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#### *Individual Behavior, Private Use and Fair Use, and the System for Copyright*

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#### **ADDENDUM: SECTIONS 106, 107, AND 109 OF THE U.S. COPYRIGHT LAW**

The three sections of the U.S. copyright law that relate most directly to the conduct of members of the general public are reproduced in this ADDENDUM: the exclusive rights of the copyright proprietor embodied in section 106, the four factors to be analyzed and balanced in evaluating fair use under section 107, and the first-sale doctrine embodied in section 109.<sup>41</sup>

#### **106 Exclusive rights in copyrighted works\***

Subject to sections 107 through 120, 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; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

#### **106A Rights of certain authors to attribution and integrity†**

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.-- Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art--

- (1) shall have the right--
  - (A) to claim authorship of that work, and
  - (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) SCOPE AND EXERCISE OF RIGHTS.--Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are co-owners of the rights conferred by subsection (a) in that work.

(c) EXCEPTIONS.--

(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is a result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) DURATION OF RIGHTS.--

(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) TRANSFER AND WAIVER.--

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

#### **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. The 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 above factors.

#### **109 Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord\***

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized 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. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or

indirect commercial advantage only during the 12-month period beginning on--

(1) the date of the publication in the *Federal Register* of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or

(2) the date of the receipt of actual notice served under section 104A(d)(2)(B), whichever occurs first.†

(b)(1)(A) Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection.

(B) This subsection does not apply to--

(i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or

(ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.

(C) Nothing in this subsection affects any provision of chapter 9 of this title.

(2)(A) Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(B) Not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990, and at such times thereafter as the Register of Copyrights considers appropriate, the Register of Copyrights, after consultation with representatives of copyright owners and librarians, shall submit to the Congress a report stating whether this paragraph has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function. Such report shall advise the Congress as to any information or recommendations that the Register of Copyrights considers necessary to carry out the purposes of this subsection.

(3) Nothing in this subsection shall affect any provision of the antitrust laws. For purposes of the preceding sentence, "antitrust laws" has the meaning given that term in the first section of the Clayton Act and includes section 5 of the Federal Trade Commission Act to the extent that section relates to unfair methods of competition.

(4) Any person who distributes a phonorecord or a copy of a computer program (including any tape, disk, or other medium embodying such program) in violation of paragraph (1) is an infringer of copyright under section 501 of this title and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509. Such violation shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.\*

(c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(d) The privileges prescribed by subsections (a) and (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.†

(e) Notwithstanding the provisions of sections 106(4) and 106(5), in the case of an electronic audiovisual game intended for use in coin-operated equipment, the owner of a particular copy of such a game lawfully made under this title, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment, except that this subsection shall not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship.

## Notes

<sup>41</sup> This material was obtained from the Web site of the U.S. Copyright Office at <http://www.loc.gov/copyright/>. It is intended for use as a general reference, and not for legal research or other work requiring authenticated primary sources.

\*Section 106 was amended by the Digital Performance Right in Sound Recordings Act of November 1, 1995, Pub. L. 104-39, 109 Stat. 336, which added paragraph (6).

†A new section 106A was added by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5128. The act states that, generally, it is to take effect 6 months after the date of its enactment, that is, 6 months after December 1, 1990, and that the rights created by section 106A shall apply to--(1) works created before such effective date but title to which has not, as of such effective date, been transferred from the author, and (2) works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in section 106A(a)(3)) of any work that occurred before such effective date.

\*Section 107 was amended by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5128, 5132, which struck out "section 106" and inserted in lieu thereof "sections 106 and 106A." Section 107 was also amended by the Act of October 24, 1992, Pub. L. 102-492, 106 Stat. 3145, which added the last sentence.

\*Section 109 was amended by the Act of October 4, 1984, Pub. L. 98-450, 98 Stat. 1727, and the Act of November 5, 1988, Pub. L. 100-617, 102 Stat. 3194. The 1984 Act redesignated subsections (b) and (c) as subsections (c) and (d), respectively, and inserted after subsection (a) a new subsection (b).

The earlier amendatory Act states that the provisions of section 109(b) "shall not affect the right of an owner of a particular phonorecord of a sound recording, who acquired such ownership before . . . [October 4, 1984], to dispose of the possession of that particular phonorecord on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before the date of the enactment of this Act." It also states, as modified by the 1988 amendatory Act, that the amendments "shall not apply to rentals, leasings, lendings (or acts or practices in the nature of rentals, leasings, or lendings) occurring after the date which is 13 years after . . . [October 4, 1984]."

Section 109 was also amended by the Computer Software Rental Amendments Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5134, 5135, which added at the end thereof subsection (e). The amendatory Act states that the provisions contained in the new subsection (e) shall take effect 1 year after the date of enactment of such Act, that is, 1 year after December 1, 1990. The Act also states that such amendments so made "shall not apply to public performances or displays that occur on or after October 1, 1995." See also [footnote 22](#), Chapter 1.

‡Section 109(a) was amended by the Uruguay Round Agreements Act of December 8, 1994, Pub. L. 103-465, 108 Stat. 4809, 4981, which added the second sentence.

\*Section 109(b) was amended by the Computer Software Rental Amendments Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5134, in the following particulars: a) paragraphs (2) and (3) were redesignated as paragraphs (3) and (4), respectively; b) paragraph (1) was struck out and new paragraphs (1) and (2) were inserted in lieu thereof; and c) paragraph (4), as redesignated by the amendatory Act, was struck out and a new paragraph (4) was inserted in lieu thereof. The amendatory Act states that section 109(b), as amended, "shall not affect the right of a person in possession of a particular copy of a computer program, who acquired such copy before the date of the enactment of this Act, to dispose of the possession of that copy on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before such date of enactment." The amendatory Act also states that the amendments made to section 109(b) "shall not apply to rentals, leasings, or lendings (or acts or practices in the nature of rentals, leasings, or lendings) occurring on or after October 1, 1997." However, this limitation, set forth in the first sentence of section 804 (c) of the amendatory Act [104 Stat. 5136], was subsequently deleted by the Uruguay Round Agreements Act of December 8, 1994, section 511 of which struck the above mentioned first sentence in its entirety. See Pub. L. 103-465, 108 Stat. 4809, 4974. See also [footnote 20](#), Chapter 1.

‡The Act of November 5, 1988, Pub. L. 100-617, 102 Stat. 3194, made technical amendments to section 109(d), by striking out "(b)" and inserting in lieu thereof "(c)" and by striking out "coyright" and inserting in lieu thereof "copyright."