13.2.2: Eligible Works

Learning Objectives

After completing this section, you will be able to

- Know what kinds of creative work are eligible for
- Grasp the broad definition of "authors" and "literary works."

Figure 3.4.1: Parthenon Marbles, East Pediment. Photograph taken at the British Museum by Justin Norris via flikr / CC BY 2.0

Can I Copyright That?

Before reading this section, please watch the overview video covering the basics of copyright law—eligible works, the distinction between ideas and their expression, the rights granted to copyright owners, and is copyright term—life plus 70 years.

Title 17 of the United States Code Section 102 explicitly delineates eight categories of original works that are eligible for copyright.

This list, while broad, actually includes a far more extensive range of work than the average citizen might imagine. For example, copyrightable works also include software.

Copyrighting Software

Why is software copyrightable? It's because an appellate ruling in the 1983 case of *Apple v. Franklin* held that software was a kind of "literary work" and therefore eligible for copyright.

The court noted that the Copyright Act defined the term "literary work" as follows:

> *"Literary works are works, other than audiovisual works, [that are] 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."*[xii]

Based on this definition, the court determined that a computer software program "is an appropriate subject of copyright."

Note, however, that copyright does not extend to the elements of works of authorship that are potentially patentable processes. And indeed, beginning in the 1990s, software companies began increasingly to patent those elements of their new software that could be described as patentable processes, precisely in order to secure the stronger protections of patent law.

In any event, software is but one example of how the courts have tended to interpret broadly the eight categories of eligible subject matter. Just as technology drove the expansion of eligible subject matter into ever new realms—e.g., first photographs and then motion pictures—the courts have also expanded the definitions of all eight categories of eligible subject matter to include maps, games, puzzles, toys, fabric design, and many other creations.

Ideas to Copyrightable Works

However, not everything is copyrightable—far from it. Just as patent law makes a sharp distinction between ideas and their application—i.e., you cannot patent an idea for a better mousetrap but you most certainly can patent a new, non-obvious, and useful apparatus that catches mice—so, too, does copyright law differentiate between ideas and their expression. You cannot copyright, for example, the idea of an epic space opera in which a mystical cadre of Jedi knights wielding laser swords battle galactic evil, but you can copyright the particular expression of that idea in the screenplay and motion picture *Star Wars*.

Because it is an abstract concept or idea, Einstein's formula $E = MC^2$ is also not copyrightable. It is true that Einstein was the first to derive the famous formula involving mass and energy, which at first blush seems to fit the requirement for creative authorship in a copyrightable work. But the formula was derived from observation of natural physical laws, and must remain in the public domain lest private intellectual property rights create a blockade that prevents scientists and mathematicians from continuing their research and teaching.

Also noncopyrightable are names, addresses, and other known facts that are not creatively compiled. That's why a phone book cannot be copyrighted, whereas the *creative* compilation of facts in a Chinese-American phone directory listing "Bean Curd & Bean Sprout Shops" may be under certain conditions, as a judge ruled in the 1991 case *Key v. Chinatown* .

To be copyrightable, a creative work must not only be *expressed* in a tangible form that allows it to be seen or copied (i.e., put to paper or some other medium), but it must also be *original*. The requirement for originality in copyright has its parallel in the necessity for novelty in patents. But this parallel works only to a point, for a copyrighted work need not be novel in the strictest sense to be original.

As Arthur R. Miller and Michael H. Davis explain in their textbook on intellectual property for law students:

> *"The author's ideas and themes may have appeared in earlier works, Indeed, much of the expression may have been produced before. But copyright will be available to [this] second author if his is a work of independent creation."*[xiii]

To reiterate, a copyrightable work must not only fit under one of the eight broad categories of eligible subject matter, but it must also be:

- Independently created.
- Expressed or fixed on a tangible medium that can be seen or copied.
- Creatively authored or compiled.
- Not a fact or abstract idea.

Footnotes

- xii*Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983) Retrieved from http://bulk.resource.org/courts.gov/...0.82-1582.html.

- xiiiArthur R. Miller and Michael H. Davis,*Intellectual Property: Patents, Trademarks, and Copyright in a Nutshell*. (5th ed., p. 25). St. Paul MN: West Publishing Co., 2007.
