

Fixation and Originality

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<http://wendy.seltzer.org/brooklaw/07copyright/>

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U.S. Constitution Article I, Section 8, clause 8

The Congress shall have power ...

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

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17 U.S.C. § 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;
 - (2) musical works, including any accompanying words;
 - (3) dramatic works, including any accompanying music;
 - (4) pantomimes and choreographic works;
 - (5) pictorial, graphic, and sculptural works;
 - (6) motion pictures and other audiovisual works;
 - (7) sound recordings; and
 - (8) architectural works.
- (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.

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§ 102. Subject matter of copyright

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 - (2) musical works, including any accompanying words;
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 - (5) pictorial, graphic, and sculptural works;
 - (6) motion pictures and other audiovisual works;
 - (7) sound recordings; and
 - (8) architectural works.

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§ 102. Subject matter of copyright

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§ 102. Fixation

- (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.**

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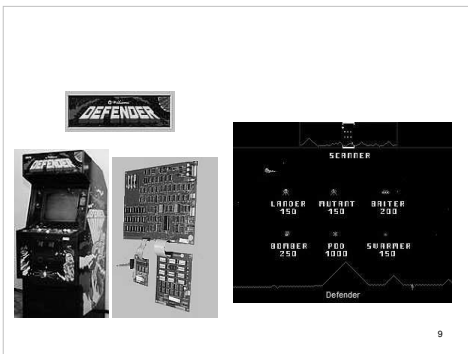


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§ 101 “Fixed”

- 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...

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§ 101 “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....

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MAI v. Peak



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§ 117. Limitations on exclusive rights: Computer programs

- (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.
- (c) **Machine Maintenance or Repair.**— Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if—
 - (1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and
 - (2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.
- (d) **Definitions.**— For purposes of this section—
 - (1) the “maintenance” of a machine is the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and
 - (2) the “repair” of a machine is the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.

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Fixation Challenges

- The Great American Novel, before you hit “save”
- Stand-up improvisation
- A poem entered in skywriting
- A lecture taped by a student
- A browsed-to website
- Computer-generated music
- Sports broadcasts

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§ 101 “Fixed”

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§ 101 “Fixed”

- ...A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

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§ 101 “Transmit”

- To “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

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Wrigley Field



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Wrigley Field Rooftops



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§ 1101. Unauthorized fixation and trafficking in sound recordings and music videos

- (a) **Unauthorized Acts.**— Anyone who, without the consent of the performer or performers involved—
 - (1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,
 - (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or
 - (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States, shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.

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§ 102. Originality

- (a) Copyright protection subsists, in accordance with this title, in **original works of authorship** fixed in any tangible medium of expression...

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What does originality mean?

- Independent creation?
- Novelty?
- Aesthetic merit?
- Intent to be original?
- Fictionalization?

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“Oscar Wilde No. 18,” Napoleon Sarony



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