recovering attorney's fees. The same will apply if a builder tries—as many do—to reuse plans without paying the architect a new fee for the privilege.

The builder's principal defense to such suit will always be that the architectural design was dictated by functional considerations. For though the statute is silent on this point, the Congressional report on the bill

states that copyright should be denied where form is dictated by function.[35] Technically, this is different from the "separability" analysis regarding designs of utilitarian objects, and it is clearly intended to be a looser standard. In practice it is probably just as difficult to apply.

The very definition of an "architectural work" presents some puzzles of its own. That definition is:

> . . . the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.[36]

According to the statutory history, the word "building" includes any "habitable structure."[37]

No sooner had this definition been enacted than the question arose whether it included habitable structures that are divorced from the real estate on which they sit, such as tents, recreational vehicles, and mobile homes. The Copyright Office has opined that it does not, because, in its view, a structure must be both permanent and stationary to qualify as a "building."[38] This view sounds comfortably definitive, and yet it may not prove so in practice. The permanence requirement, for example, is more subjective than it may at first appear. Presumably, it excludes any structure (such as a fair pavilion or a movie set) that is erected with the intent that it be dismantled shortly thereafter. And yet some famous movie sets from decades ago are still on the lots in Hollywood, more permanent probably than the houses of those who made them. The "stationary" requirement, too, while not subjective, is flawed in its

own way. Things that their owners called "mobile homes" are probably just that, but what about the nearly identical things that other owners call "prefabricated housing"—built to be movable, but in practice never moved once installed? At what point, if at all, do they become architectural works? Or are they to be denied protection merely because at one point in their careers they drifted from one spot of earth to another?

The statutory history also says that "building" includes any structure "used by" human beings, and suggests that the term includes houses, office buildings, churches, gazebos, and garden pavilions, but excludes "purely functional structures" such as bridges, cloverleafs, dams, or walkways. But what does "used by" mean? Does copyright cover structures such as the Washington Monument (leaving aside the fact that that monument is now in the public domain) or the Vietnam War Memorial that serve no definable useful function? Is the presence of interior space enough to make a structure a "building"? The Hoover Dam has extensive habitable space inside its massive walls, but would that be copyrightable given that the exterior is an uncopyrightable dam?

What about "individual standard features"? Are we really excluding "standard designs of individual features"? If so, why was such an exclusion thought necessary, given that originality is a prerequisite of copyright and the word "standard" as good as presumes lack of originality? There is a general principle that statutes should not be interpreted so as to render them irrelevant. Yet that is precisely what the Copyright Office has done, and, given the Copyright Office's close involvement in developing the architectural work provision of the statute, its interpretation is probably definitive. In its final regulations on registration of architectural works, the Copyright Office has not only

interpreted the phrase in question to mean "standard designs of individual features," but compounded the redundancy by adding solemnly that copyright does not extend to "standard configuration of spaces."[39] While engaged in these platitudes, it might have added that standard configuration of *features* (as distinct from spaces) is also not copyrightable. It did not do so, for whatever reason, but we should infer nothing from this silence. Whatever is standard, whether features, spaces, or arrangements of features and spaces, is no one's property, except in those rare cases where an original work by luck or genius becomes the standard that everyone must buy to stay in the game.

Does copyright extend to individual features of a building, provided they are not standard? Logically, the implication seems unavoidable that it does. This would mean, if true, that once a building design as a whole is protectable as an architectural work, that protection extends to the design of individual features, quite apart from the architectural work as a whole. Thus, if a house contained a window of particularly interesting and original design, the copyright would protect not only the house as such against piracy, but also the design of the window. Thus, no competitor could copy that window without permission, even if the window is the only feature copied from the architectural work.

This result, while perfectly logical, would create an odd tension. It would mean that we would apply one standard of copyrightability to features in an architectural context and a different standard to identical features that are developed independently. (For remember that a window or fountain standing alone is a "useful article," and only those elements that can be "identified separately" from its utilitarian features are copyrightable.) And the door, if you will, would thus open to

abuse. The shrewd manufacturer would have its new line of faucets designed as part of a "dream house," copyright the dream house as an architectural work, and thus get a copyright in features it might otherwise not be able to protect. This is probably a *reductio ad absurdum*. The statute and its history seem to suggest that an architectural work arises from the selection and arrangement of features, not from any particular individual feature. If this is the case, then the design of those features is no more protected by the copyright in the architectural work than a scholarly article is protected by the copyright in the journal—the collective work—in which it appears. The individual feature should be judged on whether it has artistic merit that is "separable" from its utilitarian function, just as the individual scholarly article is judged on the originality of its own expression. And yet one wonders if courts will be able to keep this fine distinction always in their minds.

Must an architect be wary of too much success? What if a copyrighted feature becomes "standard" in the industry—does the statute intervene at that point to strip it of protection? Surely not, or we have stepped through the looking glass. Copyright exists to reward, not to punish, success.

Plots and Characters

In works that tell stories, copyright affords a broader coverage than one might think, primarily because more and more things that long ago were considered merely ideas have come to be regarded as expression. For example, the plot of a novel is covered by the novel's copyright, at least to the extent that it is original with the author. The courts have developed the ingenious theory that a plot is an "arrangement of ideas" and that an arrangement of ideas amounts, magically, to "expression."[40] From a philosophical or logical point of view, this is probably a falsehood, but nonetheless it is the law.

What about characters? Here again the law gives protection to what might at first seem to be an idea. Indeed similarity of characters is often the principal battleground when one author sues another for plagiarism. But there is one unusually perplexing problem with characters: who owns them? (You may as well resign yourself early to one of the facts of life of copyright law: no principle is fixed or firm, self-defining or self-limiting. If you are commonsensical, this will cause you frequent exasperation, but on the other hand common sense will also tend to get you out of the mazes into which pure logic leads.)

This problem of characters arose in a case involving *The Maltese Falcon*.[41] After selling the story to Warner Brothers, Dashiell Hammett wrote several more stories about his detective hero, Sam Spade. Warner Brothers took him to court, claiming that he had violated the terms of his contract of sale and that the character, Sam Spade, was their exclusive property.

It might have been enough for the court to construe the contract in Hammett's favor and to hold that he had not in fact sold Warner Brothers his rights in Sam Spade. The court did this, but it did not let the matter rest there. It went on to consider whether a character, as such, could even be copyrighted, and concluded that it could not, unless it constituted the story being told. (Emma in Jane Austen's novel might be an example of the latter case.) Its opinion was that characters like Sam Spade are a writer's stock-in-trade and that the activities or words of a character in a particular story are copyrightable but not the character as such. The court characterized an author's ownership of a character as property of a different sort—property that is protected by ordinary legal rules, not by copyright law.

This case has been nothing if not controversial. Commentators note that courts have often found (or

denied) infringement of literary works by comparing their characters, thus suggesting that characters are indeed covered by copyright. It may be, though, that these characters simply fit the formula of the Spade case, as the story (or elements of the story) being told. The character who stands apart from the story, however, has an ancient lineage. From Genji to Sherlock Holmes, the world's literature is rich with heroes (and with villains like Professor Moriarty) whose identity builds over the span of many tales. Can there be any doubt that if Conan Doyle were our contemporary he could sue someone who created a detective with Holmes's characteristics, even if the new detective had a different name? And yet the character of Holmes does not reside in any one of Conan Doyle's stories. Assignment of copyright in any one of them would certainly not assign the rights to Holmes the character.

In the practical world people need not agonize over this issue. Publishers and movie producers who want the rights to characters usually include them specifically in their contracts. And conversely people who wish to retain the rights to their characters should specify as much in their contracts.

Nonetheless, if the Sam Spade case is still good law, its implications are far-reaching. How long does this unusual property right in characters last? Does it vanish when the author dies, or can he bequeath it to his children? Can he bequeath it to someone who has no connection at all with his copyrights? Could Hammett, for example, have bequeathed his rights in Sam Spade to Lillian Hellman, and would Hammett's children and publishers then have been powerless to stop her from writing books about Sam Spade? (The court never faced these problems; I would not venture to guess how a court might decide them in the future.)

The final problem of this case is that it may mean that a sale by an author of his "property" in a character is not protected by the provision in the copyright law that permits an author to terminate (revoke) a transfer of copyright. I shall deal with termination at length in chapter 3; I raise the point now only to underscore the dangers presented.

I should add that most of these issues do not arise where cartoon or other visual characters are concerned. Mickey Mouse and his colleagues are clearly protected by copyright as works of visual art. Furthermore, such visual characters can be protected separately from the particular works in which they appear.[42]

Layout and Graphic Design

Protecting the layout of a magazine or similar work creates obvious risks: there are only so many ways that a page can be designed, after all. Nevertheless, some layouts are so distinctive in their "selection and arrangement" of graphic elements that it would be unfair not to protect them, at least against the most flagrant knockoffs. In this spirit, for example, the distinctive layout of the cover of *Reader's Digest* magazine was found copyrightable.[43]

Computer Programs

Many principles of copyright have been put to the test as courts struggle with questions concerning computer programs. Programs are eligible for copyright, but there is considerable confusion about what such a copyright protects or should protect.

One important doctrine is that a computer program is protected not only in source code form but in object code form as well. This is true even if the object code is embedded in the computer, as is the case with operating system software.[44] (Source code is the version of a program that is written in any of the so-called computer languages, using words, letters, numbers,

and symbols. The source code of a program is not intelligible to a layman, but can be easily read and understood by experts. Object code, on the other hand, is the machine-readable form of a program, whether on disk, or downloadable from the Internet, or in other form, and is intelligible for the most part only to the machine it is put into, not to humans. Operating system software is the set of instructions that governs the computer's thought processes, so to speak.) Though this doctrine is the cornerstone of practical copyright protection for software, it is by no means self-evident.

When the 1976 Copyright Act was nearing completion, Congress decided to duck this and several other technology-related issues that would have slowed or halted progress on the bill. Instead it appointed a commission—the National Commission on New Technological Uses of Copyrighted Works (CONTU)—to investigate these issues, including how copyright should protect computer programs. The Commission's report, released in 1978, was sharply divided on that question. Most Commission members felt that object code was merely a copy of the source code and should be protected by copyright. In a vigorous dissent, however, the novelist John Hersey and others protested that an object code, although it is an embodiment of the source code, functions solely as a part of the computer, is not intended to communicate to human beings, and should not be protected by copyright.[45] Thus the dispute centered on what the copyright law means when it defines a "copy" as "a material object in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." The majority of the Commission took the view that the object code of a program was a copy because, theoretically, the source code

could be printed out from it. The fact is, however, that that is not the purpose of object code, and indeed the last thing any program vendor wants is for his program to be deciphered; most try (however futilely) to encrypt or otherwise protect their object codes from being "read" and understood.

In my opinion the dissent held the higher ground, so far as logic is concerned. But logic was not the only force at work here; CONTU and later the courts acted, whether consciously or not, partly out of fear that not to extend copyright protection to object code would open the gates to the Japanese or Taiwanese invader. Many computer people will, if pressed, admit that copyright doesn't fit very well onto object code, but, they say, patent protection is expensive and time-consuming to obtain, and most programs have only a short commercial life.

The problem is that granting copyright protection to things like operating system software—to pick the most blatant example—in effect grants a long-term patentlike monopoly in the machine itself, without requiring the inventor to meet the standards of patentability. A better solution might have been to enact a special statute for software, combining elements of patent and copyright. So far the pace of "creative destruction" in the computer industry has been such that this super-patentlike protection has not had the negative effect it might have had on the economy—or if it has, the effect is difficult to measure.

Accepting, though, that copyright applies to software, we must somehow distinguish the "expression" in a program from the "idea." A program is fundamentally a series of instructions directing a computer to perform certain analytic or other functions. If the problem to be solved is a difficult one, writing the program requires great skill and creativity, and, we say at a gut

level, this effort deserves protection. But how do we protect those instructions without actually protecting the process they embody? In the precomputer age instructions for doing something, even something as arbitrary as playing a game, were narrowly limited in their copyrights.[46] CONTU considered this question and decided that for any given data-processing problem there were a great number of possible programming solutions. At a certain level of specificity, they said, the choice of computer instructions constitutes the "expression" of the general solution or algorithm, which in turn constitutes the idea.[47]

If this strikes you as disingenuous, I am inclined to agree. A process is no less a process just because it is set out in more detail or is chosen from a group of processes that have the same end result. CONTU's analysis likens a program to the plot of a novel, in which the arrangement of ideas can constitute expression. But the specifics of a plot are themselves a commentary on human life and as such constitute part of the novel's end result; it cannot be said that two plots, in their details, are merely two ways of getting from A to B, because the author's choice of details helps define and describe the world he is writing about. Furthermore, the novelist's choices—including both A and B—are arbitrary, dictated only by imagination. A computer programmer, on the other hand, cannot choose details at random but must always have his eye on B, and his skill is judged by how quickly and efficiently he gets there. ("Efficiently"—is that a word compatible with copyright?) Still the CONTU theory has some validity, if only because there is no clear alternative.

Some courts in their eagerness to wed copyright to software have overlooked the more cautionary parts of the liturgy. An early and controversial case was *Whelan Associates, Inc. v. Jaslow Dental Laboratories, Inc.*,[48] in

which it was held that the "overall structure" of a computer program could be protected by copyright. Addressing the idea-expression dichotomy, the court said that the "idea" concerned was the idea of running a dental laboratory by using a computer, thus implying that everything in the program more specific than that constituted copyrightable expression. But if copyright protects the "overall structure" of a program, is it not protecting the algorithm? Is it not protecting the process or method of the program, both of which are specifically excluded from copyright by statute?

Fortunately, later decisions have expressly rejected the teaching of *Whelan*. In a technically sophisticated and tightly reasoned opinion in the case of *Computer Associates International v. Altai, Inc.*,[49] the Second Circuit laid down principles for software copyright that have become the model throughout the country. Returning to a more traditional copyright analysis, and specifically citing *Baker v. Selden*, the court emphasized the need to draw the line between a program's idea and its expression so as not to prevent use of the processes embedded in the program. This, the court said, requires analyzing the various modules of a program and sifting out what is not copyrightable. It is in its analysis of what is not copyrightable that the *Altai* opinion gave its clearest and most desperately needed guidance. It reaffirmed that insofar as program structure is informed by concerns of "efficiency," the scope of expression is narrow and there is, in that narrow range, likely to be a merger of idea and expression, in which case the expression will not be protected. It thus reaffirmed what should have been obvious: that copyright must not protect program elements that are dictated by external factors, such as the demands of the task to be performed, or the compatibility requirements of other programs in conjunction with which a program is

intended to run. Finally, it warned against inadvertent protection of programming that is common coin in the software industry. Having sifted out all these unprotectable elements we are left, in the court's colorful phase, with the program's "golden nugget" of copyrightable expression. Significantly, the court did not attempt to define what that is, though we may presume it is the programmer's own creative and somewhat arbitrary way of accomplishing the task before him. That nugget, like the gold in a prospector's pan, can only be arrived at by reduction, not assumed or defined a priori.

The effect of *Altai* has been a general narrowing of the scope of copyright protection for computer code, as opposed (perhaps) to the screen displays that it may generate. For the broader promise of protection held out earlier by *Whelan*, one should look to patent. Some software developers already have. In fact, many in the software industry believe that the only really valuable part of a program is its algorithm—and for that, only patent will suffice. The Supreme Court has upheld the issuance of a patent where a computer program is the key part—indeed the only novel part—of a mechanical process.[50] Patents of this type are now granted without much controversy. Patent thus appears well suited to robotics, expert systems, and the like. Furthermore there appears to be a trend in the U.S. Patent Office toward granting patents to algorithms, even where there is little if any connection to patent's traditional realm of processes, devices, and machines. For example, a patent has been granted to the algorithm developed at Bell Labs that can be used for optimal routing of everything from telephone calls to airline flights.[51] But patents are time-consuming to obtain and may turn out to have a high mortality rate in the courts. For many applications only copyright is appropriate.

Some who secure patents for their programs also secure copyright. The apparent conflict can perhaps be resolved by saying that patent protects the algorithm and structure of the program, whereas copyright protects the program at a more specific level. Thus when the 17-year patent term ends, copyright would continue to protect the specific instruction sequences of the program.

Yet for many software producers neither patent nor copyright is optimal. In fact, anyone planning to distribute software by one-on-one licensing would do well to follow common industry practice and rely primarily on trade-secret protection. This involves placing tight restrictions on the uses that the customer can make of the software, prohibiting disclosure to persons other than the licensee and its key employees, and requiring return or destruction of the software if for any reason the license is terminated. If you are marketing your software over the counter, trade-secret protection is of course not appropriate. In such a case copyright will be the underpinning of your user agreement.

Another area of controversy in the application of copyright to software is the protection of the "look and feel" of a program. At issue is the user interface of a program, which consists primarily of the menus and other displays that appear on the screen and the order of keystrokes by which a user inputs and manipulates data.

Popular software begets imitation, and clever imitators can copy the user interface of a program without copying any underlying code. Such was the case with Lotus Development Corporation's popular spreadsheet program 1-2-3, which had become the industry standard for financial spreadsheet software. In 1990 Lotus won a suit against a leading "clone" producer.[52]

Screen displays and the underlying code are considered to be parts of one unitary work.[53] Courts will

nevertheless judge the copyrightability of screen displays separately from that of the code.[54] This means that a court may acknowledge copyright in the unitary work as a whole but still find that the screen display element is not copyrightable, just as it might find a novel to be copyrightable as a whole but deny copyright protection to various scenes or plot sequences. What sorts of screen displays, then, may be protected?

There can be little doubt that video game screens are copyrightable, provided they contain a minimal level of original expression. They are, in essence, animated cartoons. Even quite simple screen displays such as those in the popular computer game Tetris are protectable. As a court noted, there are "almost unlimited" options for the shape of the pieces, and their movement and rotation.[55]

But what about spreadsheet displays? Clone manufacturers argued that spreadsheets and accompanying menus, like the accounting sheets in *Baker v. Selden*, cannot be given copyright without granting a monopoly to Lotus in the financial planning techniques that the spreadsheets embody. The court disagreed, finding the screen displays to be copyrightable expression in most though not all respects.

A related issue raised in the Lotus and other look-and-feel cases is the copyrightability of the keystrokes required, menu structure, command hierarchy, and, in general, a program's user interface. The trial court had held that Lotus's copyright in its interface was valid. It found, moreover, that Borland International's Quattro Pro software, which copied none of Lotus's source code but was designed to be compatible with 1-2-3, using a so-called "Lotus Emulation Interface," infringed the copyright in 1-2-3 by copying such things as menu commands and macros.

The First Circuit reversed this finding on appeal. Contrary to most people's expectations, it did not engage in an "abstraction, filtration, comparison" analysis such as the Second Circuit (and many other circuits since) adopted for comparing one piece of software to another. It found that test not applicable to the fundamental question of whether a menu command hierarchy is copyrightable per se. Nor despite the urgings of Borland did it find *Baker v. Selden* especially helpful, although its analysis of that case strikes this observer as being rather oversimplified. Instead, the First Circuit found the menu command hierarchy at issue to be a mere "method of operation" and therefore ineligible for protection under the explicit wording of the Copyright Act, which denies copyright to any "method of operation."[56]

The Supreme Court, on appeal, was widely expected to use this case as a jumping-off point for a more far-reaching exploration of copyright as applied to computer software, as it had done for the "sweat of the brow" doctrine in *Feist Publications v. Rural Telephone Co.* But the smart money was disappointed, because one justice had to recuse himself and the remaining eight split down the middle. At the end of the day the First Circuit's decision was left undisturbed, but its value as precedent was seriously undermined because half of the Supreme Court evidently thought it was bad law and, for all anyone can tell, a 5–4 decision could well have gone against it.

Although the First Circuit got where it got by an uncharted route of its own making, its decision is sound. Granting copyright to the menu commands that a program user must employ to make the program run has always seemed overreaching. Certainly in past years, before this decision, it had a chilling effect on the development of products that could compete on

efficiency and price for the loyalty of customers who have an investment in existing data files and staff training.

Is look-and-feel copyright dead? Where software is concerned, perhaps so. But other, equally questionable (to my thinking) claims to copyright for some nebulous overall impression of a work remain undisturbed. The *Lotus* decision has proved controversial among copyright scholars, suggesting that outside the easy cases there is no consensus on where the boundaries of copyright should be drawn. Recently, however, a District Court in California denied copyright to the application programming interface (API) of Oracle's Java programming language. Being in the Ninth Circuit, the court did not rely on *Lotus v. Borland*, but it arrived in much the same place, finding that a "long hierarchy of over six thousand commands to carry out pre-assigned functions" was a "command structure" and hence an uncopyrightable "method of operation."[57] Oracle did not rely on a look-and-feel theory but asserted that the "structure, sequence and organization" of its API should be protected. The court did not reject "structure, sequence and organization" as a theoretical basis for copyright, but decreed that on the facts before it, to allow copyright would in effect grant Oracle a monopoly on the underlying "commands" or functions. This was a welcome reaffirmation of the limits of copyright in software. Also welcome was the court's statement that *Baker v. Selden*, while "aged," is "not passé."

Works Created with the Aid of Computers

Can a work created by applying a computer program to a database receive a copyright? A typical work of this sort might be a biblical concordance, created by feeding the Bible into a computer bank and then applying to it a program designed to locate and arrange word correspondences. Although no reported case has

yet raised the issue, there seems to be no reason why a work of this type should not be entitled to a copyright. Admittedly the computer is doing the bulk of the legwork, but this is only at the guidance of a human being. It is a tool, no matter how creative it may be. A certain degree of human will and intellectual labor is present in any computer product.[58]

As intellectual production of this type becomes more and more common, some unusual problems of ownership will emerge. I shall deal with these in greater detail in the next chapter.

Mask Works

By an amendment to the Copyright Act in 1984, Congress granted a truncated form of copyright protection to the masks, so called, that are used to create semiconductor chips.[59] It was felt that these masks, being essentially utilitarian works, would not receive protection without specific statutory language.

A mask lies somewhere between a design and a stencil, or perhaps more accurately it is both. In it the intricate circuitry of a semiconductor chip is cut, and through it laser light etches the circuitry design onto the chip's silicon. Because of their inherently utilitarian character, Congress has granted mask works a shorter term of protection and a narrower scope of rights than other works. And, interestingly, Congress has specifically authorized anyone to use the technology contained in a mask work, provided he obtains it by reverse engineering and does not merely copy the mask.[60]

Performances

Performances of works are not regarded as works themselves until they are fixed, on tape or film, as sound recordings or audiovisual works. They are therefore not protected by copyright law until that time. This does not mean that someone can film or

record a performance without the performer's permission. That used to be forbidden by state law, if at all. Now, for musical performances, it is forbidden by federal law as well.

Federal law grants limited protection to unfixed live musical performances. Section 1101 of the Copyright Act makes it illegal to fix the sounds and images of a live musical performance in any medium, or to make, transport, or sell copies of phonorecords that duplicate any fixation, unless authorized by the performer(s). It is also illegal to "transmit or otherwise communicate to the public," by cable, broadcast, or otherwise, any live musical performance without the performer's permission. The remedies for a violation of this law are the same as for copyright infringement, but there is no requirement that anything be registered (indeed, what is there to register?) in order for the aggrieved performer to sue or to obtain any of the special benefits that timely registration confers on a copyright plaintiff. (See chapter 5.)[61] Furthermore, if the offender has acted with a motive of financial gain, he is guilty of a criminal offense and may be both fined heavily and imprisoned for up to 10 years.[62]

The sweep of this law is hard to overstate. It prohibits unauthorized distribution in this country even if the unauthorized fixation occurred outside the United States, and even, apparently, if the fixation occurred in a non-GATT country. It has no cutoff date. As far as anyone can tell, the performer's right continues to be protected indefinitely; there is no "life-plus-70" or other fixed term. This raises an interesting Constitutional problems, for the U.S. Constitution says that copyright may last only for "limited times." When the statute was challenged on that ground, however, the Second Circuit decided that while Congress did not have power to enact such a law under the Copyright

Clause, it had that power under the Commerce Clause (which gives Congress broad power to regulate interstate and international commerce).[63] But whether defensible or not on Constitutional grounds, the absence of a cutoff date will someday lead to trouble unless corrected.

Furthermore, the statute can be read as preventing distribution of (for example) bootlegged CDs even if the unauthorized fixation occurred before the statute was enacted. Nor is the performer's right subject to any third-party right of "fair use." The statutory history suggests that the statute may not be enforced in such a way as to conflict with First Amendment rights of free speech, but this is a narrower and even less clear limitation than fair use. (See chapter 9.) In the case just noted, the Second Circuit sent the matter back down to the trial court to determine if there were First Amendment problems with the law, but for reasons unknown to this writer the case never went any further.

Note that every performer has the right described here, no matter how insignificant his or her contribution to the performance. Every performer in a band or orchestra must consent or the fixation or broadcast is unlawful. In contrast to a copyright license, a license to fix a performance cannot be granted by just one of the group of right holders; it must be granted by all.

Nothing in the statute appears to prevent a performer from delegating his right of consent, so presumably orchestras and bands will obtain from their members the necessary authority to act for everyone in the group. What is less clear is whether the right can be assigned outright. The statute does not say. For example, what happens to the right of consent after a performer has died? If someone then starts selling copies of a bootleg recording of one of her concerts, who can sue the bootlegger? Is this right of consent a personal

right, to be exercised only by a performer's family, or is it a commercial right that can be freely assigned? In contrast to copyright rights, the statute provides no rules or even guidelines for how the right can be transferred, and there is no registry where the right can be recorded. It is conceivable that the Copyright Office could record claims of ownership of this right, but its current procedures are not geared to do so and there are no implementing regulations in the offing. It is not even clear that the right survives the performer's death, although the failure to specify a cutoff date for the right probably implies, as I have said, that it does survive.

Another problem that the statute finesses is how "consent" is to be determined. There is no requirement that it be in writing. If the unauthorized fixation or transmission occurred in a foreign country with different legal customs as to what constitutes "consent," will U.S. courts defer to that law or judge the facts under American contract principles? There is no way to predict.

Just to make things more interesting, a treaty whose adoption is pending as this book goes to press would create a new set of economic and moral rights for performers of literary works, artistic works, and "expressions of folklore," including the right to prevent unauthorized fixation. The United States is a signatory to this Beijing Treaty on Audiovisual Performances, but of course the treaty must be ratified by Congress, and enabling legislation enacted, in order for these new rights to take effect. Since that process cannot be counted on to happen, and will be slow in any event, I will say no more about it in this edition.

Whether authorized fixation, when it occurs, will protect a performer's interpretation, voice, or style is a matter on which the courts have not agreed. In one case on the subject, Bette Midler was able to stop the

use of television commercials in which another singer imitated her voice and style.[64] But in general, performers seeking to protect these elements should look to the "right of publicity" laws of the various states.

Interviews

People who grant interviews generally assume that somehow they own the words they utter. The situation is much murkier than that.

The first case to explore this involved Ernest Hemingway and the book *Papa Hemingway*, written by A. E. Hotchner. Hemingway's heirs sued for common law copyright infringement (this was back in the 1960s) when Hotchner included in the book several conversations (not real interviews) with Hemingway. The court decided the case against the heirs, on the grounds that Hemingway's "words and conduct . . . left no doubt of his willingness to permit Hotchner to draw freely on their conversation in writing about him and to publish such material."

The court did, however, observe that to claim a copyright Hemingway would at the least have had to indicate clearly that he "intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication." This is a fairly high bar.[65]

Some more recent cases have denied common law copyright to statements made in interviews, on the highly questionable grounds that the speakers' words were merely general ideas or spontaneous utterances. Another suggested that a televised interview should be the property of the television staff, who created the video and audio record of the interview—which of course is true as to the recording, as a derivative work, but does not solve the problem of who owns the underlying content.[66] One case has, however, granted

copyright to persons who made their own fixation of the interviews they granted, even as those interviews were being fixed and broadcast by another party.[67]

And yet one wonders: would not the typical interview be the property of both parties? After all, a good interviewer contributes materially to the quality of an interview by the questions he or she chooses to put to the person being interviewed. A good interview—a dialogue—seems a perfect example of what is called a joint work, a concept I will discuss in the following chapter.

Vessel Hulls

Under pressure from industry, Congress in 1998 enacted statutory protection for the hull designs of yachts and ships. Contrary to good sense, and apparently for want of any better place to stick such protection, Congress inserted it into the Copyright Act, where it stands out in all its bizarre incongruity.

This is the first sort of industrial design protection the United States has ever enacted on the European model. European law has long protected the nonpatentable, noncopyrightable but original designs of ordinary commercial goods: a sleek new toaster, for example, or an aesthetically pleasing ball point pen would be given protection in most European countries for a decade or so against slavish copying. American industry has always resisted such doctrine. Whether vessel hull design protection will prove to have been the camel's nose in the tent, or will pass out of history unmourned, remains to be seen.

Essentially, the law protects vessel hull designs that are original and different from public domain designs in some significant way, and that are not staple, commonplace, or dictated solely by utilitarian function. To obtain it, one must apply for it within a year (or perhaps two years; the statute seems to

contradict itself) after the design is made public. It is not available to designs already publicly known as of the date the law went into effect in late 1998.

Because the entire subject is so far removed from true copyright, I will say nothing more about it here. Interested persons should refer to Chapter 13 of the Copyright Act.

National Origin

The United States will honor the copyright of any unpublished work, regardless of the nationality of its author. Its protection for published works is only marginally less broad. It will protect any published work if, on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to any copyright treaty to which the United States is a party, or is a stateless person. The protection of works of foreign governments is worth noting, particularly inasmuch as the United States does not grant copyright to any work of its own federal government.

U.S. law will also protect any work first published in the United States or in any foreign country that is party to a copyright treaty, or is first published by the United Nations or any of its specialized agencies, or by the Organization of American States.

Given the ambiguity of whether buildings are "published," it is worth noting that U.S. copyright also extends to any pictorial, graphic, or sculptural work incorporated in a building or structure, and to any architectural work embodied in a building, if the building or structure is located in the United States or in the territory of one of its treaty partners.

There is also a special rule for sound recordings. Any sound recording first fixed in a foreign country that is party to a copyright treaty with the United States

will be protected in the United States, regardless of whether it meets any of the other tests listed above. I should add that two of the copyright treaties in question are limited to sound recordings. If a country is party to one of these but not to any other copyright treaty, the protection extended to its works and those of its nationals, etc., is limited to sound recordings.

Finally, there is a provision for copyright to be extended to the works of a foreign country by Presidential proclamation. Given that most if not all countries now belong to one or more copyright treaties, this provision is no longer of much relevance.

In chapter 12, I discuss some of the interesting problems that arise in international copyright protection. What I have to say in the intervening chapters will be limited to U.S. law, and based on the assumption (largely but not wholly correct) that U.S. law will apply, within the borders of the United States, to any foreign work just as it applies to any native work.