Copyright & Intellectual Property

Copyright's cousins:

1. *Patents* protect and encourage technological development. Patents cover utility (machines or processes), design, and discoveries, like a new type of corn or cold fusion.

2. *Trademarks* are symbols or logos, phrases, and even objects, or combinations of these three.

   There are four functions of trademarks and registered marks:
   - To identify and distinguish
   - To signify or verify that it comes from who you think
   - To signify or indicate quality of that brand or company
   - To serve as instruments in advertising, marketing and selling

3. *Plagiarism* is the act of taking ideas, thoughts or words from someone else and passing them off as your own.

4. *Copyright* refers to "all works of authorship fixed in a tangible medium of expression." This applies to writings, paintings, music, drama, recordings. As of 2017, it covers clothing and fashion, as well. It does not protect the ideas themselves, only their fixed expression. It does not protect "works for hire."

Copyright

Copyright is a right that exists only by government decree, created for the public good, that must be regulated by government to ensure that the public purpose is fulfilled. In other words, copyright is positive law, or statutory law; it is not natural law. It is a form of taxation, which is not inherently good but rather can only be as good as the results it produces.

Jefferson's 1790 copyright law gave the copyright owner the right to protect his or her creation for 28 years in the form of an initial and automatic 14-year term and a 14-year renewal that had to be applied for.

In 1831, the timeline lengthened to the original 28 years, an automatic 28-year renewal, and one optional 14-year renewal. Also in 1831, musical compositions were added. Photography was added in 1865, largely because of the commercial property photography of the Civil War. Fine art also was added.

Congress has extended copyright terms 11 times in the last 40 years, each time favoring private incentive versus the enrichment of the public domain. When the Sonny Bono Copyright Term Extension Act in 1998 added yet another 20 years to existing and future copyrights, Eric Eldred and other commercial and non-commercial users of public domain works sued, arguing the CTEA as unconstitutional.

In January 2003 (four years after the statute's passage), the Supreme Court decided 7-2 against Eldred and that the CTEA does ***not*** violate the constitutional commandment that copyrights be granted for a "limited time." This ruling meant that beginning in 2003, pre-1978 unpublished creations, including Mickey Mouse, could have copyrights limited to the author's life plus 50 years.

Copywrong:

1790 Copyright Act, 14 years
1909 Copyright Act extension, from 42 to 56 years
1978 Life plus 50 years
1998 Life plus 70 years for works created after 1977; 95 years for all other works

Of works produced between 1923 and 1942, the period affected by the Bono extension, only about 2% likely have any commercial value at all. This means that we are willing to lock up 98% of creative works in order to protect the 2% that includes the Disney mouse. (It is estimated that Disney spent $6.3 million lobbying Congress for the extension.) This means, as Kembrew McCleod put it, that we are “allowing much of our cultural history to be locked up and decay only to benefit the very few” (Freedom of Expression, 8).

Thomas Jefferson on why copyrights should be limited in term: *"He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine receives light without darkening me."*

The founding ethos of the Internet and of open source, of file-sharing, is consistent with Jefferson’s philosophy. Justice Sandra Day O’Connor wrote in a prior case, in *Feist*, that, *“The primary objective of copyright law is not to reward the labor of authors, but to promote the process of science and the arts.”*

OK, so just what does it mean to own a copyright? There are six permutations or specific rights that are bundled, including rights to:

1. reproductions
2. derivative works (or the right to someday create derivative works)
3. public distribution
4. public performance (Aero antenna case; ruled a public perf. - 2017)
5. public display
6. public digital performance of a sound recording

What isn't covered:

- Ideas (remember, it protects only their ***expression***)
- Utilitarian goods (like a toilet, or, more specifically, how it works)
- Methods, systems, math principles, formulae, equations, periodic chart of elements
- Anything that doesn’t offer its origin to the author (non-original works)

Rural Telephone Service v. Feist Publications **(1991)**.

Fair Use

Owners' rights of copyright are exclusive and monopolistic, except in four sets of circumstances. They are:

1. where the work is not eligible for the copyright, such as most government information
2. where the work is not an original; copyright does not cover copies
3. where the copyright has expired
4. where the work's copying is covered by fair use

The doctrine of ***fair use*** is this: "a rule . . . to balance the author's right to compensation for his work . . . against the public's interest in the widespread dissemination of ideas and information on the other" (*from a district court opinion*).

Fair use generally covers:

- small amounts of copying
- the advancement of ideas, education, information and knowledge
- any and all intellectual property

Fair use has been an exception to the otherwise monopolistic copyright since 1976 and passage of the U.S. Copyright Act. As stipulated by the act, federal judges typically ask four questions in determining whether the use is in fact covered by "fair use":

1. Is the use transformative? In other words, what is the purpose and character of use?
2. What is the nature of the copyrighted work as a form and by intent?
3. How much of the original work has been changed? What amount and how much substantiality when viewed as a part of the whole?
4. What is the effect or potential on the market?

These questions are implicit in the ***U.S. Code, Title 17, Chapter 1, Sec. 107,*** which reads in part, "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."

Let's break down the four provisions:

Purpose and character: What is the copyrighted material being used for? Teaching? Comment and criticism? Scholarship and research? In general, educational copying must be:

a. brief (usually less than 1,000 words)
b. spontaneous (no time to go out and get permissions from publishers)
c. noted with a copyright notice somewhere on the copied material(s), crediting or otherwise identifying the copyright owner

d. equal to or less than the cost to the student of getting the original

Nature of copyrighted work: What is the work intended for, or not intended for? Is it a workbook made to be used only once? Then don't copy it. Is the work out of print? If it is, more allowances can be made to "borrow" the work.

How much of the copyrighted work is being used and, as importantly, what does the use represent in terms of the essence of the original work? Are you using less than 300 words? You are probably OK, unless those 300 words are the heart and soul and essence of the piece.

Campbell v. Acuff-Rose Music (1994)
Castle Rock Entertainment v. Carol Publishing

Digital Millennium Copyright Act of 1998 makes it a civil and criminal violation to:

- circumvent a technological measure that controls access to a work, such as manipulating a DVD
- manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component or part that:
  - is primarily designed or produced for the purpose of circumventing a technological measure that controls access to a work
  - has only limited commercially significant purpose or use other than to circumvent a technological measure that controls access to a work

Sony Corp. v. Universal City Studios, 1984
MGM v. Grokster

Another huge aspect of the DMCA is its takedown notice, which serves to suppress free expression and creativity. Section 512 gives "safe harbor" to Internet service providers who take down content that a copyright holder claims is in violation of his or her copyright. It is this safe harbor that services like YouTube, Vimeo and Facebook rely.

Lenz v. Universal Music Corp. (2007)

For more evidence of how horrible the DMCA is in terms of its hostility toward the First Amendment: http://chillingeffects.org/

CD breakdown of who gets the money:
artist(s): 9%
label: 46%
retailer: 45%

Now here is a breakdown of digital music, when you buy a copy to own:
artist(s): 8%
label: 68%
digital service provider: 15%
credit card companies: 9%

The Constitutional Provision Respecting Copyright

The Congress shall have 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.
-- U.S. Constitution, Article I, Section 8

Thomas Jefferson:
Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it.

He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.