

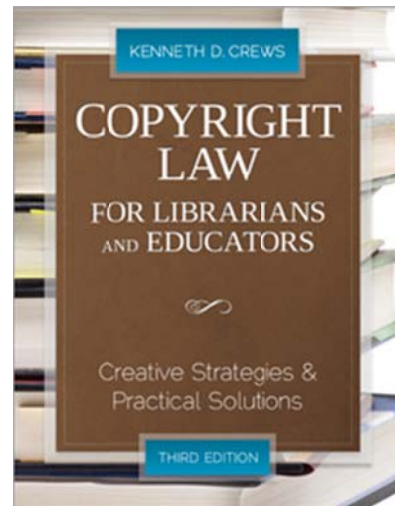
SNAPSHOTS OF COPYRIGHT:

Pictures, Puzzles, and Ponderings

from *Copyright Law for Librarians and Educators*

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Columbia University

Photographs, art, and other graphic images long have had a vital role in the development of copyright law. The first U.S. Copyright Act applied principally to books and charts, but it also applied to the graphical works of maps.¹ The year was 1790, and photography was still far in the future. While the fine art forms of painting and sculpture were greatly valued, easy means to reproduce and infringe them were not available, so the pressure for legal protection was light. With changing technology as well as greater appreciation for the artistic and economic implications of various creative forms, copyright law steadily progressed through the nineteenth century to encompass art and photography, as well as music, plays, and dance.² Because visual images are vital today for understanding copyright, it is especially appropriate that the current edition of my book, *Copyright Law for Librarians and Educators*, includes a selection of photographs to help demonstrate and reinforce some essential aspects of copyright law.³



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Each photograph in the book has a back story—and sometimes more than one. Most of all, each picture reveals something about copyright and sometimes poses quandaries about the limits and meaning of the law. I hope this essay can be a useful companion to the third edition of my book, but also stand alone to generate discussion about the meaning and application of copyright law.

Vincent van Gogh (page xiii)

The Metropolitan Museum of Art in New York City has in its permanent collections extraordinary examples of the art of Vincent van Gogh. In the background of this photograph is *Irises*, one of van Gogh's many delightful paintings of floral arrangements, painted in 1890 during van Gogh's stay at the asylum in Saint-Rémy. In the foreground is an intense and sometimes disturbing self-portrait, capturing the intensity and flourishes of van Gogh's technique, as well as the sometimes disturbing and puzzling depth of emotion that lingers behind his studious eyes. The work, *Self-Portrait with a Straw Hat*, was painted in 1887, soon after van Gogh arrived in Paris and in the early years of his foray into Impressionism. From a copyright perspective, these paintings would easily qualify for protection under today's law, and probably were protected under any relevant copyright law in the late nineteenth century.



Van Gogh lived and worked in the Netherlands and in France, two countries that have had copyright law for more than a century.⁴ Under American law, because the U.S. has entered into the Berne Convention⁵ and other multinational treaties, works from most countries are protected inside the United States. While images of these two paintings surely have been reproduced and published in numerous books and other places, they may well still be regarded as “unpublished” works because they likely were not published by van Gogh in his lifetime or by successor rightsholders.⁶ If in fact they are unpublished works, the copyright under U.S. law lasts for the life of the author plus seventy years.⁷ Van Gogh died in the year 1890; the term of seventy years postmortem has long since passed.

If the paintings are deemed to be published, the copyright status would be calculated differently. For example, if these paintings were published in the United States before 1923, the copyrights have expired.⁸ Imagine this alternative scenario: van Gogh dies in 1890, and his copyrights are inherited by his brother. The brother dies in a subsequent year, and the rights are inherited by other family members. If those rightful heirs do not make the first authorized publication of the paintings until after 1923, it is possible then that the copyright protection in these works from the 1890s would still be in effect.⁹

In the unlikely event that the paintings are today protected under U.S. copyright law, the law includes an important exception (Section 109(c)) that allows the display of a copyrighted work to the public at the place where the work is located.¹⁰ In this particular instance, the paintings were in the Metropolitan Museum of Art. Under Section 109(c), copyrighted paintings may be placed on public display in the museum. This simple exception is enormously important for museums and any other institution, retail store, library, or other organization that places copyrighted works on display where people may actually see them. Without that simple exception, museums would be largely limited to displaying works that are in the public domain, and the public would lose the cultural benefit of being able to see and enjoy and learn from great artworks. In the unlikely event that the paintings are in fact protected by copyright, then the museum did not commit copyright infringement by simply displaying them. In turn, I am left to evaluate whether I am acting within the law by snapping a photograph and including it in my book.¹¹

Bright Angel Trail (page 2)

Paths indeed can be treacherous—and they can be exciting. Bright Angel Trail is the most popular trail from the south rim of the Grand Canyon to the Colorado River at the bottom. The trail itself is about eight miles in length, dropping nearly one mile in altitude from the rim to the river. It is a fabulous adventure through geology and botany. The best times of the year to make the hike are in spring or fall, when the days are long and the temperatures moderate. I have made the trip to the bottom and back up three times. It is also an adventure through weather changes. In springtime, the temperatures at the rim frequently drop below freezing overnight, leaving snow on parts of the trail well into April. The trail is thus in many respects a little



bit like a copyright challenge: you need to step carefully and avoid slipping; when you find a more secure footing, you need to move more efficiently, and pause regularly to take a breath and enjoy the view.

Oscar Wilde (page 11)

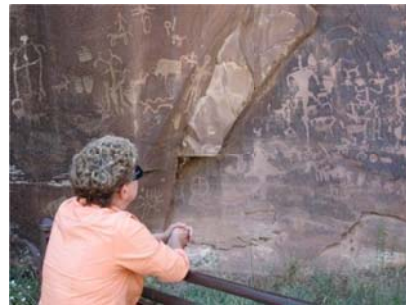
A question before the U.S. Supreme Court in 1884 was whether a photograph would even be eligible for protection under copyright law.¹² It was one more example of the law's struggle with art forms



and new technologies, questioning the appropriateness of extending copyright protection. The Court ultimately ruled that indeed a photograph could be protected by copyright, noting that the photographer's choice of lighting, camera angles, and posing of the figure were evidence of the creative expression that is a prerequisite to copyright protection for any type of work. This famous photograph is just one in a series taken by Napoleon Sarony, a well-known photographer based in New York City for much of the nineteenth century.

Newspaper Rock (page 12)

Native American peoples of the desert Southwest region of the United States began carving petroglyphs at Newspaper Rock approximately 2000 years ago. Hundreds of images of people, animals, and other symbols fill one especially imposing and smooth rock face preserved at Newspaper Rock State Historic Monument in Utah.¹³ If we were to conceive our own original images and carve them into rock today, they would most assuredly be regarded as original works of authorship that are fixed in the tangible medium of the face of the rock.



Supreme Court of the Navajo Nation (page 18)

A court system with authority over civil and criminal matters on the Navajo reservation evolved in stages beginning in the late 1800s. The current system of courts was established in the 1950s, and it has the authority to interpret and apply the laws of the

Navajo nation. Cases are heard in trial courts, and those cases can be appealed to the Navajo Nation Supreme Court.¹⁴ The Supreme Court has a chief justice and two associate justices. Since the Navajo government is an autonomous entity, separate from the U.S. government, the decisions and other works produced by the Navajo government may be subject to copyright protection.¹⁵ Because cases arising under the Copyright Act must be filed in a U.S. federal court, the Navajo courts are unlikely to decide copyright issues.¹⁶



The Dover Bookshop (page 21)

The Dover Bookshop on Earlham Street in the Covent Garden district of London offers a wide range of materials that are in the public domain and free of copyright restrictions.¹⁷ The store is a reminder that the public domain is a potential business opportunity and consequently a source of income, jobs, and tax revenues. The public domain can offer many benefits to many people. The law of copyright duration however, varies from country to country. A work that is in the public domain in the United Kingdom might not be in the public domain in the United States and vice versa. The Dover Bookshop may in fact sell you a work that is free of copyright restrictions in London, but if you bring it back to use in the United States, you had better have a look at our local laws.



The Munich Lion (page 32)

In 2005, the city of Munich, Germany, sponsored a public exhibition of a series of sculpted lions, each decorated by an established artist.¹⁸ Many of these ornate lion sculptures remain on view in the city today. This particular example stands in the Viktualienmarkt in the city center. This figure of a lion was a standard form used throughout the city, but the artwork distinguished each lion from another. Determining whether the sculptural and decorative aspects are separate copyrights or are jointly owned is not an easy challenge. The definition of a “joint work” under U.S. law (assuming U.S. law applies) is “a work prepared by two or more authors with the intention that their

contributions be merged into inseparable or interdependent parts of a unitary whole.” The fact that the lion figure and the artistic decorations were conceived separately suggests that the two works are independent and separate copyrights.

On the other hand, the lion figure was chosen for the event specifically to be decorated, and the artists conceived their decorative schemes specifically to be applied to the figure of the lion. These facts suggest that the parties intended for their contributions to be merged into an inseparable entire work or at least were intended to be interdependent parts of the unitary work that is the finished decorated lion. It does make for an interesting copyright puzzle.

The Munich lion is actually not entirely original. It is based on a traditional figure found on early public buildings in the city. The figures may have some original aspects, but for the most part they are variations on old themes. Contrast that with the similar



“CowParade,” a public art exhibition in Zurich, Switzerland, that deployed about the city fiberglass cow statues painted by various artists. The original cow statues were created by Pascal Knapp in 1998, who was commissioned to create them specifically for the CowParade series of events.¹⁹ It may be hard to claim copyright in an actual cow, but even a

lifelike cow statue can garner legal protection. Thus, Knapp today likely owns the copyrights to the standing, lying, and grazing cow shapes. The artwork images on the cows are likely owned by the artists that created them. We could again debate joint copyright ownership.

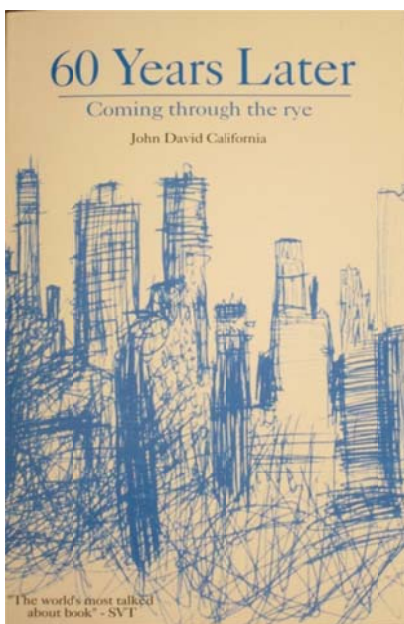
Care to make it more interesting? Under U.S. law, we could have possibilities that some of the copyrights were “works made for hire,” or that the copyrights have been transferred. German law, however, does not have a work-for-hire doctrine comparable to the one in American law, nor does Germany permit outright transfers of copyright.²⁰ As a consequence, we might feel more certain under German law that the artist still actually holds the copyright. The differences in national laws also mean that we could have

different answers about copyright ownership in the same work, depending on which country's law might apply.

Given that the legal answer to ownership conundrums is often unclear, one can only hope that the sponsors of the event and all of the contributing artists entered into written agreements that clearly detail their interests and their legal rights in the finished work. Many questions of copyright are best addressed in clear, written, and signed agreements, rather than left to the ambiguities of legal construction.

***The Catcher in the Rye* (page 42)**

J.D. Salinger's *The Catcher in the Rye* (1951) is one of the best-known and most controversial works of modern American literature. It seems that you either read or ban it, or you love it or deplore it. Nevertheless, it is a powerful and influential work. The author, Mr. Salinger, was also extraordinarily protective of his work and his privacy. He won a copyright infringement claim



against a biographer who was planning to quote from a few of Salinger's letters that were available to researchers in university archives.²¹ That case set an important and difficult standard for understanding the scope of fair use as applied to unpublished materials.

Salinger also brought a legal action against a novelist who wrote what is in some respects a sequel to *The Catcher in the Rye*. That book, *60 Years Later*, was penned under the name of John David California, creating the clever *nom de plume* J.D. California. His book tells a story from the perspective of Holden Caulfield, the protagonist of *The Catcher in the Rye*, from Caulfield's perspective as an elderly man. Salinger won a court order in the United States barring publication of the work.²² Eventually, both parties reached a settlement that allowed J.D. California to sell the book outside the U.S. and Canada, but not in either one of those countries until *The Catcher in the Rye* enters the public domain.²³

While the new novel does not use the actual words of the earlier work by Salinger, such a novel could be an infringement in two ways. First, it could be a derivative work. A derivative is a new work that is built upon and recasts, transforms, or adapts the original work.²⁴ The *Star Wars* sequels and prequels, for example, are a series of derivative works based on the original 1977 film. Derivatives can obviously be enormously valuable as evidenced by the mega-million dollar films as well as the books, toys, games, and Halloween costumes that come from a hit movie franchise. Second, the novel by J.D. California may also infringe a copyright that Salinger could have held in the character of Holden Caulfield.

A literary character that is well-developed in detail may itself have copyright protection, even if the manifestation of that character is in words. Unsurprisingly, a cartoon character, such as Mickey Mouse, is easily copyrightable as a graphic or artistic work. However, some distinctive and well-developed literary characters also have been held to be protected under copyright. Such characters include the detective Sam Spade and the secret agent James Bond.²⁵ If the character itself has copyright protection, then a new book or story that uses the character, even if placed in an entirely new context, may be copyright infringement.²⁶

The court ruling against J.D. California regarding his book *60 Years Later* was a judgment of a court in the United States. Therefore, it has enforceable validity only inside the United States. Similarly, the settlement reportedly barred only domestic sales (and Canada by agreement). I found my copy in a bookshop in Stockholm, Sweden. The next question is whether it may be lawful to bring the book to the United States. Importation of infringing works is a violation of copyright law, but that rule is subject to exceptions. One exception permits:

importation or exportation, for the private use of the importer or exporter and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States or departing from the United States with respect to copies or phonorecords forming part of such person's personal baggage. . . .²⁷

Carrying a single copy of the book, for my own private use, in my personal baggage, when I returned from Stockholm, appears to be allowed. That's a relief.

The World's Fair of 1964 (page 47)

Flushing Meadows in the borough of Queens in New York City was the site of the 1939 World's Fair with all of its art deco delights, as well as the 1964 World's Fair and its stirring vision of an industrialized modern future. A few massive and weathered relics of the 1964 fair remain on view, most notably the Unisphere Globe that stood at the symbolic center of the fair grounds. Designed by Gilmore D. Clarke, the top of the Unisphere hovers 140 feet above the park's walkways. The structure and the surrounding fountains have been designated as a historic landmark. In the report from the Landmarks Preservation Commission is this statement about intellectual property:

The Unisphere's image and the word "Unisphere" were both registered as official trademarks of the Fair Corporation, and the legal trademark symbol had to appear in the immediate vicinity of any pictorial representation of the structure, and immediately following any use of the word "Unisphere." In addition, the Corporation copyrighted a simplified representation of the Unisphere on an orange and blue background as its official logo.²⁸

The copyright status of the globe today would require some investigation and analysis. It is easily an original work that is fixed in a tangible medium and thus eligible for copyright. However, under the law as applied in 1964, one would have to investigate whether the copyrighted sculptural work was published and specifically published with a notice. If publication were deemed to be in 1964, the artwork would have been subject to renewal twenty-eight years later, in 1992. But before the end of 1992, the renewal requirement was revoked by Congress, and copyrights were given an automatic extension. A search of the recent registrations and renewals on the website of the U.S. Copyright Office reveals a number of works called "unisphere" but evidently no registration or renewal for this particular sculptural work, whether required or not, since 1978 (when the online records begin).²⁹



The Empire State Building (page 48)

For more than forty years, from its opening in 1931 until completion of the World Trade Center in 1972, the Empire State

Building was the tallest building in the world. The highest point at the top of the antenna is 1,454 feet. The architect was William F. Lamb from the firm of Shreve Lamb & Herman. The building has been a stunning art deco symbol of growth and ambition in New York City since opening its doors more than eighty years ago.³⁰

A new architectural design in the U.S. is today protected by copyright law, but that law did not apply until 1990.³¹ As a result, the important and exciting design of the Empire State Building does not have copyright protection. On the other hand, while Congress was clearly willing to extend copyright to new architectural works, Congress also did not want the rights to be comprehensive. Congress therefore added Section 120 to the Copyright Act which provides that once a work has been constructed in a place visible to the public, there is no copyright prohibition on the ability of anyone to make and use a pictorial representation of the architectural work.³² Thanks to Section 120, we can walk down the street of New York City and take a photograph that technically reproduces the architectural image of



great buildings. Even if the Empire State Building were a copyrighted design, which it is not, taking a picture and using that picture in a book is not an infringement. Moreover, I can lay claim to the copyright in my original snapshot.

Architectural designs may also be the subject of trademark protection. While the owners of the Empire State Building might have no copyright, they have claimed trademark protection on the name and on the distinctive image of the building as used in connection with various products and services. In fact, the Empire State Building Company has trademarked the name as well as a design for its real estate and entertainment business—mainly sightseeing.³³ Many other buildings have been trademarked as well, including the Chrysler Building and the Guggenheim Museum.³⁴

Even an extraordinary architectural design may lack trademark protection if the design is not used by the owner to identify the source of goods or services. The Sixth Circuit Court of Appeals found that the pyramid design of the museum of the Rock and Roll Hall of Fame in Cleveland, Ohio, was not subject to trademark protection. The court determined that the building design was not publicly recognized as the museum's trademark, and the museum did not use the building design as a separate and distinct mark on pictures and posters, but rather as merely a depiction of the

structure itself.³⁵ Accordingly, the Hall of Fame could not successfully assert a trademark claim against retailers of posters that comprised a photograph of the building and the words “Rock and Roll Hall of Fame.” Intellectual property law may apply in different forms, but the law also has limits, complications, and uncertainties. If you are seeking to assert intellectual property rights in architecture, you might have to accept a bit of ambivalence in the law. If you are looking for clear rights to use an architectural image, Section 120 is enormous help, and as long as you are not selling souvenirs, you may well avoid trademark entanglements.

The Obama Poster (page 51)

The famous poster of Barack Obama, created by artist Shepard Fairey during the 2008 presidential campaign, was holding out ample promise to become an ideal test case of fair use—until the artist botched the case. Fairey deployed what has become an iconic technique of using color to draw out character and dimension in a person’s visage. Clearly, the artistic rendering, the layout, and the captioning of “HOPE” are creative elements that give rise to copyright protection, but the artwork is based on an existing and copyrighted photograph of Obama. In some respects, the poster is a reproduction of the photograph, and more certainly it is a derivative. After the Associated Press accused Fairey of copyright infringement, Fairey sued the Associated Press for declaratory judgment, arguing that his use of the photograph was fair use.³⁶



The legal issues immediately became more complex for all parties. The AP soon found its basic claim of copyright in the photograph thrown into doubt. AP claimed to hold the copyright as a work made for hire, but the individual photographer, Mannie Garcia, joined the case, asserting that he was the rightful copyright owner.³⁷

For the defense, the major issue was fair use. Any assertion of fair use will involve a debate over the meaning and application of the four factors in the statute. Much of the public debate about fair use in this case centered on the poster’s transformative and creative elements and the law’s important support for innovative art.³⁸ Fair use is never so simple. The Obama poster could easily be fair use in its familiar form, yet an original version of the poster

created by Fairey is much more than a modified snapshot. It is made up of a collage of bright and colorful paint, glue, news clippings, and other elements.³⁹ These creative touches further transform the underlying photograph and strengthen the fair use claim. On the other hand, the HOPE poster was used for much more than aesthetic expression. Is it still fair use when the poster is used as a flat image and deployed on t-shirts, mugs, and other marketed objects? What if these objects are sold with revenues paid to the political campaign or even to the artist? These circumstances might temper or limit the application of fair use.

The poster generated robust debate in copyright circles. It also stirred a litany of knock-off versions, parodies, and even personal look-alike memes. Are these latter versions infringements of their own underlying photographs? Are they infringements of the Shepard Fairey artwork or style? If Fairey's original poster is not a fair use, then all of these later variations are at least brushing up against their own copyright infringement possibilities. The debate ended prematurely. Fairey made a devastating mistake. As is standard during litigation, he needed to submit evidence regarding the photograph he used to create his artwork, but he gave attorneys the wrong photograph. At some point he learned of his mistake and failed to alert the lawyers and the court, and he reportedly deleted the correct photograph from his computer files. Concealing evidence can be a crime. Fairey's lawyers were compelled to drop their representation of the artist, and the parties quickly settled without any ruling on the copyright issues.⁴⁰ Fairey himself was charged and sentenced for criminal contempt.

Bibliothèque nationale de France (page 81)

The Bibliothèque nationale de France claims origins in 1368, and in 1996 it relocated most collections and services to a set of four buildings along the banks of the Seine River in Paris. The older flagship building in the city center remains a powerful symbol of the importance of the library to the cultural, literary, and governmental life of Paris through the nineteenth and twentieth centuries. Known today as the Richelieu Library, these early portions of the building date to 1868. The Richelieu Library remains in use today, especially for collections related to manuscripts, performing arts, prints, photographs, maps, and plans. The exterior may be well worn, but it is undergoing restoration and is always an alluring edifice devoted to preserving the rich heritage of France.⁴¹



The World Intellectual Property Organization (page 99)

Situated high on a hillside overlooking the city and lake of Geneva, the headquarters of the World Intellectual Property Organization occupies a series of buildings with numerous offices and meeting rooms.⁴² WIPO is an agency of the United Nations, and the U.N. offices in Geneva are nearby. WIPO administers the most important treaties related to copyright and other areas of intellectual property. Most prominent among the copyright treaties is the Berne Convention for the Protection of Literary and Artistic Works.⁴³ WIPO is also currently hosting a series of meetings related to the possible development of treaties addressing copyright exceptions for the benefit of libraries, education, and persons with visual impairment. These meetings usually take place in a large semicircular room that is in many respects reminiscent of a legislative or multinational assembly room, where



delegates take their appointed places and identify themselves with large blue cards indicating the represented country.⁴⁴

The meetings are in Geneva, and the country names in the seating arrangement are in French. In the alphabetical assignment of places in the room, the United States is thus early in the sequence as “États-Unis.” Many non-governmental organizations also attend the meetings and take seats at the limited number of places around the outer edge of the semicircular room. I had the pleasure of

presenting the findings of my study of copyright exceptions for libraries and archives to an assembled gathering of the delegates in that room in November 2008.⁴⁵ Following my presentation and slideshow of various findings, delegates posed a variety of questions. Translators simultaneously sent the questions and comments in multiple languages to all delegates, and to me, through a tangle of wired headphones.

A Music Box (page 109)

I keep in my office a cabinet of copyright-related toys, games, and other objects, including a small collection of music boxes. I have one that plays the Edith Piaf gem “La Vie en Rose.” Another plays “Teddy Bear,” an Elvis Presley hit from 1957. The music box in this picture plays “Happy Birthday to You.” That song could easily be the most popular composition in the world, and it has been christened as such by Professor Robert Brauneis, in a remarkable study of its origins and its copyright status.⁴⁶ While Brauneis demonstrates that in fact the claim of copyright to the song may be dubious, it is regarded by the claimants as having a copyright date of 1935. If copyrights from that era last for a maximum of ninety-five years, the copyright on “Happy Birthday to You” would under current law be set to expire at the end of the day on December 31, 2030. The copyright in “Happy Birthday to You,” currently claimed by Warner/Chappell Music, Inc., has been challenged by Good Morning to You Productions Corp., a film production company, in a lawsuit filed in June 2013, seeking declaratory judgment that the song is in the public domain. The lawsuit also demands that Warner/Chappell repay millions of dollars in licensing fees.⁴⁷ Other suits were filed at about the same time, and they now have been consolidated into one class action case.⁴⁸

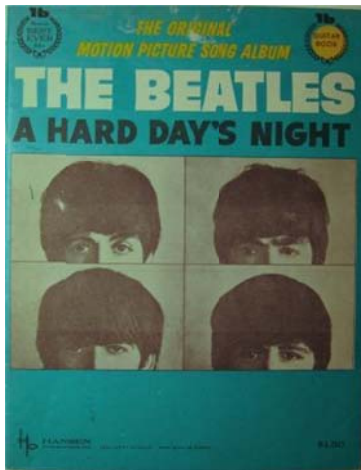
Assuming a valid copyright in the underlying composition, a music box can be a derivative of the original composition. If I turn the crank and allow the box to play the song in a place or under circumstances where it can be perceived by the “public,” then my turning the crank is an act of public performance. The manufacturer and seller of the music box may need to secure permission from the copyright owner to make and sell the device in the first place. I may need to secure permission from the rightsholder in order to make a public performance. Fortunately, I generally use my collection of copyright relics in connection with my classroom teaching. If I turn the crank and play the music in the context of my live classroom teaching activities, then I am most assuredly acting within the copyright exception in Section 110(1). By the way, assuming permission from the owner of rights in the music, the music box may be a lawfully made copyrighted derivative work. As such, I would be able to sell it or otherwise transfer ownership under the first sale doctrine of Section 109(a) of the Copyright Act.



If you like copyright puzzlers, try this one. Assume that “Happy Birthday to You” is a copyrighted work. Assume that the music box is a reproduction of the copyrighted work in the form of little bumps or “pins” on the cylinder that rotates when you turn the crank. If I take a photograph of the music box, then I am capturing at least a portion of those pins on the cylinder and thus a portion of the composition. Are the pins on the cylinder really any different than the conventional staff notation that may be printed on a page? One would not seriously doubt that notes printed on a page are subject to copyright protection, so why not pins on a cylinder? On the other hand, if only a portion of the composition as coded in the pins is visible in any single photograph of the music box, is that reproduction of just a portion of the composition an exercise of fair use? Consider those questions during your next dinner table conversation.

A Hard Day’s Night (page 113)

As a Beatles fan I could not resist including this item. I found this book of sheet music from the songs of the motion picture at a garage sale many years ago. Reselling a copyrighted work on the used market is one more exercise of first sale under Section 109(a) of the Copyright Act.⁴⁹ The movie is easy to dismiss as a teenage romp, but it is actually a fairly sophisticated example of tightly edited filmmaking in a rich complexity of black-and-white tones.



Perhaps most remarkable about the movie is that it includes ten original compositions credited to John Lennon and Paul McCartney. The entire oeuvre of the Beatles is a complex and widely varying assortment of rock and roll from “I Want to Hold Your Hand” through *The White Album* and *Abbey Road*.

The Beatles exhibited a fantastic range of talent in relatively few years. However, thinking back to their origins, their recordings were a mix of original compositions and covers, usually of traditional tunes or American blues numbers. With the production of their first movie, Lennon and McCartney needed to prepare a full LP of original compositions. The result is a set of delightful and upbeat tunes, each with its own characteristic melody and distinctive lyrics and storyline. The movie opens with the powerful and complex opening chord on a 12-string guitar that begins the song “A Hard

Day's Night." The selections include the high-paced run of "Can't Buy Me Love" as well as the melodic longing of "If I Fell." George Harrison contributed one song, "Don't Bother Me," and it offers a slightly more shadowy sentiment. Copyright or no copyright, this is great music.

Yet this particular recording raises some interesting copyright conundrums. As with most musical sound recordings, we have at least two copyrights. One copyright is in the composition, and the second is in the recording. A recorded musical performance is a derivative of the composition, and it has its own protectable copyright. As is true with many Beatles songs, John and Paul wrote the composition, but all four members performed on the recording. Two members held the initial copyrights in the compositions, and all four shared the copyrights in the recordings. Of course, business managers, agents, lawyers, producers, tax planners and others joined the conversation, and the copyrights were moved and redivided by agreement. We could even end up with Michael Jackson owning a majority share.⁵⁰

The Beatles' copyrights are also an interesting case study because most—especially the earliest—were created and published outside the United States. In accordance with the Berne Convention and other international agreements, U.S. copyright law protects works from the United Kingdom and most countries of the world.⁵¹ The U.S. also applies that protection retroactively to works (such as songs from the Beatles) that were created before the U.S. joined Berne in 1989 and joined the World Trade Organization in 1996.

When the U.S. joined the WTO, many foreign copyrights that had entered the public domain had their copyrights restored.⁵² Most discussion about restoration centers on works that entered the public domain due to failure to comply with formalities, such as a copyright notice or a renewal registration. However, another category of restored copyrights were works that entered the public domain due to limits on subject matter.⁵³ U.S. copyright law did not apply to sound recordings until February 15, 1972.⁵⁴ Thus, the "subject matter" of pre-1972 recordings was a category for restoration of copyrights. The Beatles had come and gone by 1972. All of their sound recordings were without any U.S. protection (although the underlying compositions were copyrighted). With the restoration of copyrights in 1996, however, the pre-1972 recordings from the U.K. and other countries that were part of our treaty arrangements (which includes most countries of the world) were given a restored copyright.⁵⁵ The Beatles' compositions were always protected in the U.S., and now the recordings are, too.

One of the ironies of copyright restoration is that it grants protection to foreign works, but leaves comparable U.S. works in the public domain. Pre-1972 recordings made in New York, or L.A., or elsewhere in the U.S. are without federal copyright protection. Nevertheless, some states enacted a form of legal protection for such works.⁵⁶ The U.S. Copyright Office has opened discussions of this surprisingly complex issue and has recommended bringing pre-1972 sound recordings into the federal statutory scheme.⁵⁷ The deeper one goes into the law of sound recordings, the messier it becomes.

Reuben and Amanda Anderson (page 132)

My grandparents on my mother's side are of 100 percent Swedish descent. Their families settled in northern Minnesota in the nineteenth century, and both of my grandparents were born in that state, in the vicinity of Alexandria. They married in 1921 in the town of Lowry, Minnesota and soon settled in St. Louis Park, a suburb of Minneapolis. They moved into a house they bought on Vernon Avenue in the 1920s and stayed there for the rest of their lives. This unpublished photograph may have been made by a professional photographer in Lowry in 1921. Its copyright status is a mystery without thorough investigation.⁵⁸

One possibility is that the photographer owns the copyright. In that event, we need to identify the photographer and his or her date of death because the copyright would last for the life of the photographer plus seventy more years. It may or may not be in the public domain at this time. Another possibility is that the photographer was working for and creating "works made for hire" for a photography studio. As a work made for hire, an unpublished work from the past could last 120 years. Such a work from 1921 would have copyright protection through the end of the year 2041. A third realistic possibility is that the work was created "for hire" on behalf of one or both of my grandparents. In other words, they were deemed to be the employers of the photographer and own the copyright. Again, assuming an unpublished work for hire, the copyright would last 120 years.⁵⁹



Determining the copyright status of such a work means needing to identify who actually created it, under what circumstances was it

created, and whether it was created by an employee acting on behalf of an employer. Often the actual determination of the copyright status depends not only on legal analysis, but also on historical facts that are not realistically available. The factual circumstances of events such as the photograph of a wedding from 1921 are usually lost in history. They often become orphan works. The copyright status of this particular work is uncertain, and I hope no one in my family sues me.

The Tomb of Richard Wright (page 134)

Richard Wright was an important African-American author of novels and many other literary works. He was raised in Mississippi but spent many of his formative and adult years in New York City. He was associated with the Communist Party, the WPA writers project, and even the Book of the Month club. His controversial books, such as *Native Son* (1940) and *Black Boy* (1945), exposed the social strife that goes with being an African-American in the mid-twentieth century. He relocated to Paris in 1946, continued his controversial writings, and traveled to many other parts of the world. His health deteriorated steadily in the 1950s, and he died in Paris at the age of fifty-two.⁶⁰

The Père Lachaise Cemetery is one of the most famous cemeteries in the world, and it is a major tourist attraction in Paris. It includes the graves of many notables from French history, and it is the final resting place of Jim Morrison of the Doors. Other famous gravesites include those of Oscar Wilde and Edith Piaf. Many of the graves are elaborate monuments. Others are small tombs placed in rows of a massive wall in one corner of the cemetery. The grave of Richard Wright is one of those small places of interment with a simple plaque among columns and rows of other similar markers. To be buried in Père Lachaise Cemetery is quite a distinction, even if it means being tucked behind a set of stairs where few people will likely pause to notice the final resting place of this important author. The works of Richard Wright remain standard reading for students of American society and literature. His works were also the subject of copyright litigation, in which a court ruled that brief quotations from his unpublished journals could be within fair use.⁶¹



¹ See Association of Research Libraries, “Copyright Timeline: A History of Copyright in the United States” (available at <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline>).

² See U.S. Copyright Act, 17 U.S.C. § 102 (2013).

³ Kenneth D. Crews, *Copyright Law for Librarians and Educators: Creative Strategies and Practical solutions*, 3rd ed. (Chicago: ALA Editions, 2012).

⁴ The first modern French copyright law was enacted in 1791. See Jane C. Ginsburg, “‘Une Chose Publique’? The Author’s Domain and the Public Domain in Early British, French and U.S. Copyright Law,” *Cambridge Law Journal* 65, no. 3 (2006): 654. The first modern Dutch copyright law was enacted in 1912. See P. Brent Hugenholtz, “Chronicle of The Netherlands, Dutch copyright law, 2001-2010,” *Revue Internationale du Droit d’Auteur* 226 (2010): 280-349.

⁵ For more information on the Berne Convention, see U.S. Copyright Office, *International Copyright Relations of the United States, Circular 38a* (Washington, D.C., 2010) (available at <http://www.copyright.gov/circs/circ38a.pdf>).

⁶ The current U.S. Copyright Act defines “publication” as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.” U.S. Copyright Act, 17 U.S.C. § 101 (2013). Earlier statutes did not define the concept, leaving it to varying judicial interpretations. For a substantial analysis of the definition of “published,” see Deborah R. Gerhardt, “Copyright Publication: An Empirical Study,” *Notre Dame Law Review* 87 (2011): 135-204 (available at <http://ssrn.com/abstract=2016033>).

⁷ U.S. Copyright Act, 17 U.S.C. § 303(a) (2013).

⁸ U.S. Copyright Act, 17 U.S.C. § 304 (2013).

⁹ For an interesting article that ponders whether van Gogh paintings infringe on earlier works, see Paul Edward Geller, “Hiroshige v. Van Gogh: Resolving the Dilemma of Copyright Scope in Remediating Infringement,” *Journal of the Copyright Society of the USA* 46 (1998): 39-70 (available at <http://ssrn.com/abstract=186931>).

¹⁰ U.S. Copyright Act, 17 U.S.C. § 109(c) (2013).

¹¹ My best bet is fair use, and I feel pretty good about reproducing a small image of an early work, set in the context of a museum display, and presented in the context of scholarly analysis. I find support in this case, which allowed inclusion of small images of copyrighted artworks in a book of music history: *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

¹² *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). The source of the photograph of Oscar Wilde in this essay is Wikimedia Commons.

¹³ For the official site of the Monument, see <http://www.utah.com/schmerker/2000/newsrock.htm>.

¹⁴ See “History of the Courts” (available at <http://www.navajocourts.org/>).

¹⁵ See “History” on the Navajo Nation’s official website (available at <http://www.navajonnsn.gov/history.htm>).

¹⁶ U.S. Copyright Act, 28 U.S.C. § 1338 (2013).

¹⁷ For more information on the bookshop, visit its website: <http://www.doverbooks.co.uk/>.

¹⁸ The website of the entire project is found here: <http://www.leo-parade.de/>.

¹⁹ For more information, see <http://www.cowparade.com/>.

²⁰ Adolf Dietz, “Germany,” in *International Copyright Law and Practice*, GER § 4 (Matthew Bender, 2012).

²¹ *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

²² *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010). See also, Jennifer Schuessler, “Get a Life, Holden Caulfield,” *New York Times*, June 20, 2009 (available at www.nytimes.com/2009/06/21/weekinreview/21schuessler.html).

²³ See Andrew Albanese, “J.D. Salinger Estate, Swedish Author Settle Copyright Suit,” *Publishers Weekly*, Jan. 11, 2011 (available at <http://www.publishersweekly.com/pw/by-topic/industry->

news/publisher-news/article/45738-j-d-salinger-estate-swedish-author-settle-copyright-suit.html).

²⁴ U.S. Copyright Act, 17 U.S.C. §101 (2013).

²⁵ See *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F.2d 945 (9th Cir. 1954) and *Metro-Goldwyn-Mayer v. American Honda Motor Co.*, 900 F.Supp. 1287 (C.D. Cal. 1995).

²⁶ A new biography reports that new writings by Salinger may be published in the coming years, including a story that builds on the Holden Caulfield character. Perhaps Salinger was concerned about his copyrights in part because he had future plans for Holden. See David Shields and Shane Salerno, *Salinger* (New York: Simon & Schuster, 2013).

²⁷ U.S. Copyright Act, 17 U.S.C. § 602(a)(3)(B) (2013).

²⁸ Landmarks Preservation Commission, “Unisphere, May 1995,” May 16, 1995 (available at <http://www.nyc.gov/html/lpc/downloads/pdf/reports/unisphere.pdf>).

²⁹ The searchable database is online at <http://www.copyright.gov/records/>.

³⁰ For the “official site” of the Empire State Building, see <http://www.esbnyc.com/>.

³¹ See Architectural Works Copyright Protection Act of 1990, codified in the U.S. Copyright Act, at 17 U.S.C. §§ 101-102, 120 (2013).

³² U.S. Copyright Act, 17 U.S.C. § 120 (2013).

³³ A search of “empire state building” in the database from the U.S. Patent & Trademark Office revealed various word and design marks incorporating the outline of the Empire State Building. The database is found from a link at: <http://www.uspto.gov/>.

³⁴ The U.S. Supreme Court has ruled that the layout, design, and specific appearance of a restaurant can qualify as trade dress, a doctrine related to trademark. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

³⁵ *The Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Productions*, 134 F.3d 749 (6th Cir. 1998). The architectural design by I.M. Pei may well have copyright protection because it was completed in the year 1995. However, because of the exception in Section 120, one could make and sell photographs of the building without a copyright infringement.

³⁶ See William W. Fisher III, et al., “Reflections on the Hope Poster Case,” *Harvard Journal of Law & Technology* 25 (2012): 243-338 (available at <http://jolt.law.harvard.edu/articles/pdf/v25/25HarvJLTech243.pdf>).

³⁷ *Id.*

³⁸ *Id.*

³⁹ This is based on my own visual inspection of the poster as it was on display during 2008 at the National Portrait Gallery in Washington, D.C. For the museum’s description, see <http://www.npg.si.edu/collection/obamaportrait.html>.

⁴⁰ See Randy Kennedy, “Shepard Fairey Is Fined and Sentenced to Probation in ‘Hope’ Poster Case,” *New York Times*, Sep. 7, 2012 (available at <http://artsbeat.blogs.nytimes.com/2012/09/07/shepard-fairey-is-fined-and-sentenced-to-probation-in-hope-poster-case/>).

⁴¹ For the website about current restorations of this building, see http://www.bnf.fr/en/bnf/renovation_work_richelieu.html.

⁴² Extensive information about WIPO is available on its website: <http://www.wipo.int/about-wipo/en/>.

⁴³ The full text of the Berne Convention is available at: <http://www.wipo.int/treaties/en/ip/berne/>.

⁴⁴ The final diplomatic conference on issues for the visually impaired was held in Marrakech, Morocco, in July 2013, resulting in the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled. The full text is available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323.

⁴⁵ See Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives* (Geneva, Switzerland: World Intellectual Property Organization, 2008) (available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192). The presentation slides and related materials are collected with documents of the seventeenth meeting of the Standing

Committee on Copyright and Related Rights (available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=16828).

⁴⁶ See Robert Brauneis, “Copyright and the World’s Most Popular Song,” *Journal of the Copyright Society of the USA* 56 (2009): 335-426.

⁴⁷ See Samantha Rothberg, “‘Happy Birthday’ Copyright in the Crosshairs: Filmmakers Sue to Restore Song to Public Domain,” *Jolt Digest*, June 24, 2013 (available at <http://jolt.law.harvard.edu/digest/copyright/happy-birthday-copyright-in-the-crosshairs-filmmakers-sue-to-restore-song-to-public-domain>). See also, Benjamin Weiser, “Birthday Song’s Copyright Leads to a Lawsuit for the Ages,” *New York Times*, June 13, 2013 (available at <http://www.nytimes.com/2013/06/14/nyregion/lawsuit-aims-to-strip-happy-birthday-to-you-of-its-copyright.html>).

⁴⁸ As of this writing, at least four lawsuits on the matter had been filed, and in late July some were dismissed voluntarily, allowing the cases to be consolidated in one proceeding in the U.S. District Court for the Central District of California. *Good Morning to You Productions Corp. v. Warner/Chappell Music, Inc.*, Case No. CV 13-04460-GHK (MRWx) (C.D. Cal. filed July 26, 2013).

⁴⁹ U.S. Copyright Act, 17 U.S.C. § 109(a) (2013).

⁵⁰ See “Rumors about Jackson, Beatles catalog untrue, McCartney says,” *CNN*, July 9, 2009 (available at <http://www.cnn.com/2009/SHOWBIZ/Music/07/09/jackson.mccartney/>).

⁵¹ U.S. Copyright Act, 17 U.S.C. § 104(c) (2013).

⁵² U.S. Copyright Act, 17 U.S.C. § 104A (2013).

⁵³ U.S. Copyright Act, 17 U.S.C. § 104A(h)(6)(C)(ii) (2013).

⁵⁴ See Program on Information Justice and Intellectual Property Washington College of Law, American University, *Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis* (Washington, DC: Council on Library and Information Resources, 2009): 7 (available at <http://www.clir.org/pubs/reports/pub146/reports/pub146/pub146.pdf>).

⁵⁵ However, not all of the Beatles’ recordings were made in the U.K. For example, the recordings of live performances at the Hollywood Bowl were obviously made in the United States. Evidently, those sound recordings remain without U.S. federal copyright protection.

⁵⁶ See *Protection for Pre-1972 Sound Recordings*, *supra* note 54.

⁵⁷ See United States Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings* (Washington, DC: 2011) (available at <http://www.copyright.gov/docs/sound/pre-72-report.pdf>).

⁵⁸ My grandfather’s name was also something of a mystery. Evidently, the official spelling is “Reuben,” but occasionally we would find it spelled “Rueben” or “Ruben.” There was never any explanation for the variations.

⁵⁹ Care for the absurd? They may have posed themselves and pressed the shutter release on the camera with a timer, allowing a chance to get in position. That might create a joint work owned by my grandparents together. That scenario is far from absurd today, when we can huddle with friends in front of a smartphone and pose ourselves on screen. We just do not know about any specific photograph without more facts about the exact circumstances at the time, and those facts tend to vanish quickly from memory.

⁶⁰ For a recent biography, see Hazel Rowley, *Richard Wright: The Life and Times* (Chicago: The University of Chicago Press, 2008).

⁶¹ See *Wright v. Warner Books*, 953 F.2d 731 (2d Cir. 1991).