Standards and Copyright Law
Frequently Asked Questions (FAQ)

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About the
American National Standards Institute

The American National Standards Institute (ANSI) is a not-for-profit, privately funded membership organization that coordinates the development of U.S. voluntary national standards and is the U.S. member body to the International Organization for Standardization (ISO) and, via the United States National Committee (USNC), the International Electrotechnical Commission (IEC).

ANSI was founded in 1918, prompted by the need for an "umbrella" organization to coordinate the activities of the U.S. voluntary standards system and eliminate conflict and duplication in the development process. For over one hundred years, this system has been successfully administered by the private sector, via ANSI, with the cooperation of federal, state and local governments. ANSI serves a diverse membership of hundreds of companies, professional, technical, trade, labor and consumer organizations, and numerous government agencies. Standards exist in all industries, including safety and health, telecommunications, information processing, petroleum, and medical devices, etc.

Some of ANSI's key functions include:

- Coordinating the due process and consensus-based U.S. voluntary standards system;
- Administering the development of standards and approving them as American National Standards;
- Providing the means for the U.S. to contribute to the development of international and regional standards;
- Promoting awareness of the growing strategic significance of standards technology to U.S. global competitiveness;
- Acting as a third-party accreditor of standards developers, product and personnel certification bodies, greenhouse gas validation/verification bodies, and certificate issuers.

Standards and Copyright Law FAQ

This FAQ document provides some basic guidance on how U.S. copyright law[1] might apply to the development of voluntary consensus standards. Typically, standards are created by more than one person. They are often created on behalf of a standards developing organization (SDO) rather than on behalf of the individuals contributing to them. Further, they are sometimes derived from other standards that are already copyrighted by others. These facts give rise to a number of questions under U.S. copyright law, such as whether voluntary consensus standards in certain cases should be considered “joint works,” “works for hire,” and/or “derivative works.” How such questions are answered will often determine who owns or may exploit the copyright in standards or parts of standards.

This FAQ document is limited to principles of U.S. copyright law. The validity and enforceability of copyrights may be affected by other areas of the law or laws of other jurisdictions, which are beyond the scope of this document.

The following provides a discussion of some of the legal facets of copyright law and discusses how these principles may apply to standards. Because each standard is unique, legal questions necessarily must be addressed on a case-by-case basis as any analysis will depend on the specific facts and should be addressed with the reader’s legal counsel.

Again, the reader should not rely on this as legal advice as it is a discussion paper only. Readers are also encouraged to review this document periodically for possible revisions or supplementations.

Q.1 What is copyright?

A. In the United States, copyright is a form of protection provided by the government to the authors of "original works of authorship, fixed in any tangible medium of expression” including literary, musical, dramatic, pantomimes, pictorial, and other categories of works. 17 U.S.C. §102. This protection is available to both published and unpublished works, regardless of the nationality or domicile of the author. It is unlawful for anyone to violate any of the rights provided by copyright law to the owner of the copyright.

Under the 1976 Copyright Act as amended (title 17 of the United States Code), copyright protection automatically exists for any work from the time it is created in a fixed form (*see* also answer to Question 4). Although copyright registration is not required to protect a published work, there are significant benefits to registering a copyright with the U.S. Copyright Office.

Q.2 What protection do the copyright laws provide to the author?

A. The main benefit of copyright is the right to exclude others from exploiting a work (or any part of it) without permission. By protecting an author's expression, copyright guarantees that authors and other creators may derive financial benefits from their work. Copyright encourages creators, developers, and publishers to create more works, promotes

[1] *See* U.S. Congress. *United States Code: Copyright Office, 17 U.S.C. §§ 201-216*. 1958. Periodical. https://www.loc.gov/item/uscode1958-004017003/.

creativity by granting exclusive property rights, and enables the copyright holder to reap financial rewards.

Copyright carries specific rights:

a. Reproduction Right—the right to copy, duplicate, transcribe, or imitate the work in any fixed form
b. Modification Right (also known as Derivative Works Right)—the right to modify the work or create a new work that is based on the preexisting work
c. Distribution Right—the right to distribute copies of the work to the public by sale, rental, lease, or lending
d. Public Performance Right—the right to recite, play, dance, act, show the work, or transmit the work in a public place, including showing a motion picture or other audiovisual work out of sequence and performing sound recordings by means of a digital audio transmission
e. Public Display Right—the right to show the copyrighted work directly or by means of film, slide, or television image in a public place or to transmit it to the public, or to exhibit the work's images out of sequence

Q.3 To what kinds of expressions does copyright protection apply?

A. Copyright applies to works created in a fixed, tangible form of expression which would include written works, photographs, paintings and other forms of such expression created in a fixed tangible form. Computer programs in the form of both source and object code may also be entitled to copyright protection.

Q.4 How long does the copyright protect the work?

A. As a general rule, for works created after January 1, 1978, copyright protection will endure for the life of the author plus an additional 70 years. In the case of a joint work, the term lasts for 70 years after the last surviving author's death. For anonymous and pseudonymous works and works made for hire, the term will be 95 years from the year of first publication or 120 years from the year of creation, whichever expires first.

Q.5 What is a "work for hire"?

A. Section 101 of the copyright law defines a "work made for hire" as a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as:

a. contribution to a collective work
b. part of a motion picture or other audiovisual work
c. translation
d. supplementary work
e. compilation
f. instructional text
g. test
h. answer material for a test
i. atlas

In the case of works made for hire, the employer and not the employee is considered to be the author. *See* Answer to Question 13 for a discussion of the work-for-hire doctrine and its application to standards setting.

Q.6 Are there any limits on copyright protection?

A. There are limits on copyright protection. For example, limits on copyright protection include the doctrine of fair use, which allows others to use portions of copyrighted works for purposes such as reviews, commentary, news, and scholarship. Additionally, other limits include but are not limited to titles, names, facts, ideas, systems, and methods of operation, which are not protected, nor are works in the public domain, including works whose copyright has expired.

Q.7 How does the owner of a work obtain copyright protection under the Copyright Act?

A. There is no requirement that a copyright owner register its ownership in order for it to be valid. Copyright protection attaches automatically as soon as the work is created. The copyright would apply to the drafts of standards and other documents as well as to the final work product.

Q.8 Is there any benefit to registering the copyright under the Copyright Act?

A. Registration provides the foundation for validating a copyright.

Copyright registration establishes a public record of the copyright claim, *i.e.*, when a work was created and whether it is published or unpublished. The effective date of copyright registration is the date when the Copyright Office receives the complete registration application, fee, and deposit copies. Registration may be made at any time within the life of the copyright. If registered within five years of publication, the registration certificate is *prima facie* evidence of the validity of copyright. This is important if it is necessary for the copyright owner to obtain a preliminary injunction against a copyright infringer.

Registration creates a presumption of validity. The presumption of validity will only apply if the work has been registered within five years of the publication date.

Q.9 Is a registered copyright easier to protect than a non-registered copyright?

A. A copyright holder has several remedies under federal copyright law for copyright infringement, but none of these remedies is available unless the work is registered. Those remedies include:

1. A court can prohibit an infringer from continuing his infringement and order that all infringing materials be seized.
2. The copyright holder also can choose to recover either (i) its actual damages plus any profits made by the infringer or (ii) statutory damages, which are fixed by the court as an alternative to actual damages and are often sought when the measure

of actual damages is difficult to determine. Statutory damages are discretionary and can be as high as $150,000. Statutory damage awards depend on the willfulness and harm of the infringement. They relieve the copyright owner from proving actual damages, which can be difficult. In many instances, the profits of the infringer are small.

3. The court also has the discretion to award attorney's fees and legal costs to the copyright owner when the work has been registered in a timely manner. Legal fees in any copyright infringement lawsuit, particularly attorney's fees, are extremely expensive.

4. Registration allows the copyright owner to record the registration with U.S. Customs and Border Protection to protect against the importation of infringing copies.

Q.10 Is there any time limit in which the copyright should be registered with the Copyright Office?

A. Unless registration occurs within 3 months of publication, a copyright owner of a published work cannot recover statutory damages or attorney's fees based on infringement occurring prior to the date of registration. When registration occurs more than 3 months after publication, the copyright owner is required to prove its actual damages.

Q.11 How does the copyright law deal with multiple authors generally and how might those principles apply to the joint development of voluntary consensus standards?

A. Typically, the copyright owner is easy to identify. They are the author of a novel, the creator of a design, or the composer of a song. In the voluntary consensus standards development process, the standard usually is created (or at least edited) by a group of people. It is possible, therefore, that a court may find some standards to be "joint works."

Section 101 of 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." This is different from a "collective work" (such as a periodical, anthology, etc.) where typically separate authors prepare separate works that can stand on their own but which have been assembled into a collective whole. Joint authors become owners in common and their property rights and duties are determined accordingly.

Q.12 What are the rights of joint owners under the copyright law?

A. Joint owners of copyrighted standards enjoy the exclusive rights to: (1) reproduce the copyrighted standards; (2) prepare derivative works based upon the standards; and (3) distribute copies of the standard to the public by sale or other transfer or ownership. 17 U.S.C. section 106.

The copyright of a joint work is co-owned by all of the authors. 17 U.S.C. Section 201(a).

“Joint owners” each hold an undivided interest in the entire work. Each co-owner has an independent right to use or license the use of the work without the consent of the other authors, subject to a duty of accounting to the other authors for any profits realized thereby.

Q.13 How can a standards developer obtain transfers of copyright or use rights from contributors?

A. Under section 201(d), 204(a), and 101 of the Copyright Act (relating to “transfer of copyright ownership”), the transfer of any rights of copyright ownership, other than by a non-exclusive license, must be in writing. This means that if a standard constitutes a joint work, a standards developer could claim ownership in the contributions to such standard if all of the committee members assign in writing their respective copyright ownership interests to the developer. Some developers require written assignments from their committee members.

Others obtain from contributors a non-exclusive license to the copyrighted submissions and an acknowledgement that ownership of the final standard, as a derivative work, belongs to the developer. A non-exclusive license does not necessarily have to be in writing and may often be implied from conduct. Some developers obtain such rights to contributions and the resulting standard through membership forms, IP policies, and other documents to which the members/contributors are asked to acquiesce in some manner. For example, some SDOs include language in their internal documents along the following lines:

(1) membership application forms requiring members to agree to comply with the SDO’s IP policy;
(2) an IP policy stating that every submitter who contributes copyrighted materials to the SDO retains its copyright in the submission, and at the same time, grants the SDO a non-exclusive, irrevocable, worldwide, perpetual, royalty-free license under the submitter’s copyrights in its submission to reproduce, distribute, publish, display, perform and create derivative works of the submission for the purpose of developing a standard under the SDO’s copyright; and
(3) submission forms stating that the submitter agrees the SDO may copy distribute and otherwise make available the submission for the purpose of evaluation and, in the event the submission is accepted, the SDO will own the copyright in the resulting standard (derivative work) and all rights therein, including the rights of distribution.

Because each situation is unique, which approach an SDO should take and the manner in which such SDO acquires copyright, rights to use contributions, and derivative work rights in the resulting standards, should be carefully reviewed with the SDO’s legal counsel.

In the absence of a written assignment or an express or implied license, an organization can also acquire copyright ownership rights under the “work-for-hire” doctrine. (*See* Answer to Question 5, above.)

A work is "made for hire" in one of two ways. First, the acts of authorship *of employees* are presumptively made for hire, with copyright ownership attaching to the organization that employed the employee-authors rather than the employee-authors themselves. The term "employee" is not limited to "formal, salaried employees” and no written agreement is required to memorialize the relationship. Second, courts may consider the acts of authorship by non-employees to be "made for hire" where the work is specially commissioned. The types of specially commissioned works that qualify as “works for hire”

are specifically enumerated under the Copyright Act and the relationship between author and organization must be written.

The Courts have identified a number of factors to consider in making a determination whether a given work is one made for hire:

> (1) the hiring party's right to control the manner and means by which the product is accomplished;
> (2) the skill required;
> (3) the source of the instrumentalities and tools;
> (4) the location of the work;
> (5) the duration of the relationship between the parties;
> (6) whether the hiring party has the right to assign additional projects to the hired party;
> (7) the extent of the hired party's discretion over when and how long to work;
> (8) the method of payment;
> (9) the hired party's role in hiring and paying assistants;
> (10) whether the work was part of the regular business of the hiring party;
> (11) whether the hiring party is in business;
> (12) the provision of employee benefits; and,
> (13) the tax treatment of the hired party.

The application of these factors to any given standards development organizations could result in very different results, depending upon the developer's level of control over the committee members and the process employed by the developer for standards development. For example, factors that support the application of the work for hire doctrine might include:

> (1) the developing organization's development of the of initial draft of the standard, its control over the formation and staffing of the technical committee, and its facilitation of the dissemination of drafts for comment;
> (2) the expertise of the developer's own staff in the technical areas that are the subject of the standard;
> (3) provision by developer of instrumentalities and tools necessary to develop the standard;
> (4) substantial and exclusive commitment by committee members to the standards development project sponsored by developer; and
> (5) dedication of the developer to the business of standards development, including the hiring of staff support and the provision of facilities for the use of standards development.

Q.14 When would a standard be deemed a derivative work?

A. Only the copyright owner has the right to prepare derivative works based on the owner's copyrighted work. Therefore, any person wishing to create a derivative work must have either a written assignment from the copyright owner or an express or implied license.

Section 102 of the Copyright Act provides that "[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect

or enlarge the scope, duration, ownership, or subsistence of any copyright protection in the preexisting material." In other words, copyright in a "new or revised" version of a standard covers only the material added by the later author(s), and has no effect one way or the other on the copyright status (including ownership) of the preexisting material.

A standard itself can be considered a derivative work of the contributions that were made to its development and an SDO can obtain rights to the derivative work from the copyright owner either through a written assignment or an express or implied license. Derivative works also come into play, for example, when a standard is to a minor degree modified before being adopted as an ISO or IEC standard or adopted by a member body or U.S. standards developer as a nationally adopted standard. The resulting standard (the adoption) would then be a derivative work. Copyright to most, if not all, of the standard remains with the original copyright holder. The "owner" of the derivative work can only claim copyright in connection with the portions of the adopted standard that this owner added to the work.

Q.15 Where two or more standards developers are collaborating on a standard and each has copyright ownership in its work, who owns the copyright in the collaborative standard?

A. The collaborative standard probably would be deemed a joint work absent some agreement between the standards bodies specifying a different result. Typically, two or more standards bodies who agree to collaborate on a standard first enter into some type of liaison agreement that specifies, among other things, the related IP ownership rights and obligations.

Q.16 Can the United States government hold copyright to a work?

A. In the United States, copyright protection is not available for any work of the United States government, but the United States is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise. (17 U.S.C. § 105) (Certain works of the National Technical Information Service (NTIS) and the U.S. Postal Service are excepted.) When a copyrighted work is transferred to the U.S. government, the government becomes the copyright owner and the work retains its copyright protection. This law does not apply to states and local governments which can assert copyright with respect to certain works created by them. Whether the U.S. government can obtain copyright ownership in another country depends upon the law of the particular country involved.

Q.17 How does an employee of the United States government deal with copyright related to his/her contributions to a standards developer?

A. If the government employee is acting on his/her own and not in the capacity of a government employee representing their agency in that standards developer, that person can hold copyright ownership in any work that they create. In that case, the normal rules of the SDO for license or assignment would be followed. In most cases the employee is acting in the capacity of a government employee who is representing their agency, then since the agency as noted above in the answer to question 16 typically cannot hold copyright in the work because it is in the public domain there is no copyright that the employee can assign or license.

It is important for the standards developer to know the source of the work that the government employee is submitting and to determine whether it was created inside or outside that person's role as an employee of the United States government.

Q.18 Other than United States government public domain contributions, how does the SDO deal with other material that may be in the public domain?

A. If the content of the submission to the SDO is in the public domain and not subject to copyright protection, the need for a grant of license or assignment is not applicable, and the SDO may therefore exercise all the rights of publication, distribution, sale, and assignment, as allowed by law, without any grant of license or assignment related to that material.

For more information, see http://www.copyright.gov/help/faq.