

Information Management Resource Kit

Module on Digitization and Digital Libraries

UNIT 1. CONCEPTUAL OVERVIEW

LESSON 3. COPYRIGHT: BASICS AND LEGAL FRAMEWORK

NOTE

Please note that this PDF version does not have the interactive features offered through the IMARK courseware such as exercises with feedback, pop-ups, animations etc.

We recommend that you take the lesson using the interactive courseware environment, and use the PDF version for printing the lesson and to use as a reference after you have completed the course.



© FAO and UNESCO, 2005

Learning Objectives

At the end of this lesson you will be able to:

- understand the concept of **authorship**;
- identify **works to which copyright applies**;
- identify **rights** related to **copyright ownership**; and
- recognize the **legal framework** for copyright.



Introduction



If you are dealing with the management and distribution of books, articles and other content produced by others, you should be informed about the copyright issues.

What can you do with the content you are dealing with?

Who is its the owner?

In this lesson we will look at the **basics of copyright**, starting with the source of copyright itself: the bond of authorship that exists between an author and the work that she (or he) wrote.

Furthermore, you will also find some information on the **legal framework** for copyright in this lesson.

Authorship



This carpenter is making a new chest from some wood he bought.

Most cultures recognise that **he owns** the chest until he sells it.

That ownership comes from the carpenter's **own work**, the time spent in cutting and shaping the wood, fixing hinges and fastenings, and finally, in finishing and polishing the chest.

Authorship

Things are somewhat different for the composer of a new song, poem, story, etc; He/she doesn't produce tangible objects that you can touch.

However, the composer of a new song (or the teller of a new tale) is recognized by many cultures to have a special bond with the works he or she created: the bond of **authorship**.

Copyright law gives formal legal recognition to this special bond.



Works in which copyright subsists



Copyright applies to **original creative** works, such as:

- literary works (books, articles, etc.)
- musical works (jingles to symphonies)
- artistic works (drawings, pictures, maps, diagrams)

It subsists in the **intangible** work rather than in any particular “embodiment” of it.

Copyright experts like to say that a copyright **subsists** in a work because a copyright has no separate existence without it.



Works in which copyright subsists

INTANGIBILITY

Intangible Work	Tangible Embodiments
Song	CD, record, tape, songsheet, score
Book* (the author wrote)	Book* (on the library shelf)
Article or Paper	Journal issue

ORIGINALITY

Copyright doesn't subsist in a copy! There is no authorship in merely repeating work created by others.

CREATIVITY

For copyright to subsist, there must be some creative spark in the work. This has nothing to do with literary or artistic merit (even if anyone could ever agree what is “good” or “bad” literature or art!). However, copyright doesn't subsist in mere collections or lists, unless there was some creativity in the selection or arrangement. The white pages of a telephone directory list the telephone company's subscribers in alphabetical order. The Supreme Court of the United States of America decided in a very important case in 1989 that this was not sufficiently creative to merit copyright.

Although the case only applies to the USA (over which the Supreme Court has jurisdiction), the underlying principle – that creativity sufficient for copyright to subsist requires more than the mere “sweat of the brow” is now accepted by most countries.

The level of the creative threshold varies from country to country and is established in that country's jurisprudence.

Works in which copyright subsists



Legal traditions vary as to the question whether copyright subsists from the moment of the creation of a work or rather from its **fixation in tangible form**, for example, when the work was written down.

In a country with a fixation requirement (such as the USA, the UK) Copyright in, for example, a speech or a work of choreography doesn't subsist until it is recorded.

In other countries (such as Germany), however, those works will be protected even without having been recorded or written down.

Works in which copyright subsists

In your opinion, who could own the copyright to a work from an oral tradition, once it is recorded in a tangible form?

- The person who makes the recording.
- The owner of the premises where the recording took place.
- The original author or composer of the work.
- The heirs of the original author or composer of the work.
- The community to which the original author belonged.

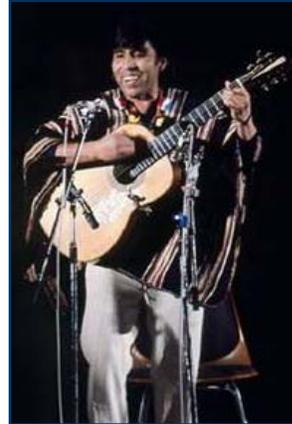
Please select the options of your choice (2 or more) and press
Check Answer

Works Subject to Neighbouring Rights

Suppose a musicologist researching music traditions records a folk singer singing a traditional song. In this case:

- the copyright in the song belongs to the **composer** (whoever she or he may be!),
- the singer has a special bond with the **performance** of the song, and
- the musicologist has a special bond with the **recording** of the **performance** of the **song**.

Making good sound recordings, even with the best modern equipment, requires skill, judgement and, often, substantial financial investment. The special bonds, and the associated legal rights, that the performer has in relation to the performance and the recordist has in relation to the recording, are recognised in many jurisdictions.



Works Subject to Neighbouring Rights



Because a performance or a sound recording isn't quite the same sort of creative work as a song, rights of the performer or of the sound recordist aren't quite copyrights. Some jurisdictions call them copyrights; others use more precise names.

A generic term for rights which are closely-allied to copyright is "neighbouring rights"; the terms "rights related to copyright" and just "related rights" are also used.

Neighbouring rights may subsist in:

- Performances
- Sound Recordings (also known as phonograms)
- Broadcasts and cable-casts
- Databases
- Catalogues
- Films
- Industrial Designs



Research Task 2 (see
research_tasks.pdf)

No copyright in knowledge or ideas



The free exchange of ideas and knowledge is fundamental to the development of humanity.

Copyright doesn't (and shouldn't) protect ideas; but it does and should protect **the way ideas are expressed**, that is, the language used by the author to convey the ideas to the readership.

The abstract ideas on which our modern society depends (such as scientific theories) are hard to understand and even harder to explain. One of the greatest skills of an author is the ability to **express** an idea in a form which someone else can understand.

The skills of authors actually help the free spread of ideas and knowledge.

The "Exclusive Rights"

So far we've talked about authorship, and about copyright subsisting in original creative works. We understand that copyright is a legal recognition of the underlying bond of authorship between the author and her or his creation, but we have not discussed what rights go with the copyright.

What does the author get as a result of that recognition?

The owner of the copyright has the **exclusive right** to do, and to authorise others to do, certain things with the work in which the copyright subsists.

Copyright is therefore sometimes called a **"bundle of rights"**.

EXCLUSIVE RIGHTS

Reproduction Right

Distribution Right

Public lending Right

Other rights

The precise contents of the bundle varies from country to country, but it always includes certain minima.

Let's have a look at them...

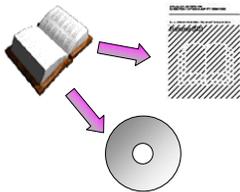
The "Exclusive Rights"

EXCLUSIVE RIGHTS

Reproduction Right

Distribution Right
Public lending Right

Other rights



The **Reproduction Right** is by far the most important (in economic terms, at least) of all the exclusive rights.

The copyright owner has the exclusive right to **copy the work**, in whole or in part.

If a copyright work is published commercially, the usual procedure for the author is either:

- to sell the entire copyright to a publisher; or
- to grant the publisher an exclusive licence.

Because "copying" means much more than mere facsimile copying, the reproduction right covers many of the different techniques for reproducing material, from hand transcribing to digital scanning, and includes most commercial markets.

The "Exclusive Rights"

EXCLUSIVE RIGHTS

Reproduction Right

Distribution Right

Public lending Right

Other rights



Usually, the **distribution right** is much more limited than the reproduction right. The distribution right in respect of physical copies gives the copyright owner the right to decide **whether or not to distribute** copies of the work to the public.

But once a copy has been distributed, the copyright owner does usually not have the right to control its subsequent distribution. This means, for example, that a purchaser of a book may do with his particular copy whatever he chooses. That is why the sale of second-hand books does not normally require the consent of the rights holder. In that case, the distribution right is said to be **exhausted**.

National, regional and community exhaustion

Theoretically, the distribution right can be exercised (and thus exhausted) territory-by-territory. However, the principle of national exhaustion is not compatible with free trade rules within trading blocs such as ECOWAS, the EU, or NAFTA, where the principle of regional or community exhaustion applies. Once the copyright holder has authorised the distribution of a copy in the trading-bloc concerned, he can no longer control subsequent distribution of the copy within the trading bloc.

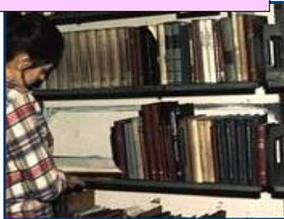
The "Exclusive Rights"

EXCLUSIVE RIGHTS

Reproduction Right
Distribution Right

Public lending Right

Other rights



Libraries perform an important role in making content available to people who might otherwise not be able to afford it. However, if a library lends a book, the borrower then loses the incentive to go and buy a copy. Copyright holders may lose as a result of library lending.

Many jurisdictions have introduced a **public lending right** which compensates authors for the public lending of their works. In some jurisdictions, in particular the European Union, the public lending right is part of copyright.

The law grants an **exception** to the not-for-profit or educational sector for the lending of a book to a member of the public by a not-for-profit public or educational library, that does not usually require the copyright holder's consent. In compensation for the loss of the right, the author receives some equitable remuneration from the government or the library authorities: the calculation and collection of the remuneration is decided by national legislation.



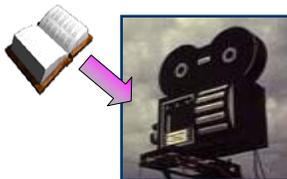
Research Task 3 (see
research_tasks.pdf)

The "Exclusive Rights"

EXCLUSIVE RIGHTS

Reproduction Right
Distribution Right
Public lending Right

Other rights



The copyright owner also has other rights.

For example, he/she has the right to permit or to refuse public performance of a work.

The copyright owner has the right to permit or to refuse the making of adaptations or derivative works. For example, a play from a book, or a book in comic-strip format.

Ownership and administration of copyright



As we have seen, generally the first owner of a copyright is the **author**.

Now suppose the author isn't an independent worker but instead is a salaried journalist, receiving wages for his/her time.

Who then would own the articles?
The journalist or the employer?

Many "copyright works" are created in the course of employment. Sometimes such works are called "works made for hire".

Is there still a bond of authorship between the employee and the work?
What does the employer get in return for the wages paid?

Ownership and administration of copyright



In some countries, if the author is an employee and creating works is part of his/her job, the **employer** owns the copyright. In other countries, the employer has full rights to the economic value of a work created in the course of employment, but the copyright itself remains with the author.

Many professional authors employ **agents** to administer copyright on their behalf, and to negotiate contracts with publishers and others to exploit the copyright. Agents are usually paid a percentage of the money received by the author. Authors' agents are experts in negotiating contracts and copyright licences, which means that the authors can get on and write.



**Research Task 4 (see
research_tasks.pdf)**

Ownership and administration of copyright

Authors are good at writing; **publishers** have the skills and the capital to promote works to readers. They usually acquire an interest in the author's copyright in exchange for their investment in the work produced by the author.



The legal nature of the publisher's interest in an author's copyright varies by custom and by jurisdiction; it is also different in different sectors of publishing.

Publishers maintain **rights and permissions departments** with staff who understand copyright to administer the copyright in the works they publish, on their own behalf and often on behalf of the author. This department will handle contacts with the author (or with the author's agent, if the work is being handled by an agent).



Research Task 5 (see
research_tasks.pdf)

Ownership and administration of copyright

Which of the following professionals are paid by the authors to administer copyright on their behalf?

- Agents
- Publishers
- Employers

Please click on the answer of your choice

Legal Framework



Now we will look at the **international legal framework for copyright**.

It is important to bear in mind however that copyright law is **national law**. Although countries' copyright laws have certain things in common, the specifics of the law apply at a national level.

In this section we therefore analyze national law in parallel.

Copyright Treaties

Although copyright laws are national laws, most nations adhere to **international treaties** which set out a basic framework.

The **Berne Convention** of 1886 is the principal international treaty. Most recently, the World Intellectual Property Organisation (WIPO) agreed the 1996 **WIPO Copyright Treaty** to address the copyright issues raised by digital technology and networks - many countries have not yet implemented it into their laws.

The Berne Convention

The Universal Copyright Convention

The WIPO Copyright Treaty

The Rome Convention

The WIPO Performers and Phonograms Treaty

TRIPS Agreement

The Berne Convention of 1886 provides (among other things) for national treatment; subsistence of copyright without formality such as registration, and a minimum term of life plus fifty years.



Research Task 6 (see research_tasks.pdf)

Copyright Treaties

The Berne Convention

The Universal Copyright Convention

The WIPO Copyright Treaty

The Rome Convention

The WIPO Performers and Phonograms Treaty

TRIPS Agreement

The Universal Copyright Convention of 1952, administered by UNESCO not WIPO, equally provides for national treatment, but also allows registration formalities.

The Berne Convention

The Universal Copyright Convention

The WIPO Copyright Treaty

The Rome Convention

The WIPO Performers and Phonograms Treaty

TRIPS Agreement

The WIPO Copyright Treaty of 1996 adds a number of provisions to reflect changing technology. Many countries have not yet implemented the WIPO Copyright Treaty into their national laws (for example, in the UK, it only became effective on 31st October 2003).

Copyright Treaties

The Berne Convention

The Universal Copyright Convention

The WIPO Copyright Treaty

The Rome Convention

The WIPO Performers and Phonograms Treaty

TRIPS Agreement

The Rome Convention provides for national treatment and minimum terms for neighbouring rights in phonograms, etc.

The Berne Convention

The Universal Copyright Convention

The WIPO Copyright Treaty

The Rome Convention

The WIPO Performers and Phonograms Treaty

TRIPS Agreement

The WIPO Performers and Phonograms Treaty of 1996 updates (with certain exceptions) Rome as the WCT updated Berne.

Copyright Treaties

The Berne Convention

The Universal Copyright Convention

The WIPO Copyright Treaty

The Rome Convention

The WIPO Performers and Phonograms Treaty

TRIPS Agreement

The Marrakesh protocol to the agreement setting up the World Trade Organisation, the so-called TRIPS agreement, recognises the importance of copyright and other intellectual property rights in modern world trade, and it says that WTO members must adhere to the main copyright conventions.

National Treatment

The mentioned international treaties oblige countries to give **national treatment** to works by nationals of other countries.



That is, if the work is published in, or written by a national of, another country which has also signed one of the international treaties, it is subject to the copyright law of the country **where it is copied**. So in each country, only the country's national laws apply to all works of whatever origin.

As a consequence, all a librarian needs to know is the particular copyright law of the country in which he or she works.

Minimum Scope Of Protection



The Berne Convention provides that the **minimum term of copyright** is the life of the author plus fifty years. This means that even after the author has died, you need the permission of the author's heirs to do anything with his/her work.

If your country has ratified the Berne Convention, the term of copyright is at least: life+50. This is sometimes written as 50 years **pma** (from the Latin "post mortem auctoris", meaning "after the death of the author").

Considerable practical difficulties arise as a consequence of this measure. It is often very difficult to find out when the author died. One of the best sources of information concerning published authors is the **authors' association** in your country; it should have links to author databases maintained by author associations around the world.

Some national laws provide for stronger or longer protection than exists under the Berne Convention; for example, in the USA and in the EU, the term of copyright is 70 years after the death of the author. Both the EU and the USA have reciprocal provisions in their laws providing for an extended term. That is, in the EU and the USA, national treatment does not fully apply. 70 year pma terms only apply to works by EU and US citizens, or those of other countries which provide a 70-year term.

Minimum Scope Of Protection

The Berne Convention requires that copyright should subsist **without formality**. Copyright is not dependent upon either registration with the authorities or legal deposit with a national library.



Some countries, such as the United States of America, maintain copyright registries even though they are members of the Berne Convention. In the USA, copyright registration makes it easier for a copyright holder to take legal action against infringers; but copyright still subsists even if the work has not been registered.

Some countries require that a work must first be fixed before copyright can subsist, while other countries have no such requirement. Article 2(2) of the Berne Convention permits (but does not require) fixation requirements.

Minimum Scope Of Protection

Country A and Country B are both signatories to the Berne Convention. Country A has no fixation requirement; Country B has a fixation requirement.

Is a work produced in Country A but not fixed into a tangible form protected in Country B?

- Yes
 No

Please click on the answer of your choice

Permitted Limitations and Exceptions

All democratic laws try to achieve a balance between often conflicting interests, and copyright law is no different.

Copyright law starts by giving authors and copyright holders great power in the form of the exclusive rights. If these powers came to be exercised irresponsibly or spitefully, it could retard what Lord Mansfield, a great British judge, called "the progress of the arts" and, indeed, freedom of expression.

There are, therefore, a number of **limitations and exceptions** to the exclusive rights of the author.

Quotations

Other Exceptions

"Fair Use"

The Berne Convention provides that it is always acceptable to make limited quotations from protected works, with acknowledgement, and provided it is done fairly. Most authors are, of course, happy for quotations to appear in a review of their work (the more so if the review is favourable); but those curmudgeonly few who might object cannot use copyright law to prevent the publication of fair quotations.

Permitted Limitations and Exceptions

Quotations

Other Exceptions

"Fair Use"

Many countries also provide for certain other exceptions to copyright law. The Berne Convention allows countries to enact certain exceptions subject to particular conditions and generally to make exceptions for special cases, provided that the exception does not conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author. These three conditions (starting with the special case) are sometimes known as the three-step test.

Quotations

Other Exceptions

"Fair Use"

The USA has a particular copyright principle called 'fair use'. You may often see commentators on the Internet in discussion groups etc. referring to 'fair use'; but you should beware that fair use may not apply to your country. In the US legal system, "fair use" is a defence to a claim for copyright infringement. Your country may well have its own exceptions to copyright, similar to fair use, but they will be subject to their own interpretation in the light of your country's national copyright law and jurisprudence.

National Limitations And Exceptions

Many nations have enacted **national exceptions** to copyright for special cases (including, in some countries, library uses) where the use doesn't undermine the normal exploitation of the work.

National limitations and exceptions include:

Private Use

Fair Dealing

Library provisions

In Germany and in many other countries, private use of a copyright work is permitted provided that **equitable remuneration** is paid to the copyright holder.

One application of this provision of copyright law relates to the home taping of recorded music. The equitable remuneration is provided by a levy on blank tapes (and in some countries also on copying devices), paid to a not-for-profit collective management society which then distributes the money to the composers and producers. However, just because "private use" is permissible in, say, Germany, it does not mean that it is permissible in your country: you must check your own legislation.

National Limitations And Exceptions

Private Use

Fair Dealing

Library provisions

Fair Dealing exists in the UK and in many countries whose copyright laws were inherited from the UK in colonial times. Fair dealing is usually more restrictive than 'fair use' in the USA. The two concepts should therefore not be mixed up.

Private Use

Fair Dealing

Library provisions

Many countries have special exceptions and limitations for the benefit of libraries, recognising the importance of libraries to the spread of learning. These exceptions and limitations will be covered in more detail later.

It should be noted, however, that few of the exceptions and limitations in national copyright laws are clear-cut. It is not always clear where fair use ends and unfair use begins; often, it depends on the circumstances of each case. Generally, the more specific the exception, the clearer its terms become: thus, a specific library exception is likely to be much more clearly-defined than a more general exception such as one for fair use or private use.

Technical Measures and Rights Management Information

The new WIPO copyright treaty introduces an important and controversial requirement that states must provide effective legal measures against the circumvention of **technical protection measures** (sometimes called DRM systems) and the removal of electronic **rights management information**, that is, information identifying the author and other information about the work.



One of the first national laws to implement this requirement was the United States' Digital Millennium Copyright Act, the **DMCA**. One (probably unintended) consequence of the DMCA is that it may be unlawful to publish information which exposes the weaknesses of technical protection measures.

Whether or not your country has implemented this provision into its national law, it is potentially dishonest to circumvent technical protection measures if the objective is thereby to avoid paying licence fees or additional licence fees to the copyright owner.

Libraries and technical measures

Libraries, however, exist to provide information to people who cannot otherwise afford to buy the original book. If a technical protection measure means that the library must pay an additional fee to the rights holder each time a digital edition is used by a new library patron, the purpose of the library is undermined. The user might as well obtain their access rights directly. Library books do not come with technical protection measures, and many librarians think that digital editions for use in libraries should be similarly unrestricted.

Moral Rights



It is a requirement of the Berne Convention to recognise certain **moral rights** of the author. These are independent of the economic rights of copyright. Moral rights are “inalienable” which means that they cannot be assigned or transferred; they remain with the author (in some countries, notably the UK, they can however be “waived”).

While the economic rights of copyright (particularly the reproduction right) help some authors to make some living from writing, moral rights do nothing to help authors pay their bills. Instead, they recognise that the bond of authorship is much more than a mere economic bond.

Authors have the right to the **acknowledgement of their authorship** and to the **integrity** of their work, that is they can object to a derogatory treatment of it.

Moral Rights

Acknowledgement of authorship

Authors have the right to be acknowledged as the author of a work. This is sometimes called the “right of paternity”.

Whatever the right is called, it is easy to see that it would be dishonest for someone else to claim the author’s work as their own, even if no money were to change hands. This right gives the author whose work is misidentified in such a way the opportunity to take legal action against the dishonest person who has done such a thing.

Integrity

Authors have the right to object to a derogatory treatment of their work. Note that they don’t have an automatic right to object to any changes or alterations, only to a treatment that is derogatory. Thus, a publisher who corrects an author’s spelling mistakes before a work is published probably does nothing wrong, whereas some film directors have objected to “colourised” versions of films that were originally released in black-and-white.

Summary

Copyright law gives formal legal recognition to the bond of **authorship**.

Copyright applies to **original creative** works, and it subsists in the **intangible** work rather than in any particular "embodiment" of it.

Rights that are closely-allied to copyright (e.g. rights of the performer or of the sound recordist) are often named "**neighbouring rights**"; the terms "**rights related to copyright**" and just "**related rights**" are also used.

The owner of the copyright has the **exclusive right** to do, and to authorise others to do, certain things with the work in which the copyright subsists. Copyright is therefore sometimes called a "**bundle of rights**" and **includes**: Reproduction, Distribution and Public lending Right.

Copyright law is **national law**, even if most nations adhere to **international treaties** which set out a basic framework (e.g. the **Berne Convention** and the **WIPO Copyright Treaty**).

Copyright laws include a number of **limitations and exceptions**, both at international and national level.



Exercises

The following five exercises will test your understanding of the concepts covered in the lesson and provide you with feedback.

Good luck!



Exercise 1

Which of the following people usually have the bond of authorship with the related works?

- A journalist writing an article.
- A singer of a new song.
- A chef creating a new recipe.
- A publisher of scientific works.

Please select the options of your choice (2 or more) and press
Check Answer

Exercise 2

To which of the following works does copyright apply to?

- A selection of old stories.
- A new song.
- A CD containing new songs.
- A cake.

Please click on the answer of your choice

Exercise 3

Does copyright apply to the General Relativity Theory?

- Yes
- No

Please click on the answer of your choice

Exercise 4

Which of the following is the most important right - in economic terms - for the copyright's owner?

- The Reproduction Right
- The Distribution Right
- The Public lending Right

Please click on the answer of your choice

Exercise 5

Which of the following is the most important source for a librarian who wants to understand how to handle copyright of materials he/she deals with?

- The national copyright laws of the country in which the librarian works.
- The international treaties on copyright.

Please click on the answer of your choice

If you want to know more...

Online Resources:

IFLA website: (<http://www.ifla.org/>)

WIPO website: (<http://www.wipo.int>)

