



# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A Lawyer's View of Copyright

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### Some Basic Thoughts on Copyright Law by Gloria Feinberg

*"If I were a rich man,  
yiddle, diddle, diddle, diddle, diddle,  
diddle, diddle-dee  
All day long I'd biddie, biddie, bum,  
If I were a wealthy man." <sup>1</sup>*

When Tevye, the dairyman in "Fiddler on the Roof", verbalized his dream of what his life would be like if he were rich, he gave expression to a pleasant thought that many of us undoubtedly must share. Well, the odds of winning a lottery are pretty slim but surely, we might surmise, a clever person could come up with an old "chestnut" lyric like "Who put the bomp in the bomp bomp bomp"<sup>2</sup> (frequently misquoted as "Who put the bop in the bop-sha-bop-sha-bop?"). And after that, the money from your copyright would just roll in...

At this point lesser optimists would caution, "Don't give up your day job." I say, read on. Copyright is the means by which lucky creators get in the position to collect royalties. It is also the means by which there could be potential return of revenue back to the government from federally-funded contracts or grants.

#### What is Copyright?

Copyright is a general term used to cover intellectual property rights which evolve from the physical manifestation of original thought. For example, transcripts may once have been unspoken thoughts; outlines of ideas or storyboards may once have been but kernels of whole plans in the creator's mind. The ideas which exist only in the mind can only be discerned and appreciated by others and protected by law when they have been reduced to some physical form by which they can then be communicated or shared. The sculpture, the musical score, the written story or the computer program are all examples of imagination which begins with only an idea and develops into a physical manifestation. For copyright in this type of intellectual property to vest there must be a commitment of the idea to a tangible format for reproduction and sharing. In general, when we speak of copyright (either common law or statutory) we are speaking of how

the exclusive right of ownership, and all that that encompasses and flows from it, in this physical manifestation of the work is protected.

The United States recognizes valuable ownership rights in what is termed "intellectual property." The Constitution provides that Congress shall have the power "... to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Constitution, Art. I, § 8. The authority to hold exclusive right to one's inventions or useful arts derives from that provision of the Constitution. It is the right to reproduce one's work and reap whatever benefits may result from one's mental labor that is the ultimate value of copyright. By claiming copyright in a work an author or his assigns would have the right to authorize reproduction of the works which he created. Not only is it a question of "what's mine is mine" but there is the possibility that income (*i.e.* royalties) may be derived from the reproduction of one's creation. Moreover, that exclusive right to make copies and collect royalties continues for the term of the copyright which, under section 302(a) of the Copyright Act of 1976, as amended, endures from the time of creation of the work through the life of the author plus fifty years after his death.

For example, when you read the notice which appears at the beginning of most copyrighted videotapes it states, in part, that all rights are reserved to the copyright holder. The copyright holder in this instance is the only one who legitimately may authorize the making of copies of his work and who is entitled to receive payment from the sale or rental of those copies. To stray a bit, when you make a copy of such a tape and



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☞ **A Lawyer's View** is a monthly publication of the Contract Law Division designed to give practical advice to the Department's procurement officers. Comments, criticisms, and suggestions for future topics are welcome.—Call Jerry Walz at FTS 202-377-1122, or via e-mail to Jerry Walz@OGCMAC@OSEC

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share it with a friend, you are, in fact, committing an illegal act. However, when you tape a copy of a film or television program off-the-air to retain in your home collection for your own enjoyment, you come under an exception known as "home use" and should have a clear conscience. The law is somewhat different with regard to exclusive rights in computer programs. Under section 117 of the Copyright Act, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program as an essential step in the utilization of the computer program. However, exact copies made may only then be sold or leased as part of the transfer of all rights in the program by those who hold such rights; adaptations made may likewise be transferred only with the authorization of the copyright owner.

### Government Benefit from Copyright Protection?

Under most circumstances copyright protection is not available for works of the U.S. Government, but the government is not precluded from receiving or holding domestic copyrights or royalties transferred to it by assignment, bequest or otherwise. (See Sect. 105 of the Copyright Act). There are exceptions which may be pertinent. For instance, one exception, under the recently adopted Berne Convention, is that the U.S. Government can hold copyright abroad in those countries which allow their own governments to hold copyright. When there is the expectation that federally-funded materials such as computer programs or instructional materials may be sold abroad, the question of whether the government may want to register for a foreign copyright may now be appropriate to consider. A second relevant exception is that under the Standard Reference Data Program (15 U.S.C. §290e) Commerce is given the right to secure copyright and its renewal on behalf of the United States as author or proprietor in all or any part of any standard reference data which it prepares or makes available under that Act.

The FAR does address the Government's rights in data produced in performance of government contracts (see FAR 52.227-14 Rights in Data-General), but is not helpful on the issue of payment of royalties to the Government. Under

this provision (and those that follow at FAR 52.227-17, 52.227-18 and 52.227-20), the Contractor is authorized to claim copyright in the subject data and the Government is granted "a paid-up nonexclusive, irrevocable, worldwide license for all such data..." Unless special terms are negotiated, then, any royalties based on the sale, reproduction or distribution of copyrighted works would flow to the Contractor.

When government money is used to develop property which is capable of generating income such as a database or software, the Government may, in some instances, by contract or under statute, require either payment of royalties or transfer of the copyright ownership. For example, under the ATP, NIST, in its initial awards, relying on section 7 of its statute (see Public Law 100-418, August 23, 1988), has required grantees to pay a share of the licensing fees and royalties it receives proportional to the Federal share of the monies invested in the funded projects. Similarly, NTIS, under its Joint Ventures Program (15 U.S.C. §37046(a)(1)(4)) has required its partners to copyright new products based on Federally-funded scientific and technical data and to assign such copyright back to NTIS. The royalties derived from these joint ventures are shared with the Government. It should be noted that once money from royalties is collected, however, there must be statutory authority to use or retain the monies received or else collected fees will be returned to the treasury.

So what is the point of it all? If you've got some talent, by all means try to sell it. In your "day job" you should examine what products evolve from government funding and whether there might be income generated from copyrightable materials. In each instance, you should consider whether there is authority for the government to share in the rewards of the intellectual property which it funded and, at least in part, made possible.

*Just food for thought..*

1. IF I WERE A RICH MAN (Jerry Rock, Sheldon Harnick)  
© 1964-Alley Music Corporation and Trio Music Co., Inc.  
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2. Lyrics by Barry Mann and Gerald Goffin, Screen  
Gems EMI Music Inc.

