First Principles: Things to Know

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Copyright Ownership

- § 201(a): Copyright in a work … vests initially in the author or authors of the work.
- § 201(b): In the case of a **work made for hire**, the employer or other person for whom the work was prepared is considered the author….

Works Made for Hire #1

- § 101: A "work made for hire" is—

(1) a work prepared by an **employee** within the scope of his or her employment;

Works Made for Hire #2

- § 101(2): a work specially ordered or commissioned for use **as** a contribution to a collective work, **as** a part of a motion picture or other audiovisual work, **as** a translation, **as** a supplementary work, **as** a compilation, **as** an instructional text, **as** a test, **as** answer material for a test, or **as** an atlas….

Works Made for Hire #3

1. a translation,
2. an instructional text,
3. a test,
4. answer material for a test,
5. an atlas,
6. a supplementary work,
7. a part of a motion picture or other audiovisual work,
8. a contribution to a collective work,
9. a compilation.

Covered Works

§ 102(a): Works of authorship include the following categories:

(1) **literary works**;

(2) **musical works**, including any accompanying words;

(3) **dramatic works**, including any accompanying music;

(4) **pantomimes and choreographic works**;

(5) **pictorial, graphic, and sculptural works**;

(6) motion pictures and other audiovisual works;

(7) **sound recordings**; and

(8) **architectural works**.

Works Made for Hire #4

a supplementary work

"supplementary work" is a work prepared for publication as a **secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work**, such as ***forewords***, ***afterwords***, ***pictorial illustrations***, ***maps***, ***charts***, ***tables***, ***editorial notes***, ***musical arrangements***, ***answer material for tests***, ***bibliographies***, ***appendixes***, and ***indexes*** ….

Works Made for Hire #5
Audiovisual Works

§ 102(a): Works of authorship include the following categories:

(1) **literary works**;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) **motion pictures and other audiovisual works**;

(7) sound recordings; and

(8) architectural works.

Works Made for Hire #6

a part of a motion picture or other audiovisual work

1. Software is a “literary work”
2. Database software?
3. Screen displays may be separately copyrighted as an “audiovisual work”

Works Made for Hire #7

a contribution to a “collective work”

A work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

Works Made for Hire #8

a compilation

A “compilation” is a work formed by the collection and assembling of preexisting materials … that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

Assignment?

"Company shall own all right, title, and interest, including all Intellectual Property Rights, in and to the Work."

"Contractor shall assign all right, title, and interest, including all Intellectual Property Rights, in and to the Work."

Assignment

"Contractor **hereby transfers and assigns** all right, title, and interest, including all Intellectual Property Rights, in and to the Work."

Copyright: Derivative Work

§ 103(b): The copyright in a … derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work….

Copyright: Idea/Expression

§102(a): Copyright protection subsists … in … works … fixed in any tangible medium of expression….

§102(b): In no case does copyright protection … extend to any idea, procedure, process, system, method of operation, concept, principal, or discovery….

Contractor Use Rights

If software is licensed to a company, can a contractor of the company use the software?

MAI Systems v. Peak Computer

Who is an Employee?

Supreme Court: CCNV v. Reid

Federal common law test

Drafting License Language

If you don’t know the technology, you will (eventually) make mistakes in license language.

License Metrics

Only limited by business realities and imagination

Examples of License Metrics:

- Environment
- Instance
- Hub
- CPU
- CPU Cores
- Data Domains (Field types)
- Database engine type input
- Database engine type output
- # records in master database
- Copy
- Named Users
- Role of user
- Country of operation
- Country of data
- Disaster Recovery
- Testing, Development, QA, Break Fix
- Type of functionality used
- Type of business software is used for

Backups

§117(a): [I]t is not an infringement for the owner of a copy of a computer program to make … another copy … of that computer program provided:

(2) that such new copy … is for archival purposes only ….

That and Which

The firm's Atlanta office, which has unisex bathrooms, is in Buckhead.

The firm's Atlanta office that has unisex bathrooms is in Buckhead.

Condition v. Covenant

Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008)

Redundancies

indemnify and hold harmless

Copyright: Fair Use

[T]he fair use of a copyrighted work … for purposes such as criticism, comment, news reporting, teaching…, scholarship, or research, is not an infringement of copyright….

Copyright: Fair Use Factors

- the **purpose and character of the use**, including whether such use is of a **commercial** nature…;
- the **nature of the copyrighted work**;
- the **amount and substantiality of the portion used** in relation to the copyrighted work as a whole; and
- the **effect of the use upon the potential market** for or value of the copyrighted work.

Commercial Use?

Sony Corp. v. Universal City Studios

"[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."

Fair Use Judicial Scorecard

Case	Affirmed?	Reversed?
Sony Dist.Ct.		✖
Sony Ct. App.		✖
Harper Dist.Ct.		✖
Harper Ct. App.		✖
Campbell Dist.Ct.		✖
Campbell Ct. App.		✖
Google Dist.Ct.		✖
Google Ct. App.		✖
Score	**0**	**8**

Trade Secrets

- Information
- Valuable because not known
- Reasonable precautions to protect confidentiality

Protects against misappropriation

Confidential Information

- Contract construct
- Restrictive covenant

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