Copyright

USA – Law and Practice

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The ‘Law & Practice’ sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.
# Law and Practice

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Weil, Gotshal & Manges LLP’s intellectual property/media practice – which focuses on all types of IP litigation and counselling, including in the copyright and trade mark space – is comprised of 24 attorneys. The practice is headquartered in New York, but the firm’s litigators routinely handle matters across the USA and around the world. Weil advises clients and litigates on their behalf on myriad complex IP issues, including: cutting-edge copyright and trade mark liability issues, including contributory and vicarious infringement issues and Digital Millennium Copyright Act (DMCA) safe harbours and compliance requirements; copyright licensing requirements and rate-setting litigation before the BMI and ASCAP rate courts and the Copyright Royalty Board; copyright pre-emption of various state laws; review of clients’ service offerings and product development initiatives for infringement risks (both direct and secondary), defences (including fair use), and development of terms of service; IP matters arising in the context of mergers, acquisitions, spin-offs, and international expansion.

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### 1. General Information

#### 1.1 Historical Roots

The United States Constitution gives Congress the power to enact laws establishing a copyright system in the United States. Congress enacted the first federal copyright law in 1790. Prior to 1976, copyright was also protected as a matter of state law. This dual system of copyright protection was abolished with the passage of the Copyright Act of 1976, which pre-empts all state copyright laws that provide equivalent rights to those protected by the federal copyright laws with one limited exception (see 17 USC § 301). Specifically, federal copyright law pre-empts all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 of the Copyright Act in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103 (see 17 USC § 301(a)). Congress preserved a narrow sphere for state copyright laws to continue to protect sound recordings created prior to 15 February 1972, which are left unprotected by federal copyright laws (see 17 USC § 301(c)).
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1.2 Principal Sources
The Copyright Act has undergone a number of major revisions. Today, the Copyright Act of 1976, as amended, is the principal source of law regulating copyright in the United States. Works created prior to 1 January 1978 — the effective date of the 1976 Copyright Act — remain governed by the Copyright Act of 1909.

Since the enactment of the Copyright Act of 1976, Congress has passed several related laws, including, most notably, the Digital Millennium Copyright Act in 1998.

1.3 International Conventions/Treaties
The USA is party to the following international treaties/conventions:

- Universal Copyright Convention (UCC) – entry into force 16 September 1955
- The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) – entry into force 1 March 1886
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – entry into force 1 January 1995
- WIPO Copyright Treaty (WCT) – entry into force 6 March 2002
- WIPO Performances and Phonograms Treaty (WPPT) – entry into force 20 May 2002

The United States has also signed a number of bilateral copyright agreements, including the US–China Intellectual Property Rights Memorandum of Understanding (effective 17 March 1992) and the Dominican Republic–Central America–US Free Trade Agreement (CAFTA–DR) (effective 1 March 2006).

1.4 Protected Holders
US copyright law generally extends the same protections to foreign nationals as to US citizens. However, US copyright law distinguishes between published and unpublished foreign works. Unpublished foreign works are protected without regard to the author’s nationality or domicile, while published foreign works are generally protected if the work was created by a US national or domiciliary, or by a national or domiciliary of a country that is party to a copyright treaty to which the United States is also a party (17 USC §§ 104(a), (b)(1)). A work is protected, regardless of the author’s nationality, if it was first published in the United States or in a country with which the United States has a copyright treaty (see 17 USC § 104(b)(2)-(4)).

The President may extend by proclamation copyright protection to nationals of countries that offer substantially similar protections to US nationals or to works first published in the United States (see 17 USC § 104(b)(6)).

Ownership of a copyrighted work is determined by the law of the work’s country of origin. Once ownership is established, US law generally determines the substantive rights of the parties — including whether the plaintiff’s work is subject to protection and whether the plaintiff has established infringement — for infringements that occurred in the United States. However, whether US courts apply domestic law, foreign law, or both depends on the location of infringement, the work’s place of origin, the location with the closest ties to the dispute and treaties to which the United States is a signatory.

2. Copyright Works

2.1 Essential Elements
The Copyright Act protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device” (17 USC § 102(a)). The statute expressly excludes from protection any “idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied” (17 USC § 102(b)).

Thus, to be protected by US copyright law, a work must be “original” and “fixed.” A work is original when it originates with the author and possesses at least some minimal amount of creativity (see Feist Publications, Inc v Rural Telephone Service Co, 499 US 340 (1991)). A work is fixed when its embodiment is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” (17 USC § 101). Examples of subject matter that courts have found insufficiently permanent or stable to satisfy the fixation requirement include stock indices, artistic arrangements of wildflowers and bowls of perishable food.

2.2 Access Copyright Protection
Copyright protection vests in the author or authors of a work upon its creation. Registration is not required to secure copyright protection, although it is a prerequisite to a civil action for infringement (see 17 USC §§ 408, 411). A copyright notice is not required to be placed on the work to secure US copyright protection, although use of a copyright notice on commercially distributed works is a common practice that aids enforcement. With limited exceptions, a proper copyright notice will defeat a defence of innocent infringement (see 17 USC § 504(c)(2)).
2.3 Copyrighted Works Register
The procedures for registration of copyright with the US Copyright Office are set forth in Sections 408-10 of the Copyright Act (17 USC §§ 408-10). A database of registered works is available on the Copyright Office website, although there may be a time lag between registration of a work and its appearance in the database.

Copyright registration has several effects. First, a certificate of registration made before or within five years of first publication of the work constitutes “prima facie evidence of the validity of the copyright and of the facts stated in the certificate” (17 USC § 410(c)). Second, a rights holder may not commence an action for infringement of a US work until the work has been registered (17 USC § 411(a)). Courts are divided as to whether registration is effective for purposes of Section 411(a) upon the filing of an application with the Copyright Office, upon approval or rejection of the application, or upon issuance of the registration certificate (see 2 Melville B Nimmer, Nimmer on Copyright, §7.16[B][1][a] at 7-154-56 (discussing cases)).

Third, no statutory damages or attorney’s fees can be recovered for infringement where, for an unpublished work, the infringement commenced before the effective date of registration or, for the case of a published work, the infringement commenced after first publication of the work and before the effective date of registration unless registration is made within three months of first publication (17 USC § 412).

2.4 Categories of Copyrightable Works
The following types of works are eligible for copyright protection:

- literary works, which are defined broadly in Section 101 as “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied”;
- musical works, including any accompanying words;
- dramatic works, including any accompanying music;
- pantomimes and choreographic works;
- pictorial, graphic and sculptural works, which are defined in Section 101 to include “two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans”;
- motion pictures and other audio-visual works;
- sound recordings (note that under 17 USC § 301(c), sound recordings fixed prior to 15 February 1972 are not protected by federal copyright law); and
- architectural works.

See 17 USC § 102(a). Compilations and derivative works are also copyrightable (see 17 USC § 103(a)). The scope of copyright protection for original works of authorship is limited by the rule that ideas, systems, processes, etc, are not copyrightable (see 17 USC § 102(b)).

2.5 Protection Requirements for Software
Software is considered a “literary work” and is therefore copyrightable (See Apple v Franklin, 714 F2d 1240 (3d Cir 1983)). Object code and source code are protectable (id at 1249).

Software may also be patented, but to receive patent protection, it must meet the statutory requirements of novelty, usefulness and non-obviousness (see 35 USC §§ 101-103).

2.6 Protection Requirements for Databases
There is no sui generis protection for databases under the Copyright Act. However, databases may be protectable as compilations. The Act defines a compilation as a “collection and assembling of preexisting materials or of data that are selected in such a way that the resulting work as a whole constitutes an original work of authorship” (17 USC § 101). A database is copyrightable only to the extent that it contains an original selection, co-ordination, or arrangement of data such that the database as a whole constitutes a creative work of authorship (see Feist Publications, Inc v Rural Telephone Service Co, 499 US 340 (1991)). The underlying data contained in a database is not protected.

Databases generally are not patentable (see in re Warmerdam, 33 F3d 1354 (Fed Cir 1994)).

2.7 Protection Requirements for Industrial Design
An industrial design may be copyrightable to the extent that it is not purely utilitarian. Useful articles, “having an intrinsic utilitarian function,” are copyrightable “if, and only to the extent,” the design “incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article” (see 17 USC § 101, definition of “pictorial, graphic and sculptural works”). Courts have found an aesthetically pleasing but utilitarian chair not copyrightable, but a statue of a dancer used as a lamp base to be copyrightable (see Superior Form Bldrs v Dan Chase Taxidermy, 74 F3d 488, 493 (4th Cir 1996); Mazer v Stein 347 US 201, 205 (1954)). In Star Athletica, LLC v Varsity Brands, Inc, No 15-866, the US Supreme Court is evaluating the copyrightability of a design applied to a useful article in the context of cheerleader uniforms.

2.8 Peculiar Works

Fictional Characters
Fictional characters may be protected by copyright so long as the character is especially distinctive or so integral to the
work that the character constitutes the “story being told.” Courts apply one or both of these tests (see DC Comics v Towle, 802 F3d 1012, 1019 (9th Cir 2015), cert denied, 136 S Ct 1390 (2016)). Copyright protection may extend to drawings, depictions, or descriptions of fictional characters, but character names alone are not copyrightable. It is possible for fictional characters to receive trademark protection but only to the extent they identify the source of products and/or services.

TV Formats
TV formats receive very limited copyright protection. Courts examine the “articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events of the two works” (Zella v E W Scripps Co, 529 F Supp 2d 1124, 1133 (CD Cal 2007)). However, when courts analyse the substantial similarity of TV formats, they disregard unoriginal elements, generic and “stock” material (often referred to as scènes à faire), and any elements that are in the public domain. Courts have dismissed a variety of TV format infringement claims, including in cases involving television news programmes, talk shows, celebrity cooking shows, game shows and reality programming.

Sport Events
While footage or broadcast coverage of a sports event is copyrightable, sporting events themselves are not because they are not “works of authorship” (see NBA v Motorola, Inc, 105 F3d 841 (2d Cir 1997); 17 USC § 102(a)).

Multimedia Works
Multimedia works — which often include audio-visual, motion-picture and sound-recording elements — are copyrightable.

Museums and Exhibitions
Many works held by museums are in the public domain and museums rarely own the copyright in works in their collections that remain under copyright. A copyrighted work, however, does not lose protection by virtue of its inclusion in a museum collection or exhibition.

Websites
The design of a website and original forms of authorship on a website — including but not limited to writings, photographs, artwork, and audio-visual content — may be protected by copyright.

Recipes
Recipes may be protected by copyright if they express the steps of a recipe in a sufficiently original manner, but not if they merely list ingredients without any expressive elaboration upon the recipe’s functional directives (see Publications Int’l, Ltd v Meredith Corp, 88 F3d 473, 482 (7th Cir 1996)). As with other types copyrightable works, courts disfavour bright-line rules for the copyrightability of recipes and instead employ case-specific inquiries (see id). A collection of recipes may also be copyrighted if an author compiles them in an original manner (see id).

Perfumes
Perfume fragrances are not copyrightable (see, eg, Parfums Givenchy, Inc v Drug Emporium, Inc, 38 F3d 477, 479 (9th Cir 1994)).

Maps
Maps are expressly listed as a statutory example of a “pictorial, graphic, and sculptural work that may be copyrighted so long as it is sufficiently original” (17 USC § 101; Mason v Montgomery Data, Inc, 967 F2d 135 (5th Cir 1992)). The factual information conveyed by a map, however, is not protected by copyright.

3. Authorship and Copyright
Ownership

3.1 Author of Copyrightable Work
The author of a copyrighted work is generally the creator of the original expression of the work. Joint authorship exists where two or more authors prepare a work with the intent to combine their contributions into inseparable or interdependent parts. As described below, in the case of works made for hire, the legal author is the employer in the case of works made in the course of employment or the entity that commissioned the work.

3.2 Corporate Body
With respect to works made for hire, the employer, person, or entity for which the work was prepared is considered the author, unless the parties agree otherwise in a signed writing.

3.3 Identification of the Author
An author may be identified by a name or pseudonym, or for registered works, by whatever name is registered for a given work. A work created by an employee for an employer within the scope of employment is considered a work made for hire, absent a contrary written agreement (17 USC § 101). A specially commissioned work is not a work made for hire unless it falls under one of the statutorily enumerated categories of works made for hire and the parties expressly agree in a signed written agreement that the commissioned work shall constitute a work made for hire (see id).

3.4 Regulation on Collaborated Works
The Copyright Act defines a joint work as “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” (17 USC § 101). When these conditions
are met, the work is considered a joint work and the authors are considered joint copyright owners.

Joint works that are not works made for hire and that were created on or after 1 January 1978 are protected for 70 years after the death of the last surviving author (see 17 USC § 302).

3.5 Collective Works
A “collective work” is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works themselves, are assembled into a collective whole (17 USC § 101). Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole and vests initially in the author of the contribution (17 USC § 201(c)). The author of the collective work must obtain permission from the owners of the underlying copyrighted works to include them in the collective work. Absent an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work and any later collective work in the same series (id).

3.6 Work for Hire Doctrine
The Copyright Act recognises a work for hire doctrine under which the employer or person for whom the work was prepared is considered the author unless the parties agree otherwise in a signed writing (see 17 USC § 201(b)). Specifically, in the employment context, under the 1976 Copyright Act (applicable to work created after 1977), a work made for hire is a work prepared by an employer “within the scope of his or her employment” (17 USC § 101). In Community for Creative Non-Violence v Reid, 490 US 730, 751-52 (1989), the US Supreme Court drew upon the common law of agency for a test of whether a work was prepared within the scope of employment. The Court identified a number of relevant factors, including the location of the work, the duration of the relationship between the parties, whether the work was part of the regular business of the hiring party, the provision of employee benefits and the tax treatment of the hired party.

Under the 1909 Copyright Act (which continues to apply to works created prior to 1978), courts applied a different test that looked to “the person at whose instance and expense the work was created” (Martha Graham Sch and Dance Found, Inc v Martha Graham Ctr of Contemporary Dance, Inc, 53 F3d 624, 634-35 (2d Cir 2004)). Under this test, an independent contractor was treated as an employee for purposes of authorship if the hiring party “[induced] the creation of the work and [had] the right to direct and supervise the manner in which the work [was] carried out” (id at 635). Paying another to create a work gave rise to “an almost irrebuttable presumption” that the commissioning party was the “author” under the “work for hire” doctrine (Estate of Burne Hogarth v Edgar Rice Burroughs, Inc, 342 F3d 149, 158 (2d Cir 2003) (citation omitted)).

In addition, a work “specially ordered or commissioned” can be a work made for hire provided that (i) the parties’ intent to treat the work as a work made for hire is set forth in a writing signed by both parties and (ii) the work was created for one of the following purposes: as a contribution to a collective work, as a part of a motion picture or other audio-visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, or as an atlas (17 USC § 101).

Although case law established a “teacher exception” under the 1909 Copyright Act for works created by professors and teachers (see, eg, Sherrill v Grieses, 57 Wash L Rep 286 (DC 1929)), the statutory definition of a work for hire under the 1976 Copyright Act does not distinguish between public and private employers. Although some scholars argue that the teacher exception was subsumed by the passage of the 1976 Copyright Act, courts have upheld the “academic tradition” that professors own the rights to their scholarly articles and other intellectual property (see Weinstein v University of Illinois, 811 F2d 1091 (7th Cir 1987)). Ultimately, despite some uncertainty about the viability of the teacher exception, because parties may “otherwise agree in a signed writing” that the work for hire doctrine not apply, professors and other public employees may establish their authorship by agreement with their employers.

3.7 Anonymous and Orphan Works
For anonymous or pseudonymous works, the copyright term is 95 years from first publication or 120 years from creation, whichever is shorter (17 USC § 302(c)). If, before the end of the term, the identity of one or more authors of an anonymous or pseudonymous work is revealed in Copyright Office records, the term endures for the “life plus 70” system based on the life of the author or authors whose identity has been revealed (id). The statute does not [yet] specifically address orphan works, although they are the subject of recent legislative and regulatory attention (see US Copyright Office, Orphan Works and Mass Digitization: A Report of the Register of Copyrights (June 2015)).

4. Copyright Protection and Management

4.1 Copyright-Owner’s Economic Rights
The statute specifies the following exclusive rights of the copyright-owner:
4.2 Duration of Economic Rights

The copyright terms for works created and fixed in a tangible medium of expression on or after 1 January 1978 is the life of the author plus 70 years (17 USC § 302(a)). Joint works that are not works made for hire are protected for 70 years after the death of the last surviving author (17 USC § 302(b)). For anonymous works, pseudonymous works and works made for hire, the copyright term lasts for 95 years from the year of first publication or 120 years from the year of creation, whichever expires first (17 USC § 302(c)).

The term of copyright for works created prior to 1 January 1978 depends on several factors due to the renewal term provision of the 1909 Copyright Act. Under the 1909 Act, a copyright lasted 28 years from the date it was secured and was eligible for renewal for an additional 28-year term. The 1976 Copyright Act extended copyright protection for works created prior to 1978 by extending the length of the renewal term to 47 years for works that had not yet been renewed. The 1998 Copyright Term Extension Act increased the renewal term to 67 years for a maximum copyright term of 95 years (a 28-year term plus a 67-year renewal term) for works copyrighted prior to 1978. For works created prior to 1978 and published between 1 January 1978 and 31 December 2002, the copyright term is the later of the life of the author plus 70 years or 31 December 2047.

4.3 Alienable Economic Rights

Copyright ownership “may be transferred in whole or in part” (17 USC § 201(d)(1)). Any of the exclusive rights specified in Section 106 may be transferred separately (17 USC § 201(d)(2)). The transferee of any exclusive right is entitled to all the statutory rights of the copyright owner in exercising that right (id). A transfer of copyright, other than by operation of law, is valid only if set forth in a writing signed by the owner of the rights conveyed or by the owner’s authorised agent (17 USC § 204(a)). A subsequent writing can validate an earlier oral transfer.

The Copyright Act protects grantors or licensors (and their heirs) by giving them the right to terminate copyright grants or licences (other than for works made for hire) at a time and in a manner prescribed by the statute (see 17 USC §§ 203 (post-1977 agreements), 304(c) (pre-1978 agreements involving renewal rights only)).

4.4 Transmissible Economic Rights

Under the Copyright Act, a copyright passes to the owner’s heirs upon the owner’s death (17 USC § 302). As noted, the copyright remains in effect for 70 years following the death of the author, or, for joint works, 70 years after the death of the last surviving author.

4.5 Moral Rights

With the limited exception of limited moral rights for creators of works of visual art, the Copyright Act does not expressly provide moral rights for authors of copyrightable works. In some instances, however, courts have found certain types of editing to be infringing when it alters the author’s intended meaning or purpose (see Gilliam v Am Broad Cos, 538 F2d 14 (2d Cir 1976); Clean Flicks of Colorado, LLC v Soderbergh, 433 F Supp. 2d 126 (D Colo 2006)).

Section 106A of the Copyright Act provides limited moral rights for creators of certain works of visual art. The author of a “work of visual art” (which, as defined in Section 101, is limited to paintings, drawings, prints, sculptures, or photographs that exist in single copies or in consecutively numbered and signed editions of 200 or fewer copies) has the right to:

- claim authorship of the work;
- prevent being identified as the author of a work he or she did not create;
- prevent being identified as the author of a work in the event of “a distortion, mutilation, or other modification of the work” that would be prejudicial to his or her honour or reputation;
- prevent any intentional distortion, mutilation, or other modification of the work that would be prejudicial to his or her honour or reputation; and
- prevent destruction of a work of “recognised stature.”

Section 106A does not apply to works of visual art that are incorporated into buildings if the removal of the work would cause its destruction or mutilation and if the author consented to the installation of the work before 1 December 1990, or consented in writing after that date in an instrument that specified that the work could be destroyed or mutilated by removal (17 USC § 113(d)(1)). For works that can be removed from a building without destruction or mutilation,
Section 106A applies unless the owner has made a good-faith effort to notify the author in writing of an intent to remove the work and the author failed to remove it or to pay for its removal within 90 days of receiving the notice (17 USC § 113(d)(2)).

Modification of a work as a result of conservation or public presentation does not constitute “distortion, mutilation, or other modification” unless it is caused by gross negligence (17 USC § 106A(c)(2)).

4.6 Duration of Moral Rights
For works created on or after 1 December 1990, the rights of attribution and integrity under Section 106A last for the life of the author; for works created before 1 December 1990, if title to the work was held by the author on that date, the rights last for the same length of time as the rights conferred by Section 106; and for joint works they last for the life of the last surviving author (17 USC § 106A(d)(1)-(3)).

4.7 Alienable Moral Rights
Moral rights provided under Section 106A are not transferable, but they may be waived by the author in writing (see 17 USC § 106A(e)). In the case of joint works, waiver by one author waives the rights for all authors (see id).

4.8 Transmissible Moral Rights
Section 106A rights terminate upon the death of the author or, in the case of joint works, upon the death of the last surviving author (see 17 USC §106A).

4.9 Minimum Age Requirement
The Copyright Act does not impose a minimum age requirement. However, because transfer of copyright ownership requires a signed writing memorialising the transfer, a minor (under 18 years old) must appoint a duly authorised agent to enter into a transfer or licence agreement on the minor’s behalf (17 USC § 204(a)).

4.10 Specific Types of Contract
The statute merely requires that a transfer of copyright, other than by operation of law, be set forth in a writing signed by the owner of the rights conveyed or by the owner’s authorised agent (17 USC § 204(a)).

4.11 Exhaustion Doctrine
The first sale doctrine allows the owner of a copy or phonorecord “lawfully made” under the Copyright Act to sell or otherwise dispose of the copy without permission of the copyright owner (17 USC § 109(a)). The first sale doctrine does not apply where possession of the copy has been acquired by “rental, lease, loan, or otherwise, without acquiring ownership of it” (17 USC § 109(d)).

Section 602(a)(1) of the Copyright Act provides that unauthorised importation of a copyrighted work acquired outside the United States infringes the copyright-owner’s distribution right (17 USC § 602(a)(1)). However, this provision is limited by the first sale doctrine, which applies to copyrighted works made in the United States, purchased outside the United States from the manufacturer’s foreign distributor and imported into the United States, as well as to books made under licence outside the United States and imported into the United States without authorisation of the copyright owner (See Kirtsaeng v John Wiley & Sons, Inc, 133 S Ct 1351 (2013)).

4.12 Dealing with Rights
The Information Society Directive does not apply to the United States, which is a signatory to, among other treaties, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). However, the United States agreed to adopt only limited provisions of the WPPT.

Linking to a copyrighted work does not implicate any of the copyright owner's Section 106 exclusive rights, ie, it does not constitute an act of direct infringement. In some circumstances, however, linking to infringing materials may constitute contributory infringement. Section 512(d) of the Copyright Act provides a safe harbour against secondary liability for an internet service provider that "refer[es] or link[es] users to an online location containing infringing material or infringing activity" by using information location tools such as a directory or a hypertext link. If the service provider has actual or constructive knowledge that the linked material or activity is infringing, however, it must act expeditiously to remove or disable access to it to be immune from liability (see 17 USC § 512(d)).

Courts are divided as to whether the Section 106(3) distribution right can be violated by making copies of a work available online for downloading without authorisation. Compare UMG Recordings, Inc v Alburger, 2009 WL 3152153, *3 n41 (ED Pa Sept 29, 2009) (“[An] individual violates the exclusive-distribution right by ‘making available’ that illegally downloaded work to other internet users...”) with Capitol Records v Thomas, 579 F Supp 2d 1210, 1218 (D Minn 2008) (actual dissemination of copyrighted works required to establish “distribution” within meaning of the Copyright Act); see also US Copyright Office, The Making Available Right in the United States (22 February 2016).

4.13 Synchronisation
US copyright law grants to rights-holders the exclusive rights to reproduce and distribute copyrighted works. To reproduce and distribute an existing musical work as part of an audio-visual work, the creator of the audio-visual work must obtain a licence from the owner of the musical work. A synchronisation licence allows the licensee to synchronise the
musical composition in timed relation with visual content and to reproduce the composition as part of the audio-visual work. Synchronisation rights typically are licensed by the publisher of the musical work. The right to perform the musical work publicly when the audio-visual work is publicly performed is a distinct right from the synchronisation. The performance right may be obtained as part of the same transaction granting the synchronisation right but often is obtained separately.

4.14 Collective Rights Management System
The United States has a variety of collective licensing organisations. The most prominent organisations are discussed below.

Musical Works
There are several performing rights organisations (PROs) that license the right to perform publicly the musical works in their respective repertories on a collective basis, most typically in the form of a “blanket” licence that offers the licensee the right to perform any work in the repertory on an unlimited basis in exchange for a fixed fee. The two largest US PROs — the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc (BMI) — are regulated by anti-trust consent decrees with the US Department of Justice intended to constrain the market power accumulated by aggregating millions of copyrighted works from diverse rights-holders into a single licence and to ameliorate the anti-competitive effects of collective licensing. Key provisions of the consent decrees include:

- the obligation to offer a licence to any user upon request;
- interim licence coverage while negotiations are pending;
- a prohibition on obtaining exclusive rights from affiliated publishers and composers;
- the obligation to offer certain alternative forms of licence to the “one size fits all” blanket licence; and
- a determination of reasonable rates and licence terms by the federal court that supervises the PRO’s consent decree in the event of a negotiating impasse between the PRO and the licensee. There are several smaller PROs as well, including SESAC and Global Music Rights (GMR). These organisations are unregulated by anti-trust consent decrees, but each has been sued by music users in private anti-trust actions in recent years. SESAC’s settlements with the US Department of Justice intended to constrain market power accumulated by aggregating millions of copyrighted works from diverse rights-holders into a single licence and to ameliorate the anti-competitive effects of collective licensing. Key provisions of the consent decrees include:

Sound Recordings
US copyright law provides compulsory licences for certain uses of sound recordings created on or after 15 February 1972, including (among others) public performances and ephemeral recordings made in connection with “non-interactive” webcasting and satellite radio (see 17 USC §§ 112, 114). These compulsory licences are administered collectively on behalf of the recording industry by SoundExchange, which distributes statutory royalty payments to record labels, performing artists, and musicians.

Printed Works
The Copyright Clearance Center (CCC) is a collective licensing organisation that offers rights to use printed works on behalf of authors and publishers. The CCC has non-exclusive rights to the works it licenses; rights-owners retain the ability to set licensing conditions and prices.

4.15 Powers of Societies
See 4.14 Collective Rights Management System above.

4.16 Specific Feature
As noted, software is copyrightable as a “literary work” under Section 102(a) of the Copyright Act (see Apple v Franklin, 714 F2d 1240 (3d Cir 1983 and 2.5 Protection Requirements for Software) above).

In addition, the DMCA prohibits the circumvention of software or some other “technological measure that effectively controls access to a work” (see 17 USC § 1201).

5. Exceptions to Copyright

5.1 General Clause
Sections 107-119 of the Copyright Act set forth a number of exceptions to the exclusive rights set forth in Section 106, including:

- a fair use defence that provides the “fair use” of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” is “not an infringement of copyright” (Section 107);
- rights of reproduction for libraries and archives (Section 108);
- a first sale doctrine that permits an owner of a lawfully made copy or phonorecord to sell or otherwise dispose of the copy or phonorecord (Section 109);
- exemptions for the performance and display rights essential to non-profit, educational settings (Section 110);
- exemptions for retransmission of broadcast programming and compulsory licensing of retransmission by cable systems (Section 111);
- the ability to create an ephemeral copy or phonorecord of a particular transmission except in the case of a motion picture or other audio-visual work (Section 112);
- limitations on exclusive rights in pictorial, graphic and sculptural works, including exceptions for useful articles...
and the right to remove or destroy certain works “incorporated in or made a part of a building” (Section 113);

• limitations on certain sound recording rights and compulsory licensing of certain types of digital audio transmissions (Section 114);

• compulsory licensing for making and distributing phonorecords of nondramatic musical works (Section 115);

• compulsory licensing for public performances by means of coin-operated phonorecord players in the absence of voluntarily negotiated licences (Section 116);

• permission for an owner to copy a computer program as an essential step in the utilisation of the computer program or for archival purposes only (Section 117);

• compulsory licensing of certain copyrighted works in connection with non-commercial broadcasting (Section 118); and

• compulsory licensing for secondary transmissions by satellite carriers (Section 119).

5.2 Factors to be Considered
A fair use defence may be asserted against a claim of infringement of any of the Section 106 exclusive rights. Section 107 provides that the determination of whether a use is “fair” must take into account the following factors:

• the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

• the nature of the copyrighted work;

• the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

• the effect of the use upon the potential market for, or value of, the copyrighted work.

See 17 USC § 107. The statutory factors are non-exclusive; courts are free to consider other equitable factors as well.

5.3 Exemption of Private Copy
There is no specific statutory protection for private use under US copyright law. However, the fact that the unauthorised copying is private and non-commercial typically will weigh in favour of a finding of fair use.

5.4 Exemption of Cultural Goods/Buildings
There is no explicit exception for reproductions of cultural goods or buildings in public places.

5.5 Exemption of Intermediaries
Section 512 of the Copyright Act codifies several “safe harbours” for internet service-providers that bar liability for monetary and most injunctive relief so long as the statutory prerequisites are satisfied. A “service-provider” is defined broadly as “a provider of online services or network access, or the operator of facilities therefore” in relation to the safe harbours set forth in Section 512(b)-(d) (see 17 USC § 512(k)(1)(B)). For purposes of Section 512(a), “service-provider” is defined as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, or material of the user’s choosing, without modification to the content of the material as sent or received” (17 USC § 512(k)(1(A)).

Section 512(a) provides a safe harbour for “transitory digital network communications” that applies to infringement that occurs by reason of transmitting material through the provider’s system or network or by “intermediate and transient storage” of the material in the course of the transmission.

Section 512(b) provides a safe harbour for “system caching” that applies to “intermediate and temporary storage of material” on a system or network that occurs automatically.

Section 512(c) provides a safe harbour for “information residing on systems or networks at direction of users” that applies to infringement “by reason of the storage at the direction of a user of material” that resides on the provider’s system or network, so long as the service-provider:

• lacks actual knowledge of infringement or “aware[ness] of facts or circumstances from which infringing activity is apparent”;

• upon obtaining actual knowledge of infringing activity or awareness of infringing activity “acts expeditiously to remove, or disable access to” the material;

• does not receive a financial benefit directly attributable to the infringing activity where the service-provider has the right and ability to control the infringing activity; and

• upon receiving written notification of claimed infringement in the statutorily prescribed form, acts expeditiously to remove or disable access to the material claimed to be infringing.

A notification of claimed infringement must comply with Section 512(c)(3). Among other things, the notice must:

• be provided to an agent designated by the service-provider;

• identify the allegedly infringed work and the allegedly infringed material therein, with information “sufficient to permit the service-provider to locate the material’’;

• include the complaining party’s contact information; and

• include a statement of good-faith belief that the complained-of use is not authorised and a sworn statement that the complainant is authorised to act on behalf of the copyright owner. A notice that “fails to comply substantially” with each of the statutory requirements “shall not be considered” in determining whether a service-provider has the requisite knowledge of infringing activity (17 USC § 512(c)(3)(B)(i)).
Section 512(d) provides a safe harbour for “information location tools” that applies to infringement “by reason of the provider referring or linking users to an online location containing infringing material or infringing activity” by using information location tools such as a directory or a hypertext link. The service provider must act expeditiously to remove or disable access to material where it has actual or constructive knowledge that the material or activity is infringing.

Safe-harbour protection does not require a service provider to “monitor its service or affirmatively seek facts indicating infringing activity” (17 USC § 512(m)). However, if a service-provider does proactively take remedial action where the facts and circumstances indicate infringing activity, it is protected “whether or not the material or activity is ultimately determined to be infringing” (17 USC § 512(g)(1)).

To be eligible for safe-harbour protection, a service-provider must have adopted and reasonably implemented a policy providing for the termination of repeat infringers in appropriate circumstances and it must accommodate and not interfere with “standard technical measures,” which are generally available technical measures used to identify protected works (17 USC § 512(i)).

5.6 Exemption of Satire/Parody
Satire and parody — both forms of criticism or commentary, which are among the illustrative fair uses — may qualify as fair use under the Copyright Act, although that determination must be made on a case-by-case basis. Courts will look to the purpose and character of the satire or parody to determine if it is sufficiently “transformative” (ie, whether it “adds something new [to the copyrighted work]... altering [it] with new expression, meaning, or message”) (Campbell v Acuff-Rose Music, Inc, 510 US 569, 579 (1994) (citation omitted)). In terms of the permissible amount of the taking, the Supreme Court has held that parody “must be able to ‘conjure up’ at least enough of the original to make the object of its critical wit recognisable” (id at 588). Where the defendant’s work does not make the original work a target of its satire, at least in part, it is not a parody and is not entitled to the same fair-use latitude (see, eg, Dr Seuss Enters, LP v Penguin Books USA, Inc, 109 F3d 1394 (9th Cir 1997) (finding humorous retelling of the O J Simpson case in an illustrated take-off of the Dr Seuss book The Cat in the Hat was not a parody and not fair use)).

5.7 Freedom of Speech
Freedom of speech is accommodated by US copyright law in two important ways. First, freedom of speech is accommodated by the rule that ideas, systems, processes, etc are not copyrightable (17 USC § 102(b)). Copyright protection extends “only to the expression of the idea – not [to] the idea itself” (Eldred v Ashcroft, 537 US 186, 219 (2003) (citation omitted)). This “idea/expression dichotomy” strikes “a definitional balance between the First Amendment and the Copyright Act” by ensuring that “every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication” (id, citation omitted). Second, freedom of speech is also accommodated by the fair use doctrine. The US Supreme Court has asserted that “the Framers intended copyright itself to be the engine of free expression” and noted the “latitude for scholarship and comment traditionally afforded by fair use” (Harper & Row, Publishers v Nation Enterprises, 471 US 539, 558 (1985)). Other courts similarly have acknowledged that the fair use doctrine is meant to account for First Amendment concerns (see, eg, A&M Records, Inc v Napster, Inc, 239 F3d 1004, 1028 (9th Cir 2001) (“We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine”); see also Nihon Keizai Shimbun, Inc v Comline Bus Data, Inc, 166 F3d 65, 74 (2d Cir 1999) (recognising that the Second Circuit has “repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine”)).

6. Neighbouring/Entrepreneurial/ Copyright-Related Rights

6.1 Neighbouring Rights
The United States has a unitary copyright system and generally does not recognise a separate system of “neighbouring rights” in a creative work attributable to parties other than the work’s author (such as performers or producers). In the United States, separate copyrights are recognised for musical compositions and sound recordings. US copyright law recognises public performance rights for musical compositions. For terrestrial (broadcast) radio play, the public performance right does not extend to performers or to the owner of the sound recording. However, under the Digital Performance in Sound Recording Act of 1995, royalties for broadcasts of digital performances are paid to performers and recording copyright owners through SoundExchange. The only other right the Copyright Act expressly confers on performers is the anti-bootlegging provision of 17 USC § 1101, which prevents the fixation, transmission, or distribution of a live musical performance without the consent of the performer or performers involved.

In a few specific instances, the US has adopted limited neighbouring rights through international treaties. For example, the WPPT addresses neighbouring rights, but the WPPT ratification instrument underscores the United States’ limited adoption of the neighbouring right provisions:

“Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Pho-
nograms Treaty only in respect of certain acts of broadcast-
ing and communication to the public by digital means for
which a direct or indirect fee is charged for reception, and
for other retransmissions and digital phonerecord deliver-
ies, as provided under the United States law.”

See WPPT Notification No 8, http://www.wipo.int/treaties/
en/notifications/wppt/treaty_wppt_8.html.

6.2 Content of Neighbouring Rights
As noted above, the United States recognises public per-
formance rights but not neighbouring rights. There are no
neighbouring moral rights in the United States because US
law only recognises moral rights in certain visual works (17
USC § 106A). Public performance rights are alienable and
pass to a decedent author’s heir(s) like other copyright rights.

7. Copyright Infringement and
Litigation

7.1 Considering Copyrighted Work as Infringed
Direct Infringement:
A work is infringed when any of the copyright-owner’s ex-
clusive rights enumerated in Section 106 or rights of the au-
thor under Section 106A are violated (17 USC § 501).

Secondary Infringement:
Although the Copyright Act does not expressly impose li-
ability on parties other than direct infringers, courts rec-
ognise that parties that “played a significant role in direct
infringement committed by others” may be held secondarily
liable (Arla Records LLC v Lime Group LLC, 715 F Supp
2d 481, 506 (SDNY 2010)). To prevail on a claim of second-
ary infringement, the plaintiff first must establish direct in-
fringement by a third party (id; A&M Records, Inc v Napster,
Inc, 239 F3d 1004, 1013 n2 (9th Cir 2001)). The two types of
secondary copyright infringement are contributory infringe-
ment (including inducement) and vicarious infringement.

Contributory Infringement and Inducement
A contributory infringer is “one who, with knowledge of
the infringing activity, induces, causes, or materially contributes
to the infringing conduct of another” (Gershwin Publ’g Corp
v Columbia Artists Mgmt, Inc,443 F2d 1159, 1162 (2d Cir
1971)). Knowledge of infringement can be actual or con-
structive (see Napster,239 F3d at 1020).

A material contribution requires that the alleged contribu-
tory infringer “acted in concert with the direct infringer”
and participated in the direct infringement in a “substantial”
manner (see, eg, BWP Media USA Inc v Hollywood Fan
Sites, LLC, 69 F Supp 3d 342, 357 (SDNY 2014)). Providing
funding to an infringer, without more, is not considered a
material contribution to infringement (UMG Recordings,
Inc v Shelter Capital Partners LLC, 718 F3d 1006, 1032 (9th
Cir. 2013)).

In cases against internet service-providers, a material con-
tribution often is considered to be the provision of the “site
and facilities” for known infringing activity (see, eg, Napster,
239 F3d at 1022). To be liable, an online service provider
must “learn of specific infringing material and fail to purge
such material from [its] system” (Napster, 239 F3d at 1021).
Offline, this theory has been applied to the operators of flea
markets at which vendors were selling counterfeit sound
recordings (see, eg, Fonovisa, Inc v Cherry Auction, Inc, 76
F3d 259, 264 (9th Cir 1996)). Contributory infringement li-
bility for online service providers is limited by application
of the “staple article of commerce” doctrine, under which
“the sale of copying equipment, like the sale of other articles
of commerce, does not constitute contributory infringe-
ment” if the product is “capable of substantial non-infringing
uses,” Sony, 464 US at 442, to online platform operators. The
doctrine does not shield a computer system operator who
“learns of specific infringing material available on his sys-

tem and fails to purge such material from the system, the
operator knows of and contributes to direct infringement,”
Napster, 239 F3d at 1021, or affirmatively encourages (in-
duces) infringement (see Metro-Goldwyn-Mayer Studios
Inc v Grokster, Ltd, 545 US 913 (2005), on remand, 454 F
Supp. 2d 966 (CD Cal 2006)).

Liability may be imposed under an inducement theory
against a party who “distributes a device with the object of
promoting its use to infringe copyright, as shown by clear
expression or other affirmative steps taken to foster infringe-
ment, is liable for the resulting acts of infringement by third
parties” (Grokster,545 US at 936–37). Following Grokster,
courts have held that inducement can arise from the provi-
sion of a service without the distribution of a product or
device (see Columbia Pictures Indus Inc v Fung, 710 F3d
1020, 1045–46 (9th Cir 2013)).

Vicarious Infringement
A vicarious copyright infringer is one who “has the right
and ability to supervise the infringing activity and also has
a direct interest in such activities” (Napster, 239 F3d at 1022
(citation omitted)). The right and ability to supervise must
relate specifically to “the infringing activity” (id). The de-
fendant must have the right and ability “to supervise and
control the infringement, not just affect it” (Perfect 10, Inc
v Visa Intern Serv Ass’n,494 F3d 788, 805 (9th Cir 2007)
(emphasis in original)). There must be “a causal relation-
ship between the infringing activity and any financial benefit
[the] defendant reaps, regardless of how substantial the ben-
etit is in proportion to a defendant’s overall profits” (Ellison
v Robertson, 357 F3d 1072, 1079 (9th Cir 2004) (emphasis
omitted)).
7.2 Defences Available Against Infringement
In addition to defences directed at a plaintiff’s failure to prove a required element of its claim, potential defences to direct copyright infringement claims include:

- fair use;
- independent creation of the allegedly infringing work (ie, no illegal copying);
- first sale doctrine (defence to an unauthorised distribution claim);
- applicability of the DMCA safe harbour provisions
- copyright misuse;
- failure to register the copyright; and
- statute of limitations (infringement claims must be brought within three years from the time the cause of action accrued).

7.3 Role of Privacy
US copyright law does not contain any explicit privacy provisions or exceptions, but privacy considerations nonetheless can play an important role in determining the outcome of an infringement action. The Copyright Act grants to copyright holders an exclusive right of publication, which has been used to prevent or redress the publication of other commercial distribution materials never intended for public consumption, such as personal letters, private photographs, and diaries. This right is subject to the fair use doctrine and Section 107 expressly provides that “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the [statutory] factors” (17 USC § 107). While none of the statutory factors for determining fair use relates specifically to privacy, privacy considerations often inform the outcome (see, eg, Salinger v Random House, Inc, 811 F2d 90, 97 (2d Cir 1987) (enjoining publication of biography that quoted subject’s previously unpublished letters and noting that “such works normally enjoy complete protection against copying any protected expression”); Monge v Maya Magazines, Inc, 688 F3d 1164 (9th Cir 2012) (acknowledging that, although not dispositive, the unpublished nature of private wedding photographs weighed against a finding of fair use)).

Separate from federal copyright protection, many states have enacted “right of publicity” laws that protect against a defendant’s unauthorised exploitation of a plaintiff’s name or likeness (see, eg, Midler v Ford Motor Co, 849 F2d 460 (9th Cir 1988)). Although right of publicity laws vary by state, the most common claims arising from such laws are for (i) invasion of privacy through misappropriation of a person’s name or likeness, or (ii) infringing the right of publicity — a person’s right to exploit his or her own likeness commercially.

The Information Society Directive does not apply to the United States.

7.4 Proceedings Available
A copyright-holder may sue for money damages and/or injunctive relief, the latter of which may be expedited by seeking a temporary restraining order or a preliminary injunction. Note that under Section 411(a) copyright registration is a prerequisite for filing most copyright infringement suits, with actions to enforce authors’ limited moral rights under Section 106A being one of the few exceptions.

7.5 Neighbouring Rights Versus Copyrights
The United States does not recognise neighbouring rights as distinct from copyright.

7.6 Moral Rights in Court
US copyright law protects moral rights in certain works of visual art (see 17 USC § 106A). Pursuant to Section 106A, the author of a copyrightable work of visual art may enforce the following moral rights in a court proceeding:

- the right to claim authorship of the work;
- the right to prevent being identified as the author of a work he or she did not create;
- the right to prevent being identified as the author of a work in the event of “a distortion, mutilation, or other modification of the work” that would be prejudicial to his/her honour or reputation;
- the right to prevent any intentional distortion, mutilation, or other modification of the work that would be prejudicial to his or her honour or reputation; and
- the right to prevent destruction of a work of “recognised stature.”

7.7 Non-Declaratory Infringement Proceedings
An accused infringer may seek a judicial declaration that the activity in question is not infringing or that an affirmative defence (eg, fair use, or a DMCA safe harbour) applies. An accused infringer also may assert additional causes of action in certain circumstances. For example, if a rights-holder files a fraudulent DMCA takedown notice, the user whose content was removed from a service may seek damages against the rights holder for the fraudulent take-down notice (17 USC §512(f)).

7.8 Court Handling Copyright Proceedings
Federal district courts have original jurisdiction over any civil actions arising under the Copyright Act (see 28 USC §1338(a)). Federal courts have exclusive jurisdiction for actions arising under the Copyright Act or a copyright treaty to which the US is a signatory (id).

The 1976 Copyright Act does not apply to sound recordings made before 15 February 1972, so those recordings remain protected under state law rather than the federal copyright law. Accordingly, some plaintiffs have sought to enforce their rights in pre-1972 sound recordings in state courts. The US
Copyright Office has suggested giving federal copyright protection to pre-1972 sound recordings and pre-empting state law protection, which would give federal courts exclusive jurisdiction over claims surrounding pre-1972 sound recordings, but Congress has not done so.

7.9 Necessary Parties
The necessary parties to an infringement action are determined on a case-by-case basis. This issue is not addressed in the Copyright Act. Rule 19 of the Federal Rules of Civil Procedure provides a two-step test for determining whether a party must be joined in an action. First, the court determines whether a party is “necessary” pursuant to Rule 19(a). If so, the court must determine whether the party is “indispensable” to the case pursuant to Rule 19(b). In the copyright context, necessary parties typically include the party seeking to enforce a copyright and the allegedly infringing party.

A licensee must be an exclusive or co-exclusive licensee to have statutory standing to sue for copyright infringement (see HyperQuest, Inc v N’Site Sols, Inc, 632 F3d 377, 384 (7th Cir 2011)). A non-exclusive licensee may not bring an action for infringement because, under the Copyright Act, only “[the] legal or beneficial owner of an exclusive right under a copyright” may bring a civil action for infringement (17 USC § 501(b)).

7.10 Involvement of Third Parties
Co-defendants may be held jointly and severally liable for actual and statutory damages (17 USC § 504(c)(1)). Plaintiffs who sue to enforce copyrights may be justified in notifying third parties that they might be liable if they continue to sell infringing products and such justification can serve as a defense to an alleged infringer’s counterclaim for tortious interference (P Kaufmann, Inc v Americraft Fabrics, Inc, 232 F Supp 2d 220, 225 (SDNY 2002)).

A defendant found liable for secondary infringement may seek indemnification from a direct infringer (See Foley v Luster, 249 F3d 1281, 1289 (11th Cir 2001)).

7.11 Court Fees
The plaintiff in a proceeding must pay the court fees associated with filing the complaint. Pursuant to Section 505, the court, in its discretion, “may allow the recovery of full costs by or against any party other than the United States or an officer thereof” and also may award “a reasonable attorney’s fees” to the prevailing party (see 17 USC § 505).

7.12 Formalities Required Before Initiation
Except for an action arising out of an author’s rights in a work of visual art protected by Section 106A, a plaintiff must seek copyright registration prior to filing an infringement action (see 17 USC § 411(a)). If the deposit, application and fee required for registration have been delivered to the US Copyright Office in proper form and registration has been refused, the applicant is still entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights (see id). There are no other prerequisites to filing suit.

7.13 Urgent Measures for Right Holders
In conjunction with filing an infringement action, plaintiffs may seek a temporary restraining order or a preliminary injunction on an expedited basis prior to a full adjudication on the merits.

Copyright holders generally do not have formal pre-suit measures available to address infringement, on an urgent basis. However, the DMCA sets forth “notice and take-down” procedures under Section 512 that authorise rights holders to request the removal of infringing content from online services. As long as the notification complies with Section 512(c), the service-provider must promptly remove the allegedly infringing content and notify the alleged infringer of the removal. The alleged infringer may then file a counter-notice. If the copyright-owner does not bring a lawsuit against the alleged infringer within 14 days after being notified of the counter notice, the service-provider must add the removed work back to its network (17 USC § 512(g) (2)). These procedures are intended to be an efficient means for copyright-holders to obtain relief and allow service-providers a means of protecting themselves from liability for infringing content posted by users.

7.14 Available Urgent Measures
To obtain a temporary restraining order or preliminary injunction, a party must demonstrate that (i) it is likely to succeed on the merits of its case, (ii) it is likely to suffer irreparable harm in the absence of injunctive relief, (iii) the balance of the equities tips in its favor and (iv) an injunction would be in the public interest (see Winter v Natural Res Def Council, Inc, 555 US 7, 22 (2008)).

7.15 Obtaining Information and Evidence
A rights holder can obtain discovery from the alleged infringer pursuant to the Federal Rules of Civil Procedure and may petition the court for expedited discovery in an urgent matter. A rights holder plaintiff also may seek discovery during litigation from third parties by means of a subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure. Pre-suit discovery options are very limited, but Rule 27 of the Federal Rules of Civil Procedure allows a plaintiff, prior to filing an action, to file a petition to take depositions to “perpetuate testimony.”

7.16 Requesting Urgent Seizure
Where the defendant is unable to satisfy a monetary judgment, the plaintiff often will obtain a judgment lien on the defendant’s real or personal property until the judgment is
Although the Copyright Act does not define wilfulness, most courts define wilfulness as acting with knowledge of, or with reckless disregard for, the infringing nature of the conduct (see Island Software & Computer Serv, Inc v Microsoft Corp, 413 F3d 257, 264 (2d Cir 2005) (expressing majority view of willfulness as objective recklessness)). Innocent infringement involves an objectively reasonable, good faith belief that the conduct was non-infringing (see, eg, Rosen v Netfronts, Inc, No CV 12-658 CAS, 2013 WL 3467205, at *4 (CD Cal 9 July 2013)). In cases of wilful infringement, the court, in its discretion, may increase statutory damages up to USD150,000 per work (17 USC § 504(c)(2)). In cases involving innocent infringers, by contrast, the court may reduce the award of statutory damages to not less than USD200 (id).

Timely copyright registration is a condition of obtaining statutory damages and attorney’s fees (see 17 USC § 412).

7.21 Party Responsible for Paying Fees
The Copyright Act gives the court discretion to allow the recovery of costs and reasonable attorney’s fees to the prevailing party, except that costs and fees are not recoverable by or against the United States or an officer thereof (see 17 USC § 505). In exercising that discretion, courts typically consider a variety of factors, including frivolousness, motivation, the objective reasonableness of the losing party’s position, a party’s litigation misconduct and whether awarding fees will deter repeated instances of copyright infringement or overly aggressive assertion of copyright claims. The Supreme Court has held that courts may give “substantial weight” to the objective reasonableness of the losing party’s position as long as “all other relevant factors” are taken into account (Kirtsaeng v John Wiley & Sons, Inc, No 15-375 (US 16 June 2016)).

7.22 Average Duration of Proceedings
The length of a copyright infringement proceeding is highly variable. Factors include the types of works at issue, the type of infringement(s) alleged, the number of works at issue, the type of damages sought and the rules, practices and case-load of the court in which the action is litigated. Trials alone may last several weeks — or, in particularly complex cases, months — depending on the types of evidence presented and the number of witnesses called by each party. From the initial filing of a lawsuit through discovery, pre-trial motion practice, trial, post-trial briefing and one or more appeals, a copyright case can span several years.

7.23 Decisions Enforced
Once the court issues a judgment awarding damages, the prevailing party may seek to enforce the judgment if the losing party does not comply. Rule 69 of the Federal Rules of Civil Procedure provides that a money judgment is enforced according to the procedure of the state where the court is located. If a defendant is unable to satisfy a monetary judgment, a prevailing plaintiff may obtain a judgment lien on
the defendant’s real or personal property until the judgment is paid. Court also may enjoin the infringing conduct (17 USC § 502). If the defendant violates an injunction, the rights holder may institute contempt proceedings.

7.24 Administrative or Criminal Means
A wilful copyright infringer may face criminal liability pursuant to 18 USC § 2319 if the infringement was committed:

- for purposes of commercial advantage or private financial gain;
- by the reproduction or distribution, including by electronic means, during any 180–day period, of one or more copies or phonorecords of one or more copyrighted works, which have a total retail value of more than USD1,000; or
- by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

Any person who fraudulently places a false copyright notice on a work, or who removes or alters a copyright notice appearing on a copyrighted work, may be fined up to USD2,500 (17 USC § 506(d)-(e)).

7.25 Customs Seizure of Counterfeits and Parallel Imports
Parallel imports are subject to the first sale doctrine, which provides that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorised by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord" (17 USC § 109). This defence is not limited to first sales made within the United States; it also applies to copyrighted works made in the United States, purchased from the manufacturer’s foreign distributor and then reimported into the United States, as well as to works made under licence outside the United States and imported into the United States without authorisation of the copyright owner (see Kirtsaeng v Wiley, 133 S Ct 1351 (2013)).

The US Customs and Border Protection (CBP) prevents foreign pirated and counterfeit goods from being imported into the United States. Owners of registered copyrights and trademarks may record their copyrights and trade-marks with the CBP for border enforcement protection. The Copyright Act authorises the reasonable impoundment of copies or phonorecords claimed to have been made or used in violation of the copyright-owner’s rights and all masters, tapes, film, or other articles by means of which such copies or phonorecords may be produced (17 USC § 503(a)(1)).

7.26 Special Provisions
There are no special provisions concerning the appellate review of copyright proceedings. Nor are there specialised courts of second or third instance. Copyright decisions of federal district courts may be appealed to their respective federal circuit courts of appeal. Decisions of the United States Courts of Appeals may be appealed to the United States Supreme Court, which has discretionary, but not mandatory, review over circuit court decisions.

7.27 Full or Factual Review
Appellate review encompasses the factual findings of the trial court, which are reviewed for clear error, as well as legal conclusions, which are reviewed de novo.

7.28 Providing the Court with All Necessary Evidence
Appellate review is limited to consideration of the factual record established before the trial court (see Federal Rule of Appellate Procedure 10(a)). Appellate courts generally reject the introduction of new evidence on appeal that was not presented to the trial court and arguments other than those concerning the court’s jurisdiction are generally deemed waived if they were not presented to the trial court.

7.29 Alternative Dispute Resolution
Alternative dispute resolution (ADR) is increasingly common in copyright cases. Arbitration and mediation are the most common forms of ADR for copyright cases in the United States. Some federal courts provide for optional, or even mandatory, ADR procedures prior to holding trials (see, eg, District Court for the Southern District of New York Local Civil Rule 83.9 (optional ADR procedures); District Court for the Central District of California Local Rule 16-15.1 (mandatory ADR procedures)). These rules vary by court, but ADR is typically optional in copyright cases.

Mediation is a non-binding ADR process whereby the parties and their attorneys meet a neutral third party who is trained to facilitate settlement discussions. The mediator helps the parties to reach their own voluntary settlement by assessing the strengths of the parties’ positions and identifying potential areas of agreement or disagreement.
Arbitration, which may be binding or non-binding in nature, is more akin to an informal trial where the arbitrator holds a hearing to decide the merits of the case. Parties may agree in a contract to resolve prospective disputes through arbitration, or they may agree to arbitrate after a conflict has arisen. The parties’ arbitration agreement should set forth, or incorporate by reference, procedural and evidentiary rules to be applied and a method for selecting the arbitrator(s). The prevailing party may petition a court to enforce the arbitration award, if necessary. When courts hear cases on whether to uphold arbitration awards involving issues such as copyright ownership, they determine the rights of the instant parties, but the court decisions do not bind others. An arbitrator may determine the parties’ rights to copyrighted works if the arbitration agreement provides such authority (see Folkways Music Publishers, Inc v Weiss, 989 F2d 108, 111 (2d Cir 1993)).