

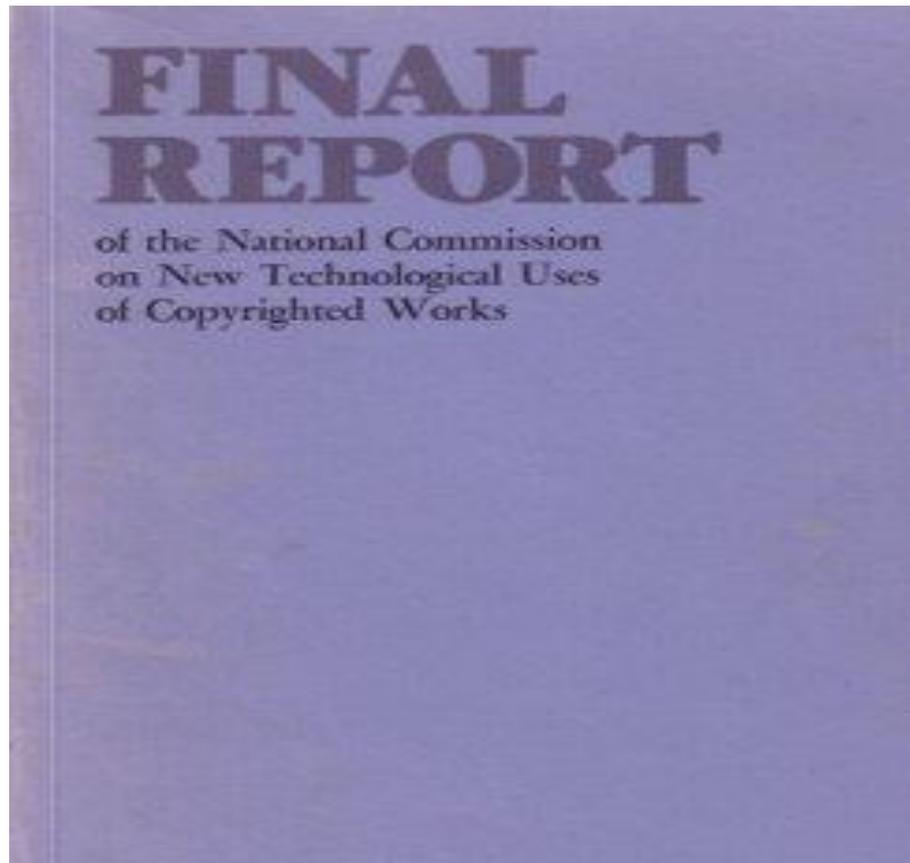
United States
Copyright Office
The Library of Congress



Computer Software Copyright Basics

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CONTU Commission and Report



CONTU Commission and Report



Thus, one is always free to make a machine perform any conceivable process (in the absence of a patent), but one is not free to take another's program. This general rule is subject to exceptions which restrict the power of copyright owners.

Subject Matter of Copyright



- ⌘ § 102. Subject matter of copyright:
- ⌘ (a) Copyright protection subsists, in accordance with this title, in 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. Works of authorship include the following categories:
 - ⌘ (1) literary works;

Fixation



⌘ A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

Copies



⌘ “Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.

Subject Matter: Literary Works



⌘ “Literary works” are 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.

Subject Matter: Literary Works



⌘ The term 'literary works' does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data. It also includes computer data bases, and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves.

House Report to the 1976 Act

Limitations on Exclusive Rights



- ⌘ § 102. Subject matter of copyright: In general
- ⌘ (b) In no case does copyright protection for an original work of authorship extend to 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 in such work.

Subject Matter: Computer Programs



- ⌘ A “computer program” is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.
- ⌘ Claim of authorship may be in object code, source code, and/or screen display

Exclusive Rights

- ⌘ § 106. Exclusive rights in copyrighted works
- ⌘ Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
 - ⌘ (1) to reproduce the copyrighted work in copies or phonorecords;
 - ⌘ (2) to prepare derivative works based upon the copyrighted work;
 - ⌘ (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - ⌘ (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 - ⌘ (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly;

Additional Key Concepts

§ 105. Subject matter of copyright: United States Government works³⁷

- ⌘ Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.
- ⌘ A “joint work” 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.

Additional Key Concepts



- ⌘ A “work made for hire” is —
- ⌘ (1) a work prepared by an employee within the scope of his or her employment; or
- ⌘ (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Additional Key Concepts



⌘ A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work”.

Additional Key Concepts



- ⌘ A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

Additional Key Concepts



- ⌘ § 202. Ownership of copyright as distinct from ownership of material object
- ⌘ Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Limitations on Exclusive Rights

- ⌘ § 117. Limitations on exclusive rights: Computer programs⁵⁴
- ⌘ (a) Making of Additional Copy or Adaptation by Owner of Copy. — Notwithstanding the provisions of section 106, 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 provided:
 - ⌘ (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
 - ⌘ (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Limitations on Exclusive Rights



- ⌘ § 107. Limitations on exclusive rights: Fair use
- ⌘ Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
- ⌘ (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- ⌘ (2) the nature of the copyrighted work;
- ⌘ (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- ⌘ (4) the effect of the use upon the potential market for or value of the copyrighted work.

Key Cases



- ⌘ Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983)
- ⌘ Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3d Cir. Pa. 1986)
- ⌘ Computer Associates International, Inc., v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992)
- ⌘ Lotus Development Corporation v. Borland International, Inc., 49 F. 3d 807 (1st Cir. 1995) aff'd by an equally divided court, 516 U.S. 233 (1996)
- ⌘ Softel, Inc. v. Dragon Medical and Scientific Communications, Inc., 118 F.3d 955 (2d Cir. 1998)
- ⌘ Jacobsen v. Katzer, 553 F.3d 1373 (Fed. Cir. 2008)

Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d
1240 (3d Cir. 1983)



- ⌘ Determined that, like source code, object code is copyrightable subject matter
- ⌘ Determined that, like application programs, operating system programs are copyrightable
- ⌘ Also held that if other methods of expressing an idea are not foreclosed as a practical matter, any interest in achieving complete compatibility is irrelevant to the question of merger of the idea and expression

Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d
1222 (3d Cir. Pa. 1986)



- ⌘ Held that a computer program's structure, not just its literal code, is protected by copyright
- ⌘ Similarities in the structure, sequence and organization of a program is sufficient to support an infringement claim even without allegations that object or source code was copied
- ⌘ Substantial similarity between the file structures of the programs, screen outputs, and subroutines may demonstrate infringement

Computer Associates International, Inc., v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992)



- ⌘ In order to determine infringement, courts must engage in an abstraction, filtration and comparison test.
- ⌘ Must determine the idea of subroutines within the program in the abstraction portion
- ⌘ Must filter out: public domain elements, elements dictated by efficiency, functionality, compatibility, industry practices, mechanical specs, hardware constraints, programming practices, etc.
- ⌘ Must then compare the “golden nuggets” – those elements from the infringed work that are creative expression

Lotus Development Corporation v. Borland International, Inc., 49 F. 3d 807 (1st Cir. 1995) aff'd by an equally divided court, 516 U.S. 233 (1996)



- ⌘ Is a menu command hierarchy consisting of 469 commands copyrightable?
- ⌘ Is it infringement to precisely copy all 469 commands?
- ⌘ No, it's a method of operation similar to the controls on a VCR or a "querty" keyboard.

LOTUS 1-2-3

Worksheet

Range Copy Move File Print Graph Data Quit

MENU

Global, Insert, Delete, Column-Width, Erase, Titles, Window, Status

	A	B	C	D	E	F	G	H
1								
2								
3								
4								
5								
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Softel, Inc. v. Dragon Medical and Scientific Communications, Inc., 118 F.3d 955 (2d Cir. 1998)



- ⌘ Non-literal similarity of computer programs may constitute copyright infringement
- ⌘ *Altai* requires the filtering out of unprotectable elements before comparing the similarities in copyrightable expression
- ⌘ However, Feist teaches that the selection and arrangement of non-protectible elements may be protected even if the constituent elements may not
- ⌘ Thus, after filtering out the unprotectible elements under the *Altai* analysis, care must be taken to not only compare the “golden nuggets” but also the selection and arrangement of all of the elements

Jacobsen v. Katzer, 553 F.3d 1373 (Fed. Cir. 2008)



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