"INTELLECTUAL PROPERTY" (IP)*

U.S. Constitution, Article I, Section 8, clause 8: Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Recall: 


(2) Madison's assumption of the coincidence of private economic interest and public interest in knowledge and inventions expressed in Federalist #43

English Origins of U.S. IP and Copyrights

- the Crown
- Statute of Anne
- common law copyright – there is disagreement whether there was indeed common law copyright; many commentators contend that what we sometimes regard as common law copyright was, in fact, a protected privacy interest

U.S. major laws -- 1790, 1831, 1870, 1909, and 1976, plus the Digital Millennium Copyright Act (DMCA) of 1998

There have also been twelve extensions of the term of copyright, including retroactive extensions (i.e., extensions of the copyrights of already created works), in the past few decades.

1976 Copyright Act (PL 94-553)

17 USC § 102 - Subject matter of copyright: In general

(a) "original works of authorship fixed in tangible medium of expression . . . . 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.
(b) In no case does copyright protection for an original work of authorship 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."

* “Intellectual property” is a recent and contentious locution. I will ordinarily put the term in quotation marks to indicate the fundamental disagreement that characterizes it.

Five (+ 1) exclusive rights that copyright holders have:

1. to reproduce and to exclude others from reproducing
2. to derive and to exclude . . .
3. to distribute copies and to exclude . . .
4. to perform publicly and to exclude . . .
5. to display publicly and to exclude . . .
[6. to transmit digitally and to exclude . . .]

Duration of copyright, as of fall 1998, is life of the creator + 70 years (increased 20 years from previous term of protection); see Lolly Gasaway (2003). See Eldred. et al. v. Ashcroft (2003), the Supreme Court decision that found the Sonny Bono Copyright Term Extension Act, PL 105-298, 112 Stat 2827, constitutional.

There are important limitations on the exclusive rights granted to rightsholders by copyright; these limitations include fair use, reproduction by libraries and archives, transfer of a particular copy (doctrine of first sale), certain performances and displays, secondary transmissions, and ephemeral recordings. Please also remember that limitations on the duration of copyright and the protection of expression not ideas (itself a contentious distinction) also support the intellectual commons. They do so especially in creating the public domain.

Fair Use($\text{§107 of Title 17 of the United States Code; alternatively written 17 USC 107}$)

"A privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent, notwithstanding the monopoly granted to the owner" ($\text{Black's Law Dictionary}, 1990, p. 598)

According to one school of thought, fair use is simply opposed to misappropriation or infringement, which is "unauthorized use of copyrighted material without permission [or, often, knowledge] of copyright holder" ($\text{Black's Law Dictionary}, 1990, p. 781)

§107: includes but needs not be limited to "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research"

Boundaries of fair use are deliberately difficult to ascertain. Before 1976, fair use was a matter of common law; now it is a matter of black letter law. It is still controversial in that two contesting schools of thought argue whether fair use is a positive concept (a use is fair until demonstrated to be otherwise) or a negative concept (it is only a defense against an accusation of misappropriation; thus, all use is misappropriation until demonstrated to be otherwise). See OTA (1986), IITF (1995), Boyle (1996), Lessig (1999), and the NRC report (2000).

Identifying if a taking (this term itself is ideologically loaded) is fair use or not requires balancing a number of variables:
character and purpose of the use, including its commercial character
nature of the copyrighted work
the proportion that was taken
the economic impact of the taking

Miller & Davis (1990, pp. 349-350) add two other factors: (1) the intent and motives of the defendant(s) and (2) the relationship of the taking to the First Amendment and the exercise of free speech. They base their assertion on what they see as a growing emphasis in case law. The relationship between copyright and free speech is complex and evolving, e.g., see the Church of Scientology cases.

Reproduction by libraries and archives (§108; or 17 USC 108)

For no commercial advantage
Must be open to the public
Must include notice of copyright near the reprographic machines, e.g., "the making of a copy may be subject to copyright law"
"Rule of 5" (§108, g. 2)

Transfer of a particular copy -- doctrine of first sale (§109; or 17 USC 109)

This doctrine maintains that it resides in someone other than the copyright holder to sell, lease, loan, destroy, display, or give away that one, legally obtained copy without the knowledge and/or permission of the copyright holder.

Selected other provisions of the 1976 Act of interest in the United States Code

§302 duration of copyright
§405 omission of copyright notice
§408 no need for registration

Moral Rights

Not economic or proprietary in nature; they are personal. They cannot be sold or transferred, i.e., alienated, only waived; can be held only by individual, not corporate, persons.

"the intimate bond that exists between a literary or artistic work and its author's personality" (Raymond Sarraute, quoted in Goldstein, 1994, p. 166).

Largely ignored in the United States. The Continental legal tradition, however, has made moral rights the centerpiece of protection of creativity.

Moral rights include (Henn, 1991, p. 215, citing a number of sources in note 57):

1. To be known as the creator of the work
2. To prevent others from being identified as the author of the work  
3. To prevent others from falsely attributing authorship to a creator  
4. To prevent others from making "deforming changes" to one's work  
5. To withdraw a work from distribution if the views therein are no longer consonant with the creator's  
6. To prevent others from using the work or the creator's name in a way that would decrease the creator's professional reputation.

Also called "attribution and integrity rights" or "paternity [sic] rights"

**Berne Convention**

The Berne Convention Implementation Act of 1988 (PL 100-568) explicitly noted that the U.S. was not recognizing any additional rights to copyright; moral rights were not to be added to the protections granted by the Berne Convention in the U.S. The legislative history of the Act and subsequent hearings on related legislation indicate that opponents to moral rights protection maintained and continue to maintain that existing common law protections, a growing number of Federal and state cases, and a growing number of Federal (e.g., the Visual Artists Rights Act) and state statutes (e.g., California Art Preservation Act) protect moral rights of creators.

Colorizing movies, e.g., Ted Turner in France

World Intellectual Property Organization (1996) treaties (EU treaties also of interest)

Nation states were left to decide for themselves the breadth and width of the application of the WIPO principles. See WIPO (2004) and the Digital Future Coalition (2004).
Selected Sources


