§ 197:229. Executive summary for clients regarding US copyright law and practice

Client Executive Summary on U.S. Copyright Law and Practice

§ 1. Introduction

Copyright protection is available to authors and creators of original literary, dramatic, musical, artistic, and other intellectual works (e.g., books, plays, musical works, artworks, motion pictures and sound recordings). The owner of a copyright has the right, for a specified period of time, to exclude others from reprinting, publishing, distributing, copying, publicly performing, or publicly displaying the work, and from preparing derivative works based on the copyrighted work. A copyright does not, however, prevent others from using any of the knowledge set forth in the work to make, use, or sell the idea or invention. Copyright protection does not extend to any idea, procedure, process, system, method or operation, concept, principle, or discovery. Any violations of the exclusive rights of the copyright owner are referred to as infringement or piracy.

Copyright protection is available in most countries around the world and, in fact, is the subject of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), which was established in 1886 and is administered by the World Intellectual Property Organization, a specialized agency of the United Nations. The Berne Convention is fundamentally based on the concept of "national treatment," and is intended to ensure that all authors of works published in Member States are treated in the same way as nationals would be under the national laws of the Member State with respect to the grant of copyright protection. While the Berne Convention does not purport to regulate all of the standards for copyright protection that might be imposed within a Member State, it does require that members adhere to certain minimum requirements in formulating their own national copyright laws. It should be noted, however, that there are material substantive variations among national copyright laws and authors must be mindful of whether or not their particular type of work is covered by the copyright laws of a specific country and must carefully consider the scope of the exclusive rights granted to copyright owners in that country. Apart from the language of the copyright law, significant tensions exist among countries with regard to perceived deficiencies in the enforcement of the rights of copyright owners to prevent infringement.

When developing a copyright registration and protection program, attention should be paid to the laws and enforcement histories of all countries in which the work will be made commercially available. However, for illustrative purposes, the discussion that follows focuses specifically on the legal framework in the United States, where the law of copyrights is implemented at the federal level through the Copyright Act of 1976 ("Copyright Act"). The responsibility for administering the Copyright Act lies with the United States Copyright Office ("Copyright Office"). Copyright protection is available to both published and unpublished works. Copyright protection is also used to protect computer software programs. The Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others:

- to reproduce the copyrighted work in copies or phonorecords;

- to prepare derivative works based upon the copyrighted work;

- to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

- to perform the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes and motion pictures, and other audiovisual works;

- to display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and

- in the case of sound recordings, to perform the work publicly by means of a digital audio transmission.

It is illegal for anyone to violate any of the rights provided by the Copyright Act to the owner of a copyright. The rights of the copyright owner extend for the term fixed by statute. Like any other form of property, a copyright may be transferred or assigned.

The Copyright Act provides federal copyright protection for works fixed in a tangible medium of expression, regardless of whether the work is published; however, common law copyright protection is available for works that have not been fixed in tangible form and a cause of action for infringement for such works can be brought in state court.

The provisions of the Copyright Act conform to the requirements of the Berne Convention, which has also been adopted by many other industrialized countries. Copyright owners interested in exploiting and protecting their copyrights outside of the United States should be mindful of other international agreements such as the Universal Copyright Convention, the Geneva Phonograms Convention, the World Trade Organization agreement, and the WIPO Copyright Treaty.

§ 2. Protectable works

Section 102(a) of the Copyright Act makes copyright protection available to "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." As such, in order for copyright protection to be available for a given item, it must be a "work of authorship," be original, and be fixed in a tangible medium of expression.

§ 3. —Work of authorship

For purposes of copyright protection under the Copyright Act, a "work of authorship" includes literary works; musical works, including the accompanying words; dramatic works, including the accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. The list is described as "illustrative and not limitative … and do[es] not necessarily exhaust the scope of 'original works of authorship' … ." Copyright protection also extends to compilations and derivative works.

The Copyright Act does not define all of the eight categories of works because some of them have fairly settled meanings. For example, there is little confusion about the meaning of "musical works," "dramatic works," and "pantomimes and choreographic works." It is unnecessary to distinguish between electronic or concrete music in the statute since the form of

the work really has no importance. However, the terms "literary works," "pictorial, graphic, and sculptural works," "motion pictures and audiovisual works," and "sound recordings" require definitions because their meaning is not as clear as the other types of works. For example, the definition of "pictorial, graphic, and sculptural works" carries with it no requirement of artistic taste, aesthetic value, or intrinsic quality. The term includes not only works of "art," in the traditional sense of works shown in a museum or gallery, but also works of graphic art and illustration, art reproductions, plans, and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works. These works can be used in business and advertising or as "applied art" in the design of a product.

Interpretation and redefinition of the traditional categories of protectable works is often required by development of new technologies. For example, the Copyright Act was amended in 1995 in anticipation of developing technologies that would facilitate the distribution of sound recording through digital transmissions. At that time, Congress passed the Digital Performance Rights in Sound Recordings Act of 1995 ("DPRA"). Among other things, the DPRA recognized a copyright owner's exclusive rights to control the performance of sound recordings, although the scope of these "digital performance rights" was strictly limited and compulsory licensing requirements applied in several situations.

The Copyright Act lays out a very important and specific exception to copyright protection. Notably, copyright protection does not extend to any "idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." However, copyright protection is granted to the "expression of ideas," **and making** this distinction can be difficult, especially if the idea and its expression "merge" **and you** cannot separate the idea from its expression. In that situation, four factors will be considered to determine if copyright protection is available: expression of an idea is copyrightable only if the expression is original; even though the work is original, it will not be copyrightable if the expression of the idea merely embodies the elements of the idea that are functional; an expression that is obvious is inseparable from the idea itself, which means that by providing protection, the idea, as opposed to its expression, would be protected; and if a particular expression is one of a limited number of possible ways of expressing an idea, then the expression "merges" with the idea and the work is not copyrightable. These factors have proven difficult to apply in many cases, particularly when dealing with computer software. However, it is now fairly clear that copyright protection will be available if the expression of an idea is original and substantial and has elements that go beyond all of the functional elements of the idea itself, and beyond the obvious, and if there are numerous other ways of expressing the noncopyrightable idea.

§ 4. —Originality requirement

In order to qualify for copyright protection under the Copyright Act, a work must be "original." The requirement of originality has a low threshold and does not require novelty, utility, ingenuity, or aesthetic merit. What is required is that the work be the author's own product and not be the result of copying the work of others. Although an author may consult existing works in preparing the new work, the author must contribute more than a merely trivial variation to an existing work in order for the originality requirement to be satisfied. Categories of materials that are generally not eligible for statutory copyright protection because they do not meet the standard of originality include: (a) words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents; (b) ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing; (c) blank forms, such as time cards, graph paper, account books, report forms, order forms, and the like, which are designed for recording information and which do not in themselves convey information; (d) works consisting entirely of information that is common property containing no original authorship, such as, for example, standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources; and (e) typefaces as typefaces.

The issue of originality arises frequently in cases involving compilations of factual information. The difficulty in these cases is that facts alone are not copyrightable, but compilations (the way in which the facts are selected and arranged) are copyrightable. Someone who discovers a fact is not its "maker" or "originator." The person who has found and reported a particular fact has not created that fact. Therefore, facts themselves are not copyrightable. However, factual compilations may be original if the author chooses the facts to include in the compilation, the order of their placement, and how the facts are arranged to make the compilation user-friendly. In such cases, selection and arrangement of facts may be copyrightable provided that there is evidence that the activities entail a modicum of creativity.

§ 5. —Tangible medium of expression requirement

Copyright protection under the Copyright Act is available only when the work is fixed in a tangible medium of expression. This means that there must be some physical embodiment of the work. In order for a work to be fixed, it must be in a form that is permanent or stable enough to permit it to be perceived, reproduced, or otherwise communicated for more than just a transitory period of duration. Novels in manuscript form, phonograph records, and compact discs all meet the requirement of being "fixed." However, a live recital or show that was not taped or filmed could not be copyrighted due to the lack of any permanent tangible embodiment of the performance.

§ 6. Ownership of copyrights

The ownership of the copyright in a work initially belongs to the author or authors of the work. As a general rule, the author of a work is the actual creator; however, in the case of any "work made for hire," the employer or other person for whom the work was prepared will be considered to be the author and, as such, will be the owner of the copyright relating to the work, unless the parties have expressly agreed in writing to the contrary. When there is more than a single author of the work, each of the authors will be considered to be the co-owner of the work, unless there is an agreement to the contrary.

The "work-made-for-hire" provisions are set out in § 101 of the Copyright Act, which contains a two-prong definition of a "work made for hire":

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

(2) A work specially ordered or commissioned for use:

(a) as a contribution to a collective work,

(b) as a part of a motion picture or other audiovisual work,

(c) as a translation,

(d) as a supplementary work,

(e) as a compilation,

(f) as an instructional text,

(g) as a test,

(h) as answer material for a test, or

(i) as an atlas,

if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

The definitions section in the Copyright Act elaborates on several of the nine categories listed above. Generally, ***audiovisual works*** are intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment,

together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes. ***Collective works*** include such things as periodical issues, anthologies, or encyclopedias, where various independent contributions are assembled into a collective whole. ***Compilations*** include the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. Collective works are also compilations. ***Motion pictures*** are audiovisual works that impart an impression of motion, together with accompanying sounds, if any. ***Supplementary works*** are secondary adjuncts to works by another author including forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendices, and indices. Finally, an ***instructional text*** is a literary, pictorial, or graphic work prepared for publication to be used in systematic instructional activities.

Application of Section 101 of the Copyright Act means that if the work was prepared by an employee within the scope of employment or falls within the criteria enumerated in item (2) of Section 101, including the requirement that the parties enter into a written agreement on the matter, then the work will be owned by the employer or other person for whom the work was first prepared. This result may, of course, be modified if the parties agree in writing to the contrary. Since many works that may qualify for copyright protection do not fall under any of the categories listed in item (2) of Section 101 of the Copyright Act, the issue of whether an employer has an automatic right to ownership of works created during the course of an employment or independent contractor relationship is resolved by determining the extent to which the creator is considered an "employee," so that Section 101(1) of the Copyright Act would operate to make the work a "work made for hire."

The U.S. Supreme Court has addressed the issue of defining the meaning of the term "employee" for purposes of § 101(1) of the Copyright Act. The Supreme Court concluded that the statute was intended to describe the conventional "master-servant" type of relationship recognized under agency law when the term "employee" was chosen. The Supreme Court then went on to set out a number of factors that are relevant in determining whether a person was involved in the requisite type of relationship:

- the hiring party's right to control the manner and means by which the product is accomplished;
- the skill required;
- the sources of instrumentalities and tools;
- the location of the work;
- the duration of the relationship between the parties;
- whether the hiring party may assign other projects to the third party;
- the hiring party's discretion over when and how long the hired party should work;
- the method of payment, the provision of employee benefits, and the tax treatment of the hired employee;
- the hired party's role in hiring and paying assistants; and
- whether the hiring party is in business, and whether the work is part of the regular business of that party.

Generally, the closer an employment relationship comes to regular, salaried employment, the more likely it is that a work created within the scope of that employment would be a work made for hire. Examples of works for hire deemed to have been created within an employment relationship include a software program created by a staff programmer for a computer company; a newspaper article written by a staff journalist for publication in a daily newspaper; a musical arrangement written

for a music company by a salaried arranger on its staff; and a sound recording created by the staff engineers of a record company.

As changes in the labor market have blurred the distinction between employment and independent contractor status, it has become essential for any party who commissions another to create a copyrightable work to obtain a written agreement assigning ownership of the work to the person who commissioned the work, rather than relying upon the application of the "work-made-for-hire" doctrine. In fact, it is now considered to be standard practice to have employees execute written assignments at the commencement of their employment in order to eliminate any form of controversy as to whether works created by the employee actually fell within the "scope" of his or her employment. Such agreements should also contain clauses obligating the signatory to execute confirmatory assignment documents with respect to specific works of authorship.

Of course, written assignments should also be mandatory in situations involving works created by independent contractors and consultants, and the assignment should be signed ***before*** the party begins the work. For example, written agreements should be obtained in advance from computer consultants commissioned to develop a new software program. Such persons are not likely to be deemed employees under the common law agency rules generally applied in the "work-made-for-hire" analysis. Moreover, while some programs prepared by independent consultants might fall into one of the enumerated categories of works that qualify as "made for hire" outside the employment relationship (*e.g.,* a "translation" from one computer language to another or a "supplementary work" such as an "add-in" program that works with another program), many computer programs will not meet those tests. In addition, if the work to be created by the independent contractor or consultant is expected to have a lengthy useful life, advice should be obtained regarding the potential effects of the so-called termination rights described below with respect to the assignment that are vested in the contractor/consultant as a matter of law.

§ 7. Creation of copyright rights

For works created on or after January 1, 1978, federal copyright protection begins at the time that the work is created or fixed in tangible form. Copyright is secured automatically when the work is created, and a work is created when it is fixed in a copy or phonorecord for the first time. If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date. Copies are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm. Phonorecords are material objects embodying fixations of sounds (excluding, by statutory definition, motion picture soundtracks), such as cassette tapes, CDs, or LPs. Thus, for example, a song (the "work") can be fixed in sheet music ("copies") or in phonograph disks ("phonorecord"), or both. Prior to January 1, 1978, works eligible for copyright protection were protected under common law prior to publication or registration as unpublished works and were protected by statute from the time that either the work was first published with a copyright notice or when an unpublished work was registered with the Copyright Office.

Currently, published works are eligible for protection in the United States if any one of the following conditions is satisfied: (1) 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 a copyright treaty to which the United States is also a party, or is a stateless person wherever that person may be domiciled; (2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention; or the work comes within the scope of a presidential proclamation; or (3) the work is first published on or after March 1, 1989, in a foreign nation that on the date of first publication, is a party to the Berne Convention; or the work, first published on or after March 1, 1989, is a pictorial, graphic, or sculptural work that is incorporated in a permanent structure located in the United States; or, if the work, first published on or after March 1, 1989, is a published audiovisual work, all the authors are legal entities with headquarters in the United States.

While copyright protection begins at the time that the work is created or fixed in tangible form, formal registration is recommended to enhance the rights of the owner. Copyright registration requires the completion and filing of a registration form with the Copyright Office and the deposit of the work to be registered with the Copyright Office. The work is made available for public inspection at both the Copyright Office and the Library of Congress. Formal registration occurs only upon a determination by examiners at the Copyright Office that the work qualifies for registration and that the application has been completed in the proper manner. Registration may be made at any time within the life of the copyright.

Even though registration is not generally a requirement for copyright protection, the copyright law provides several inducements or advantages to encourage copyright owners to make registration.

• Registration establishes a public record of the copyright claim and thus will cut off certain defenses that might be available to "innocent infringers."

• Before an infringement suit may be filed in court, registration is necessary for works of United States origin and for foreign works not originating in a country which is a party to the Berne Convention, which is the major international treaty relating to harmonization of global copyright laws.

• Registration is a condition to the recordation of a transfer with respect to a work.

• If made before or within five years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate. The defendant then bears the burden of proving the invalidity of the copyright.

• If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.

• Copyright registration allows the owner of the copyright to record the registration with the United States Customs Service for protection against the importation of infringing copies, a process described in more detail below.

§ 8. Copyright notices

There is no longer any requirement that copyright notices be placed on copies of these works in order for copyright protection to be available; however, it is still recommended that copyright notices, which identify the owner of the copyright and the date of publication (e.g., © *[year of publication] [name of author]*), be used as a means of deterring potential infringers. To avoid an inadvertent publication without notice, the author or other owner of copyright in an unpublished work may wish to place the following notice on any copies that leave the owner's control (e.g., Unpublished work © *[year of creation] [name of author]*). Use of notices will also prevent an alleged infringer from using an "innocent infringement" defense to an infringement claim. Firms publishing copyrighted works on the Internet should also consider one of the copyright management tools that are now available to uncover and track unauthorized copying of content posted in cyberspace.

The "C in a circle" notice is used only on "visually perceptible" copies. Certain kinds of works, for example, musical, dramatic, and literary works, may be fixed not in "copies" but by means of sound in an audio recording. Since audio recordings such as audio tapes and phonograph disks are "phonorecords" and not "copies," the "C in a circle" notice is not used to indicate protection of the underlying musical, dramatic, or literary work that is recorded. Instead, the copyright notice for phonorecords embodying a sound recording should contain the following three elements appearing together on the phonorecord: (1) *the symbol*? (the letter P in a circle); (2) *the year of first publication* of the sound recording; and (3) *the name of the owner of copyright* in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. The copyright notice should be placed on copies or phonorecords in such a way that it gives reasonable notice of the claim of copyright. The notice should be permanently legible to an ordinary user of the work under normal conditions of use and should not be concealed from view upon reasonable examination.

Further information on affixing copyright notices is included in Copyright Office Circular No. 3, Copyright Notice.

§ 9. Fundamental rights of the copyright owner

Under the Copyright Act, the owner of a copyright has the exclusive right to:

- Reproduce the copyrighted work in copies or phonorecords;
- Prepare derivative works based upon the copyrighted work;
- Distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- Perform the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes and motion pictures, and audiovisual works;
- Display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including individual images of a motion picture or other audiovisual work; and
- Perform sound recordings publicly by means of a digital audio transmission.

Works of "visual art," defined to include one-of-a-kind works such as paintings, drawings, prints, exhibition-only photographs, and single or limited-edition sculptures, also carry limited moral rights of attribution and integrity in favor of the artist only. These rights provide the author with the right to prevent the use of his or her name as the author of any work that he or she did not create, or that has been distorted, mutilated, or otherwise modified so as to prejudice the author's honor or reputation. In addition, the author can prevent intentional distortion, mutilation, or other modification of their work that would be prejudicial to his or her honor or reputation, and prevent the destruction of a work of recognized stature.

The exclusive rights of a copyright owner are cumulative and generally overlap in many cases. The rights may be subdivided in any manner deemed appropriate by the owner and, in turn, each of these subdivided rights can be owned, sold, licensed, and separately enforced. It should be noted, however, that the exclusive rights of the copyright owner enumerated above may in some instances be subject to various statutory and judicial limitations such as the following:

- the doctrine of "fair use;"
- the limited rights to reproduce copyrighted works granted to libraries and archives;
- the "first sale" doctrine, which allows the owner of a copy lawfully made to sell or otherwise dispose of the copy without the copyright owner's authorization;
- the rights of nonprofit educational, religious and governmental persons to perform, display and/or transmit copyright works under certain circumstances;
- the limited rights of certain commercial establishments—a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services—to play radio or television broadcasts of nondramatic musical works on a "homestyle receiving apparatus";
- the rights of a hotel, apartment or similar establishment to relay signals transmitted by a broadcast station licensed by the FCC within the local service area of the station where no direct charge is made to see or hear the secondary transmission;
- the exception to the exclusive rights to reproduce a pictorial, graphic, or sculptural work that allows making, distributing,

or displaying of pictures or photographs of useful articles in which the work is reproduced so long as the pictures or photographs are used in connection with advertising, commentaries, or news reports; and

• with respect to a copyright owner's rights in architectural works, the right of others to make, distribute, or publicly display pictures, paintings, photographs, or other pictorial representations of the work if the building or other work is located in or is ordinarily visible from a public place.

The exclusive rights of a copyright owner may also be subject to one of the compulsory licenses provided for in the Copyright Act for the following uses: (1) secondary transmissions of cable television systems; (2) making and distributing recordings of nondramatic musical works; secondary transmissions made by satellite carrier to the public for private home viewing; and (4) noncommercial educational broadcasting.

§ 10. Moral rights of the copyright holders

The concept of "moral rights" provides an author of a work (including a written work, a film, or other artistic work) certain protections that go beyond those established under traditional copyright laws. Moral rights originated under French law, and the theory is that a work encompasses the personality of the author, that it is part of the author's character. Moral rights are provided for specifically under the Berne Convention. One of these moral rights is the right to proper attribution for an author's work, which means that the author has the right to have a proper byline or credit line for a work. In addition, moral rights encompass the right of integrity, or the right to object to improper or derogatory treatment of a particular work. Moral rights also allow a creator to object to his or her name being used in association with a work when that individual did not create the work. Moral rights survive even after a particular work is assigned, sold, or transferred under the theory that personality is not something that is transferable.

Moral rights are recognized in many foreign countries and the European Union, but there is considerable debate whether they exist under United States law. It appears that United States law focuses on the economic value of a particular work rather than such personal rights. While some states have enacted legislation protecting moral rights, Congress has failed to enact such specific legislation, with the exception of the Visual Artists Rights Act, which provides a limited set of moral rights to the author of a "work of visual art" which is narrowly defined to include "a painting, drawing, print, or sculpture" or "a still photographic image produced for exhibition purposes only" which exists in a single copy or a very limited edition. Most courts in the United States have not embraced the theory of moral rights.

§ 11. Transfers of copyright ownership

Copyright ownership may be transferred; however, such a transfer is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner or his or her agent. A transfer of ownership includes an exclusive license, including those limited in time or place of effect, as well as the grant of a lien on a copyright. Copyright transfers should be recorded in the Copyright Office in order to permit the transferee to secure certain priority rights with respect to any subsequent transferees, although the priority rights will be available only if (i) the recorded document specifically identifies the work to which it pertains, so that, after indexing by the Copyright Office, it would be revealed by a reasonable search of the records of the Office; and (ii) the copyright in the work has been registered with the Copyright Office.

Whenever the author of a work assigns or licenses the work, recognition must be taken of the "termination rights" granted to the author or his or her statutory successors by statute. Specifically, under § 203 of the Copyright Act, which applies to any work that is not a "work made for hire," the exclusive or nonexclusive assignment or license of a copyright or any right under a copyright is subject to termination by the author or his or her statutory successors within a five-year window which begins thirty-five years after the date of the assignment or license or, in the case of an assignment or license covering rights of publication, thirty-five years from the date of publication, or forty years from the date of execution of the grant, whichever is earlier. In the case where the assignment or license was originally executed by two or more authors of a joint work, termination may be effected by a majority of the authors who executed it.

§ 12. Duration of copyright protection

Copyright protection expires after a fixed term. The term depends on several factors, particularly the date on which a work was created. The Copyright Term Extension Act, which became effective on October 27, 1998, extends the duration of a copyright in a work created on or after January 1, 1978, to the life of the author plus 70 (formerly 50) years after the author's death. A work that is created (fixed in tangible form for the first time) on or after January 1, 1978, is automatically protected from the moment of its creation. In the case of "a joint work prepared by two or more authors who did not work for hire," the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright is 95 years from publication or 120 years from creation, whichever is shorter.

Works originally created before January 1, 1978, but not published or registered by that date, have been automatically brought under the statute and are now given federal copyright protection. The duration of copyright in these works will generally be computed in the same way as for works created on or after January 1, 1978—the life-plus-70 or 95/120-year terms will apply to them as well. The law provides that in no case will the term of copyright for works in this category expire before December 31, 2002, and for works published on or before December 31, 2002, the term of copyright will not expire before December 31, 2047.

For works originally created and published or registered before January 1, 1978, under the law in effect before 1978, copyright was secured either on the date a work was published with a copyright notice or on the date of registration if the work was registered in unpublished form. In either case, the copyright endured for a first term of 28 years from the date it was secured. During the last (28) year of the first term, the copyright was eligible for renewal. The Copyright Act of 1976 extended the renewal term from 28 to 47 years for copyrights that were subsisting on January 1, 1978, or for pre-1978 copyrights restored under the Uruguay Round Agreements Act, making these works eligible for a total term of protection of 75 years.

§ 13. Infringement of copyright rights

Section 501 of the Copyright Act provides that "[a]nyone who violates any of the exclusive rights of the copyright owner … is an infringer of the copyright." Assuming that the unauthorized use of the copyrighted work is not permitted under the doctrine of "fair use," a copyright owner is entitled to actual or statutory damages with respect to the infringement, as well as to injunctive relief in appropriate circumstances. In addition, under the judicial doctrine of "contributory infringement," anyone who knowingly induces, causes, or materially contributes to an infringement is an infringer. The Copyright Act also provides for criminal penalties for willful infringement of copyright rights for the purpose of commercial advantage or private financial gain, for fraudulent placement or removal of a copyright notice, and for false representation of a material fact in an application for copyright registration under the Copyright Act.

Proof of copyright infringement requires that the plaintiff prove ownership of the copyright and that the copyrighted work has been copied. In turn, proof of copying is usually provided by circumstantial evidence, including evidence that the defendant had access to the copyrighted material, and by demonstrating that the copyrighted work and the work of the defendant are "substantially similar." Proof of access may be unnecessary if there is such "striking similarity" as to preclude the possibility that the defendant independently arrived at the same result. Substantial similarity does not require that the works be identical; however, it must be shown that the similarities are more than trivial.

One of the most common defenses to a copyright infringement action is that the defendant's use of the copyrighted work falls within the equitable doctrine of "fair use," which allows persons other than the actual copyright owner to use the protected work in a reasonable manner without the authorization of the owner. Fair use was recognized at common law and has been codified in § 107 of the Copyright Act, which provides the following:

Notwithstanding the provisions of § 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include: (1)

the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

A trier of fact examining an alleged infringement under the provisions of § 107 must take into account the four factors enumerated in the statute and such other circumstances as may be relevant.

§ 14. Avoidance of third party infringement claims

In addition to the procedures that it may establish to perfect and maintain its rights in copyrighted materials, a company must take appropriate precautions to insure that it does not infringe the legal rights of third parties when creating a new work. Particular attention needs to be paid to the development process when the company is aware of the existence of similar works or products. For example, someone needs to determine whether any preexisting copyright materials are incorporated into the new work. The inquiry in this area begins by identifying all the parties that may have contributed in any manner to the creation of the work. Then, such parties should provide evidence that all required third party consents to use preexisting materials have been obtained. Another issue to consider is whether the work was created with reference to an earlier work. If so, there is a risk that the new work might be deemed to be "substantially similar" to the preexisting work. If the work is already completed, a careful comparison must be made of the new and prior works. If development of a new work has not begun, clean room procedures should be used to avoid intentional or inadvertent copying. Consideration should also be given to the possibility that the doctrine of "fair use" can be relied upon to permit reproduction and use of a copyrighted work without the permission of the copyright owner.

§ 15. Recordation of copyrights with U.S. Customs and Border Protection

In addition to registering trademarks and copyrights with the PTO and Copyright Office, respectively, intellectual property owners can obtain further protection and support with respect to infringing importations by recording their rights with U.S. Customs and Border Protection ("CBP"). "Recordation" refers to the process by which CBP collects information from an intellectual property owner about specific registered trademarks, copyrights, or trade names, and then enters that information into an electronic database accessible by CBP officers across the country. CBP uses this recordation information to actively monitor shipments and prevent the importation or exportation of infringing goods. For example, the CBP has the authority to seize infringing or counterfeit merchandise at ports of entry and may issue monetary fines against anyone who facilitates an attempt to import and introduce counterfeited merchandise into the U.S. The CBP may also provide information to the U.S. Attorney's Office regarding seized goods and request that criminal proceedings be launched against any involved illegal activity under the Trademark Counterfeiting Act of 1984. In addition, the CBP will assist trademark or copyright owners in taking further legal action against infringers by providing them with information, if known, regarding the seizure, such as a description of the merchandise, the quantity involved, the name and address of the manufacturer, and the name and address of the importer, and samples of the suspected infringing merchandise. Finally, the CBP, working with foreign law enforcement agencies, can coordinate and participate in raids of counterfeit production facilities located outside of the U.S. and provide information to local authorities to assist them in launching criminal prosecutions of foreign manufacturers engaged in exporting counterfeit items to the U.S. In fact, it may be possible to record trademarks with foreign customs officials to obtain protection under their seizure rules and procedures.

§ 16. Additional issues and considerations

Companies involved in the development of semiconductor chips and related products should be mindful of Chapter 9 of the Copyright Act, titled "Protection of Semiconductor Chip Products," which provides protection for original mask works fixed in a semiconductor chip product by, or under the authority of, the owner of the mask work, which have either been registered or commercially exploited anywhere in the world. In addition, while amendments to the Copyright Act adopted in 1980 made it clear that computer programs were eligible for protection under the copyright laws, and that protection was available regardless of the form in which the program existed, the courts have encountered difficulties in sorting out which aspects of specific computer programs are copyrightable. Finally, the popularity of the Internet as a publication medium has created

serious issues regarding potential copyright infringement. For example, common Internet activities such as linking and framing may, depending on the circumstances, constitute copyright infringement, and whether the current version of the Copyright Act is adequate for issues that might arise in the online environment is still an open question.