CHAPTER 6

Copyright Abandonment

Chapter Contents

§ 6.01 Introduction

Copyright abandonment, also called dedication to the public domain, occurs when a copyright owner intentionally gives up copyright protection for a work. Given the extremely long copyright terms in effect today,[1] and the fact that since March 1, 1989 copyright protection begins

[1] For example, a work created by an individual author on or after January 1, 1978 receives a single copyright term of the life of the author plus seventy years. 17 U.S.C. § 302(a). See § 3.02 *supra*.

automatically whether a creator wants it or not,[2] copyright abandonment has become an increasingly important source of public domain material. Indeed, the only works created after March 1, 1989 that are in the public domain are those in which copyright has been abandoned. This is not an insignificant body of work—for example, thousands of software programs have been dedicated to the public domain.[3]

In addition, millions of copyright owners have given up some of their exclusive rights through the use of open source and Creative Commons licenses.[4] Such works are technically not in the public domain, but may be freely used by the public for many purposes.[5] Use of such licenses is far more common than abandonment of copyright[6], and perhaps represents the creation of a partial public domain, or "semi-commons."[7]

[1]—Effect of Copyright Abandonment

When the copyright in a work is abandoned by the owner it enters the public domain. Thus, he no longer owns any exclusive rights in the work and cannot bring a claim of copyright infringement against anyone who makes use of the work.[8] Copyright abandonment is therefore a complete defense to a claim of copyright infringement.[9]

[2]—Copyright Abandonment Versus Forfeiture

Copyright abandonment is always intentional.[10] In contrast, copyright forfeiture occurred where a copyright owner losest his copyright in a work because he unintentionally failed to comply with the conditions for federal copyright protection imposed by the copyright law in effect at the time, such as the use of a copyright notice on published works.[11]

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[2] Since March 1, 1989, the United States has had an unconditional copyright system—that is, a full term of copyright protection is acquired automatically by all works that meet the minimal creativity and originality requirements. See § 4.01 *supra*.

[3] See § 6.03 *infra*.

[4] See § 6.04 *infra*.

[5] *Id.*

[6] *Id.*

[7] See Loren, "Building a Reliable Semi-commons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright," 14 Geo. Mason L. Rev. 271 (2007). The "semi-commons" is described as a body of "creative works which is characterized by public rights and private rights that are both important and that dynamically interact." 14 Geo. Mason L. Rev. at 275.

[8] See, e.g., Bell v. Combined Registry Co., 397 F. Supp. 1241 (N.D. Ill. 1975).

[9] *Id.*

[10] See § 6.02 *infra*.

[11] National Comics Publications v. Fawcett Publications, Inc., 191 F.2d 594, 597-598 (2d Cir. 1951). See Chapter 4 *supra* for a detailed discussion of copyright

Whether copyright is abandoned or forfeited, the work is in the public domain. However, in some important respects the legal ramifications differ.[12] This is particularly true for works first published outside the United States before March 1, 1989. If the copyright in such a foreign work was lost due to forfeiture, it likely had its United States copyright automatically restored on January 1, 1996.[13] In contrast, it appears that there is no restoration when the copyright in a foreign work was abandoned, rather than forfeited.[14]

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forfeiture. However, courts sometimes confused the terms abandonment and forfeiture, or used them interchangeably. See, e.g., Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F. Supp. 1392, 1399 n. 5 (C.D. Cal. 1990), pointing out that the court in Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1019-1020 (9th Cir. 1985), *cert. denied* 474 U.S. 1059 (1986) used the term "forfeiture" rather than "abandonment" even though it was clear that it was an "abandonment and not a forfeiture case."

[12] See § 6.02[1] *infra*.

[13] See § 8.02 *infra*.

[14] See Dam Things from Denmark, a/k/a Troll Company ApS, v. Russ Berrie & Company, Inc., 290 F.3d 548, 560 (9th Cir. 2002), in which the alleged infringer of a restored work argued that the copyright in the work had been abandoned, thus it did not qualify for copyright restoration. The court held that there had been no abandonment, but stated that its decision did "not suggest that . . . abandonment may never be a bar to restoration." See § 8.02[5] *infra*.

§ 6.02 The Nuts and Bolts of Copyright Abandonment

Neither the current copyright law (Copyright Act of 1976)[1] nor prior law (Copyright Act of 1909)[2] contain any provision explicitly allowing copyright owners to dedicate their works to the public domain, or explaining how it can be done.[3] However, the courts have

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[1] 17 U.S.C. §§ 101 *et seq*. See United States Copyright Office, *Compendium II of Copyright Office Practices*, § 1507.14 (1984) ("There is no provision in the copyright statute for abandoning a copyright or copyright claim or any of the rights therein.").

[2] Former 17 U.S.C. §§ 1 *et seq*. See United States Copyright Office, *Compendium of Copyright Office* Practices (1970) § 12.4.2.I ("there is no provision in the copyright law for abandoning a copyright").

[3] However, an uncodified portion of the Computer Software Rental Amendments Act of 1990 (Section 805 of Pub. L. No. 101-650, 101st Cong., 2d Sess., 104 Stat. 5089) provides that "public domain shareware" may be donated to the Library of Congress. Copyright Office regulations implementing this law provide that "[p]ublic domain computer software means software which has been publicly distributed with an explicit disclaimer of copyright protection by the copyright owner." 37 C.F.R. § 201.26(b)(3). By 1990, all United States copyright formalities had been made optional. See Chapter 4 *supra*. Thus computer shareware created in 1990 or later could be in the public domain only if the owner abandoned his copyright protection. This indicates that both Congress and the Copyright Office believe that copyright protection may be abandoned.

In addition, when the manufacturing clause was in effect (see § 4.04 *supra*), an unlimited number of books violating the clause could be imported into the United States if the owner filed with the Copyright Office a statement of abandonment of the United States copyright in the work. Authors League of America, Inc. v. Oman, 790 F.2d 220 (2d Cir. 1986).

One commentator has posited five strong rationales supporting copyright abandonment. See Kreiss, "Abandoning Copyrights to Try to Cut Off Termination Rights," 58 Mo. L. Rev. 85, 98-100 (1993).

- First, the fact that the 1976 Act is silent regarding abandonment does not mean Congress intended to abrogate this right: "In writing the 1976 Copyright Act, Congress was concerned about creating copyright and defining the limits of copyright. . . . Congress never considered the rare situation in which an author might not want to have a copyright, for the very good reason that people who do not want copyrights will rarely get into legal fights about their copyrights."
- Second, "abandonment is an equitable doctrine which, like laches and estoppel, should be permitted even though the statute itself does not explicitly refer to these equitable defenses."
- Third, "the copyright system is an incentive system, not a coercive one." Thus, "nothing in the Constitution or the Copyright Act compels an author to accept the benefits of copyright."
- Fourth, abandonment cannot be prevented: "an author can destroy the copyrights in a work by burning or destroying all copies of the work [or] refuse the economic benefits of copyright by not releasing the work."
- Fifth, abandonment should be allowed out of respect for personal freedom and property rights: "As a matter of policy, society allows people to do what they please with things that they own."

long recognized that copyright owners can abandon their rights in a work with the result that it enters the public domain.[4]

The most commonly cited test for copyright abandonment requires that the copyright owner: (1) intend to abandon his rights in the work; and (2) manifest such intent through an "overt act."[5]

Obviously, all uncertainly is avoided if the copyright owner explicitly abandoned copyright in the work involved in writing.[6] However, a copyright may be abandoned without any writing explicitly saying so where the copyright owner's overt actions show that this was intended. Examples of such an overt actions include:

- A television station destroyed the broadcast tapes of local news broadcasts one week after they were made.[7]

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[4] See, e.g., Heine v. Appleton, 11 F. Cas. 1031, 1033 (C.C.S.D.N.Y. 1857) (artist abandoned copyright in drawings when he helped prepare them for publication and made no claim to copyright in them).

[5] This test was first enunciated by Judge Learned Hand in National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 598 (2d Cir. 1951).

> "[T]he author or proprietor of any work made the subject of copyright by the Copyright Law may abandon his literary property in the work before he has published it, or his copyright in it after he has done so; but he must abandon it by some overt act which manifests his purpose to surrender his rights in the work, and to allow the public to copy it." (Footnote and internal quotation marks removed).

This test has been used in most abandonment cases since. See, e.g.:

Second Circuit: Capitol Records, Inc. v. Naxos of America, Inc., 372 F.3d 471, 483 (2d Cir. 2004).

Fifth Circuit: Imperial Homes Corp. v. Lamont, 458 F.2d 895, 898 (5th Cir. 1972).

Seventh Circuit: Jackson v. MPI Home Video, 694 F. Supp. 483, 490 (N.D. Ill. 1988).

Eighth Circuit: Southwestern Bell Telephone Co. v. Nationwide Independent Directory Service, Inc., 371 F. Supp. 900 (W.D. Ark. 1974).

Ninth Circuit: Micro Star v. Formgen Inc., 154 F.3d 1107, 1114 (9th Cir. 1998); Hampton v. Paramount Pictures Corp., 279 F.2d 100 (9th Cir. 1981), *cert. denied* 364 U.S. 882.

Eleventh Circuit: Pacific and Southern Co., Inc. v. Duncan, 744 F.2d 1490 (11th Cir. 1984).

[6] A statement included on a work such as "This work is released to the public domain" should suffice. The organization Creative Commons has an automated means of dedicating a work to the public domain at its Web site. See § 6.04 *infra*. In addition, the Copyright Office will "record an affidavit or other statement, signed by all of the copyright owners, purporting to abandon a copyright, without expressing any opinion concerning its legal effect." United States Copyright Office, *Compendium II of Copyright Office Practices*, § 1507.14. No particular language is required in such a statement, but it should: (1) be signed by the copyright claimant or his agent or assignee, (2) "contain clear words of present abandonment," and (3) "adequately identify the work with which it deals." United States Copyright Office, *Compendium of Copyright Office* Practices (1970) § 12.4.2.II.

[7] Pacific and Southern Co., Inc. v. Duncan, 572 F. Supp. 1186, 1197 (N.D. Ga. 1983), *aff'd in part* 744 F.2d 1490 (11th Cir. 1984).

- The publisher of an investment newsletter included the following statement in the publication's copyright notice: "The information contained in this letter is protected by U.S. copyright laws through noon EST on the 2d day after its release."[8]
- The co-author of an article requested that it be published in a professional journal without his name.[9]
- The owner of architectural plans distributed copies to subcontractors without warning them they were copyrighted, permitted the public to view a house based on the plans without restriction (including taking measurements), and published in a newspaper an unnoticed advertisement containing the floor plan.[10]
- A woman taught folk singer Pete Seeger a folk hymn to which she had added a new verse and, to preserve the song, gave him unrestricted permission to publish it without receiving either credit or royalties, or establishing her ownership of the new verse.[11]

[1]—Publication Without Copyright Notice

Prior to March 1, 1989, published works had to contain copyright notices to enjoy federal copyright protection. Works published without notice before 1978 automatically entered the public domain.[12] Those published during January 1, 1978 through February 28, 1989 entered the public domain if the lack of notice was not cured within five years.[13]

Since use of a notice was so important for copyright protection, affixing a notice on a work was considered to be very strong evidence that the copyright owner did *not* intend to abandon his rights in the work.[14] This was so even if the notice was invalid.[15]

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[8] Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F. Supp. 1392, 1395-1397 (C.D. Cal. 1990).

[9] Seshadri v. Kasraian, 130 F.3d 798, 804-805 (7th Cir. 1997).

[10] DeSilva Construction Corp. v. Herrald, 213 F. Supp. 184, 196-197 (M.D. Fla. 1962).

[11] Sanga Music, Inc. v. EMI Blackwood Music, Inc., 55 F.3d 756, 761 (2d Cir. 1995).

[12] See, e.g.:

Second Circuit: Shaprio & Son Bedspread Corp. v. Royal Mills Associates, 764 F.2d 69, 72 (2d Cir. 1985) (1976 Act).

Ninth Circuit: Twin Books Corp. v. Walt Disney Corp., 83 F.3d 1162, 1165 (9th Cir. 1996) (1909 Act).

See § 4.02[1][a][i] *supra*.

[13] 17 U.S.C. § 405. See § 4.02[1][a][ii] *supra*.

[14] See National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 598 (2d Cir. 1951) (copyright owner's attempt to affix copyright notice on comic strips was "conclusive evidence that it wished to claim a copyright upon them"). See also:

On the other hand, a simple way for a copyright owner to abandon copyright in a work was to knowingly publish it without notice.[16] However, this did not always result in copyright abandonment.[17]

A work published without a valid notice before March 1, 1989 also entered the public domain if the omission of a valid notice was not done on purpose—that is, if it was accidental or due to ignorance or negligence.[18] In such a case, the copyright was forfeited, not abandoned.[19] Nevertheless, the practical effect was the same: the work entered the public domain.[20] However, there are some important differences between copyright forfeiture and abandonment due to lack of notice. Copyright was forfeited only when a work underwent a general publication without notice.[21] A limited publication was not

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Second Circuit: Marvin Worth Productions v. Superior Films Corp., 319 F. Supp. 1269, 1273 (S.D.N.Y. 1970) (use of copyright notice was "compelling evidence" copyright owner did not intend to abandon copyright).

Seventh Circuit: Bell v. Combined Registry Co. 397 F. Supp. 1241,1248 (N.D. Ill. 1975) ("The presence of a notice is strong evidence of an intent not to abandon.").

But see Sanga Music, Inc. v. EMI Blackwood Music, Inc., 55 F.3d 756, 761 (2d Cir. 1995) (copyright in folk hymn abandoned upon publication even though the magazine in which it was published had a copyright notice on its masthead).

[15] National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 598 (2d Cir. 1951). See also, L & L White Metal Casting Corp. v. Cornell Metal Specialties Corp., 353 F. Supp. 1170, (E.D.N.Y. 1972), *aff'd* 177 U.S.P.Q. (BNA) 673, 1973 WL 20396 (2d Cir. 1973) (inclusion of technically inaccurate notice in catalog did not evince intent to abandon copyright).

[16] See, e.g.:

Eighth Circuit: Sieff v. Continental Auto Supply, 39 F. Supp. 683, 686 (D. Minn. 1941) (owner of catalog abandoned copyright when it published a new edition without valid notice).

Ninth Circuit: Lopez v. Electrical Rebuilders, Inc., 416 F. Supp. 1133, 1135 (N.D. Cal. 1976) (copyright in a sequential numbering system for identifying automobile distributors was abandoned when the owner printed price lists for customers without copyright notices).

[17] Dam Things from Denmark, a/k/a Troll Company ApS, v. Russ Berrie & Company, Inc., 290 F.3d 548, 559 (3d Cir. 2002) (Danish manufacturer of troll dolls did not abandon its copyright even though it published many dolls without proper notice during the 1960s).

[18] In some cases lack of notice on a few copies due to accident or mistake was excused. See § 4.02[4][a][i] *supra*.

[19] See, e.g.:

Second Circuit: Shaprio & Son Bedspread Corp. v. Royal Mills Associates, 764 F.2d 69, 72 (2d Cir. 1985) (1976 Act).

Ninth Circuit: Twin Books Corp. v. Walt Disney Corp., 83 F.3d 1162, 1165 (9th Cir. 1996) (1909 Act).

See § 4.02 *supra*.

[20] See Holt Howard Associates v. Goldman, 177 F. Supp. 611 (S.D.N.Y. 1959) (ceramics published without notice would be in the public domain whether lack of notice was intentional—resulting in abandonment; or unintentional—resulting in forfeiture).

[21] See § 5.02[1] *supra* for a discussion of what constitutes "general publication."

sufficient.[22] In contrast, courts have indicated that a copyright could have been abandoned if it was intentionally distributed without notice even if the distribution did not amount to a general publication.[23] Moreover, in some cases, forfeiture of copyright due to lack of notice could be excused or cured.[24]

[a]—Unnoticed Publication by Third Parties

A copyright was also considered abandoned where a copyright owner expressly authorized, or acquiesced to, the widespread unnoticed publication of a work by a third party.[25] However, logically enough, there was no abandonment when the copyright owner expressly conditioned publication by a third party on the affixation of copyright notice, and the third party failed to do so.[26]

[b]—Unnoticed Publication After March 1, 1989

Use of copyright notices on published works became optional on March 1, 1989—that is, published works no longer entered the public domain due to lack of notice.[27] As a result, a copyright owner who publishes a work without notice on or after March 1, 1989 is not deemed to have abandoned his copyright.[28]

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[22] See § 5.02[2] *supra* for a discussion of what constitutes "limited publication."

[23] Bell v. Combined Registry Co. 397 F. Supp. 1241,1248 (N.D. Ill. 1975) ("A limited distribution [without notice], even if not widespread enough to effect a forfeiture, can, coupled with the requisite intent, cause an abandonment.").

[24] See § 4.02[4] *supra*.

[25] See, e.g.:

First Circuit: Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 556, 559 (D. Mass. 1928) (magazine's copyright in an article was abandoned when it permitted it to be reprinted in several newspapers without notice).

Second Circuit: Stuff v. E.C. Publications, Inc., 342 F.2d 143, 145 (2d Cir.), *cert. denied* 382 U.S. 322 (1965) (copyright in art print abandoned when "the copyright owner authorized or acquiesced in the wide circulation of . . . copies without notice.").

Seventh Circuit: Bell v. Combined Registry Co. 397 F. Supp. 1241, 1248 (N.D. Ill. 1975) (copyright in poem abandoned when author authorized in writing the distribution of unnoticed copies to U.S. troops in the Pacific during World War II).

[26] See National Council of Young Israel, Inc. v. Feit Co., Inc., 347 F. Supp. 1293, 1297 (S.D. N.Y. 1972) (copyright in advertising materials not abandoned when owner permitted customers to republish materials on the condition that they affix a proper copyright notice to such publications and they failed to do so).

[27] Berne Convention Implementation Act of 1988 ("BCIA") Pub. L. No. 100-568, 102 Stat. 2853, 2857 (1988). The BCIA amended 17 U.S.C. § 401(a) to provide that "notice *may be placed* on publicly distributed copies" of a work. (Emphasis added.) 17 U.S.C. § 402(a) was amended to provide that notice "may be placed on publicly distributed phonorecords." See § 4.02[1][a][iii] *supra*.

[28] Innovative Networks, Inc. v. Satellite Airlines Ticketing Centers, Inc., 871 F. Supp. 709, 720 (S.D.N.Y. 1995) (copyright in the design for an airline business center was not abandoned when the owner published it without notice in 1991 because notice "was not a necessary precondition to copyright protection").

[2]—Failure to Act Not Copyright Abandonment

Since an overt act is required to abandon a copyright, it follows that "[m]ere inaction or negative behavior will not suffice."[29] Unlike trademark, protection for which may be lost if the owner fails to prosecute infringers,[30] copyright protection is not lost simply because a copyright owner does not fight infringers.[31] Likewise, there is no abandonment when a copyright owner fails to meet the demand for a work or permits it to go out of print.[32] In addition, failure to renew the copyright in a derivative work does not cause abandonment of the original work on which it was based.[33]

[3]—Limited Abandonment

A copyright consists of a bundle of rights, including the exclusive rights to do and to authorize others to:

- reproduce the work
- prepare derivative works based on the copyrighted work
- distribute copies of the work to the public by sale, rental or other means, and
- publicly perform or display the work[34]

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[29] Dodd, Mead & Co., Inc. v. Lilienthal, 514 F. Supp. 105, 108 (S.D.N.Y. 1981). However, not all courts have accepted this view. See Dam Things from Denmark, a/k/a Troll Company ApS, v. Russ Berrie & Company, Inc., 290 F.3d 548, 560 (9th Cir. 2002) ("there must be either an act, or a failure to act, from which we can readily infer an intent to abandon the right.").

[30] See, e.g., Sweetheart Plastics, Inc. v. Detroit Forming, Inc. 743 F.2d 1039, 1047-1048 (4th Cir. 1984) ("if, through failure to prosecute, a mark continually loses 'strength' and 'distinctiveness,' it will eventually hemorrhage so much that it dies as a mark. That would be 'abandonment' through acts of omission," quoting McCarthy, *Trademarks and Unfair Competition* § 17:5 (2d Ed. 1984)).

[31] See, e.g.:

Second Circuit: Lottie Joplin Thomas Trust v. Crown Publishers, Inc., 456 F. Supp. 531 (S.D.N.Y. 1977) (copyright in three musical compositions by composer Scott Joplin not abandoned even though the owner—Joplin's widow—waited eight years to take legal action against infringer).

Ninth Circuit: Hampton v. Paramount Pictures Corp. 279 F.2d 100, 104 (9th Cir. 1960) (copyright in a silent film was not abandoned even though the owner failed to take any action to enforce its copyright for over twenty-five years).

But see, Sandler v. Katz, 20 C.O. Bull. 621, 625 (S.D.N.Y. 1925) (failure to enforce copyright for over ten years resulted in abandonment).

[32] Dodd, Mead & Co., Inc. v. Lilienthal, 514 F. Supp. 105 (S.D.N.Y. 1981).

[33] Filmvideo Releasing Corp. v. Hastings, 426 F. Supp. 690 (S.D.N.Y. 1976) (failure to renew copyrights in films based on books did not result in abandonment of copyright in books when copyrights to books were renewed by the owner).

[34] See 17 U.S.C. § 201(d)(2). ("Any of the exclusive rights comprised in a copyright. . . . may be transferred . . . and owned separately.") See also, H.R. Rep. No. 1476,

The question then arises whether a copyright owner must abandon all of his copyright rights or may instead abandon some rights and keep others. For example, could the copyright owner of a book abandon the rights to reproduce and distribute it, but retain the right to creative derivative works, such as films or plays, based upon it? Or, could he abandon the right to make noncommercial use of the work, while retaining the right to commercial uses? There are few cases on this issue, but all have held that there cannot be a limited or partial abandonment of a copyright.[35]

This view may have made sense prior to 1978 because before that time copyright rights were generally held to be indivisible—that is, the copyright owner had to transfer all his copyright rights because partial assignments were not allowed.[36] However, when the Copyright Act of 1976 took effect in 1978, copyright rights became freely divisible.[37] Since any individual copyright right may be separately transferred, it seems logical that it should also be possible to separately abandon such rights.[38] The Ninth Circuit has suggested, but did not hold, that such a limited abandonment is possible.[39]

94th Cong., 2d Sess., 123 (1976) ("any of the exclusive rights that go to make up a copyright . . . can be transferred and owned separately").

[35] See:

Second Circuit: Paramount Pictures Corp. v. Carol Publishing Group, 11 F. Supp.2d 329, 337 (S.D.N.Y. 1998); Richard Feiner & Co. v. H.R.I. Industries, Inc., 10 F. Supp.2d 310, 313 (S.D.N.Y. 1998).

Eleventh Circuit: Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Co-op. Productions, Inc., 217 U.S.P.Q.2d 857, 858 (N.D. Ga. 1981) (concept of limited abandonment rejected because "[n]o pertinent authority has been cited for the proposition and the Court knows of none").

But see, Kreiss, "Abandoning Copyrights to Try to Cut Off Termination Rights," 58 Mo. L. Rev. 85, 96 n. 44 (1993) ("The court in *Showcase* rejected the idea of a limited abandonment because no authority had been cited for such a proposition. Such a 'reason' is really no reason at all.").

[36] See Goodis v. United Artists Television, Inc., 425 F.2d 397, 400 (2d Cir. 1970).

[37] 17 U.S.C. § 101 (copyright owners may transfer "any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect").

[38] See Kreiss, "Abandoning Copyrights to Try to Cut Off Termination Rights," 58 Mo. L. Rev. 85, 96 (1994).

> "Because each of the copyright rights has a separate legal existence and can be separately owned and transferred, each of them can also be separately abandoned. For example, an author could abandon the exclusive right to make copies of a particular work, while retaining the other copyright rights. Or an author could abandon the rights to perform or display a work, while retaining the rights to make and distribute copies."

[39] Micro Star v. Formgen, 154 F.3d 1107, 1114 (9th Cir 1998) (software maker could have abandoned the exclusive copyright right to create and freely distribute new levels for a computer game where it encouraged users to do the same without obtaining permission).

[4]—Terminating Copyright Abandonment

If a copyright owner abandons his copyright, does the abandonment last forever, or can he later change his mind and re-claim his copyright rights? There are no cases directly addressing this issue. However, even if an abandonment of copyright could be terminated, anyone who used the work involved without knowledge of the termination would be shielded from liability for copyright infringement by the equitable estoppel defense.Four elements must be made out to establish an equitable estoppel defense to copyright infringement:

> "(1) the plaintiff must know the facts of the defendant's infringing conduct;
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> "(2) the plaintiff must intend that his conduct be acted on or must so act that the defendant has a right to believe that it is so intended;
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> "(3) the defendant must be ignorant of the true facts; and
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> "(4) the defendant must detrimentally rely on the plaintiff's conduct."[40]

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[40] Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F. Supp. 1392, 1399-1400 (C.D. Cal. 1990) Starting on July 27, 1987, the publisher of a weekly commodities investment newsletter included a provision in the copyright notice for the work stating that its copyright was abandoned two days after publication. It then removed this provision from the notice on September 22, 1987. A brokerage firm, relying on the original notice, copied the work until January 1989 when it first learned that that the publisher claimed unlimited copyright in the newsletter. The court held that the publisher was estopped from asserting an infringement claim against the brokerage firm for all the copying it did from July 27, 1987 through January 1989.

§ 6.03 Computer Software

Although there are no statistics available, it's likely that more software has been dedicated to the public domain than any other type of work.[1] There is a long tradition in the software programming community of sharing work with others and not seeking to profit from the work.[2] However, although it is sometimes described as "public domain," most software has not been dedicated to the public domain. This is so even though it is available free of charge or may be used free of most copyright restrictions.[3]

[1]—Free and Open Source Software

Instead of abandoning all of their copyright rights and placing their work in the public domain, programmers who want to make their work freely available usually license it as "free software" or "open source software."[4] Free software is not necessarily free of charge, though it often is. Rather, it is software that is licensed to users free of most copyright restrictions.[5]

The father of the "free software movement" was programmer Richard Stallman. In 1984, Stallman enunciated four key freedoms he wanted to preserve for all time for all people who used software:

- the freedom to run the program, for any purpose
- the freedom to study how the program works, and adapt it to the user's needs
- the freedom to redistribute copies

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[1] A Google search of the term "public domain software" obtained 1,650,000 results (www.google.com, visited on April 7, 2007).

[2] One example of software that has been dedicated to the public domain is the program RasMol that allows chemistry students and researchers to view molecular structures in three dimensions. During the 1990s, it was the most widely used molecular graphics program in the world, with nearly three quarters of a million users. See http://www.umass.edu/microbio/rasmol/index2.htm (last visited April 7, 2007).

[3] A 2004 survey of thousands of software projects hosted at Sourceforge.net, a Web site used by software developers to make their work available to the public, found that only 2.7% had been dedicated to the public domain. Valimaki, *The Rise of Open Source Licensing*, § 5.1.5 (1st ed.).

[4] The terms are largely synonymous and are sometimes conflated as free and open source software or FOSS, or free/libre open source software (FLOSS). Woods, "What Is Open Source," http://www.onlamp.com/pub/a/onlamp/2005/09/15/what-is-open-source.html (last visited April 6, 2007). Free software should not be confused with "freeware," which is copyrighted software that is not open source, but is distributed to users at no cost. See Fishman, *Web and Software Development: A Legal Guide*, p. 16/37 (4th ed.) See also, Bailey, *Open Source Bibliography* (2005).

[5] Free Software Definition, http://www.fsf.org/licensing/essays/free-sw.html (last visited April 6, 2007).

- the freedom to improve the program, and release the improvements to the public[6]

Stallman and other programmers who shared his goals believed that they could not achieve them simply by placing their software, including the source code,[7] in the public domain. Because anyone may use public domain software in any manner, there is no way to be sure that modifications users make to software will be freely available. For example, a person or company could modify public domain software and distribute it to the public with a proprietary license, and refuse to provide the source code for the modifications to others.[8]

Stallman and other pioneers of the open source movement devised an ingenious solution to the problem: Instead of placing their software in the public domain, developers would retain their copyright ownership and license their software to the public with mass-market licenses. However, they devised a radical new type of license—one that required all users to live by Stallman's four freedoms. Thus, the free software movement uses copyright to give away rights, not keep them. In the late 1980s, Stallman began to create a computer operating system called GNU that he distributed to the public under the General Public License (GPL). The open source license was born.[9]

There is no single open source license; to date, over fifty have been created,[10] but all have certain elements in common:

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[6] *Id.*

[7] Source code is computer code written in high level computer languages, such as C++ and Java, consisting of English-like words and symbols readable by humans, and that can be debugged, modified, or adapted by them. Fishman, *Web and Software Development: A Legal Guide,* p. 6/3 (4th ed.).

[8] Fishman, *Web and Software Development: A Legal Guide*, p. 16/42 (4th ed.).

[9] *Id.* at p. 16/43. Open source software remained relatively little known and used until 1991, when a twenty-one-year-old Finn named Linus Torvalds developed the system kernel for a new operating system he named Linux (a play on the word UNIX, a well known proprietary operation system with which Linux was compatible). Torvalds made Linux freely available over the Internet. However, instead of making Linux public domain, he retained his copyright rights and distributed it under the GPL. This way, no one could make the Linux code proprietary and Torvalds maintains control over which modifications should be incorporated into the official version of the kernel. In 1992, Linux was combined with the GNU system begun by Richard Stallman and the Free Software Foundation. The GNU/Linux operating system soon became wildly popular with technically-sophisticated users and businesses around the world. Other important open source software programs are Apache, which runs a majority of Internet servers, SendMail, Internet e-mail software, and Perl, the standard Internet scripting language. See http://en.wikipedia.org/wiki/Linux (last visited April 7, 2007).

[10] See http://www.opensource.org/licenses/alphabetical (last visited April 7, 2007). However, the first open source license—the GNU GPL (general public license)—is by far the most widely used. A 2004 survey of thousands of software

- The license must permit anyone who obtains and uses the software to sell or give it away it to others without have to pay a royalty or other fee to the original copyright owner(s). However, open source software is not necessarily free—that is, without financial cost. Users may sell it to others, and are free to charge whatever they want (and can get).
- Open source licenses require everyone who distributes the software to provide unfettered access to the program source code, although not necessarily free of charge.
- The license must allow users to modify the software, and to create derivative works based upon it.
- The license must not discriminate against any person or group of persons or restrict anyone from using the software in a specific field of endeavor.
- When software is distributed under an open source license, only that license may be used. Thus, for example, users cannot be required to sign nondisclosure agreements, patent licenses or any other agreements governing how the software may be used. This ensures that the software remains "open."[11]

Thus, under an open source license, all the exclusive of a copyright owner—the right to copy, distribute and modify the work—"are reversed into nonexclusive."[12]

"Copyleft" (a play on the word copyright) is the key factor the differentiates the various open software licenses. Copyleft (also called reciprocity) is a license requirement that governs how modifications to the original open source software must be legally treated when they are publicly distributed. If a license contains a strong copyleft provision, anyone who modifies the source code and distributes it to the public must license the modifications back to the public under the same terms as the original software.[13]

However, a whole family of licenses contain no copyleft and few other restrictions on users. The best-known of these no copyleft licenses is the Berkeley Software Distribution License (BSD). This license, one of the earliest nonproprietary licenses, permits users to

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projects hosted at Sourceforge.net, a Web site used by software developers to make their work available to the public, found that over 66% used this license. Valimaki, *The Rise of Open Source Licensing*, § 5.1.5 (1st ed.).

[11] Fishman, *Web and Software Development: A Legal Guide*, p. 16/23-16/27 (4th ed.). See also "The Open Source Definition," http://www.opensource.org/docs/definition.php (last visited April 7, 2007).

[12] Valimaki, The Rise of Open Source Licensing, § 5.1.1 (1st ed.).

[13] Fishman, *Web and Software Development: A Legal Guide*, p. 16/8 (4th ed.). See also, "What Is Copyleft?" http://www.gnu.org/copyleft/ (last visited April 7, 2007).

do virtually anything they want with BSD-licensed code: they may distribute the software—either for free or commercially—without providing the source code; they may also modify it and distribute the changes without providing the source code. Software distributed under no copyleft licenses can be turned into proprietary software (and then relicensed for a fee) by anyone, as long as the developers of the original open source software are credited.[14] Indeed, there is little to distinguish BSD-license software from software dedicated to the public domain, except that the original software author technically retains copyright ownership in the code, and users are required to include a copy of the license and a copyright notice in publicly distributed versions of the software.

[2]—Abandonware

"Abandonware" is commercially developed software—usually computer games—that is no longer sold and/or supported by the manufacturer.[15] In other words, the software is out-of-print. There are hundreds of Web sites from which these games can be downloaded.[16] Failure to sell or support a computer game does not constitute an abandonment of the copyright.[17] Thus, abandonware is ordinarily not in the public domain.

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[14] Fishman, *Web and Software Development: A Legal Guide*, at p. 16/30 (4th ed.) See also "BSD Licenses," http://en.wikipedia.org/wiki/BSD_license#External_links (last visited April 7, 2007).

[15] The Abandonware FAQ, http://www.abandonwarering.com/?Page=FAQ (last visited April 7, 2007).

[16] Zurcher, "'Abandoned' Games Kept Alive—Illegally," Washington Post, p. E01 (March 16, 2001).

[17] See § 6.02[2] *supra*.

§ 6.04 Open Content, Open Access and the Creative Commons

The ideas behind free and open source software have been extended to works other than software, such as writings, music, photos, and video. Terms such as "open access,"[1] and "open content"[2] have been coined to describe this process.

The most prominent organization involved in this movement is the Creative Commons[3]—a nonprofit corporation whose goal is "to cultivate a commons in which people can feel free to reuse not only ideas, but also words, images, and music without asking permission—because permission has already been granted to everyone."[4] Since its founding in 2001, the Creative Commons has become a worldwide phenomenon with over 140 million web pages subject to Creative Commons licenses[5] and search engines dedicated to finding creative commons licensed content on the Internet.[6]

[1]—Creative Commons Automated Public Domain Dedication

One of the initial goals of the Creative Commons project was to help copyright owners abandon their copyrights.[7] The Creative Commons

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[1] Open content, "coined by analogy with 'open source,' describes any kind of creative work (including articles, pictures, audio, and video) . . . that is published in a format that explicitly allows the copying and the modifying of the information by anyone." "Open Content," http://en.wikipedia.org/wiki/Open_content (last visited April 7, 2007). It can be material that has been dedicated to the public domain, but usually it is material that has been made freely available to the public under an open content license, such as a Creative Commons License. *Id.*

[2] Open access refers to published peer-reviewed scholarly journal articles made freely available to the public under open content licenses, such as a Creative Commons licenses. "Open access," http://en.wikipedia.org/wiki/Open_access (last visited April 7, 2007).

[3] See http://creativecommons.org (last visited April 8, 2007).

[4] See http://creativecommons.org/about/legal (last visited April 8, 2007). The organization's concept of the "commons" is "[r]elated to the public domain," but "is the more general idea of . . . resources that are not divided into individual bits of property but rather are jointly held so that anyone may use them without special permission . . . public streets, parks, waterways, outer space, and creative works in the public domain—all of these things are, in a way, part of the commons." *Id.*

[5] Lessig, "A Report on the Commons," http://creativecommons.org/weblog/entry/6106 (last visited April 7, 2007).

[6] See http://search.creativecommons.org/ (last visited April 7, 2007).

[7] The Creative Commons Web site, "Cultivating the Public Domain," http://creativecommons.org/about/legal/cultivating (last visited April 8, 2007), provides:

> "One goal of the Creative Commons project is to alert creators who do not intend to copyright their work to the 'overt act' requirement and to help them comply with it. Then we hope to help creators label works in a way that makes it clear to potential re-users that the work is in the public domain. And we intend to develop mechanisms for attaching 'public domain' labels to digital works in a way that computer applications can recognize and process-enabling easy location and retrieval of digital works in the public domain."

Web site contains an automated method that copyright owners can use to clearly and explicitly dedicate any type of work to the public domain.[8] However, it has been little used. The vast majority of Creative Commons users have elected to license their work with Creative Commons licenses, rather than dedicate it to the public domain.[9] This has led some to think that total abandonment of copyright rights is not a popular idea:

> "What is striking from observing the data on the early years of the Creative Commons is that, when permitted to choose for themselves, very few prefer an unstructured commons—the realm of unrestricted public domain—to a structured one."[10]

The Creative Commons Web site also allows copyright owners to choose what is termed "Founders' Copyright." This is intended to shorten the copyright term from life plus seventy years, to fourteen or twenty-eight years, the copyright terms in effect when the first copyright statute was enacted by the Founding Fathers in

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[8] See http://creativecommons.org/license/publicdomain-2 (last visited April 7, 2007). The Web site requires copyright owners to provide their name, email address, and title of the work to be dedicated to the public domain. The copyright owner is then automatically sent an email containing a web link to a confirmation page. By clicking the "confirm" button on the bottom of this page the owner confirms that:

> "Dedicator makes this dedication for the benefit of the public at large and to the detriment of the Dedicator's heirs and successors. Dedicator intends this dedication to be an overt act of relinquishment in perpetuity of all present and future rights under copyright law, whether vested or contingent, in the Work. Dedicator understands that such relinquishment of all rights includes the relinquishment of all rights to enforce (by lawsuit or otherwise) those copyrights in the Work.
>
> "Dedicator recognizes that, once placed in the public domain, the Work may be freely reproduced, distributed, transmitted, used, modified, built upon, or otherwise exploited by anyone for any purpose, commercial or non-commercial, and in any way, including by methods that have not yet been invented or conceived."

Thereafter, the former copyright owner is instructed to mark the material as dedicated to the public domain. Html code is provided for web pages. For text, the following statement is provided:

> "This work is hereby released into the Public Domain. To view a copy of the public domain dedication, visit http://creativecommons.org/licenses/publicdomain/ or send a letter to Creative Commons, 543 Howard Street, 5th Floor, San Francisco, California, 94105, USA." *Id.*

[9] A survey conducted in 2004 found that only 2% of users of Creative Commons licenses dedicated their works to the public domain; 98% used licenses imposing various restrictions. Chandler and Sunder, "The Romance of the Public Domain," 92 Cal. L. Rev. 1331,1362 (2004).

[10] *Id.*

1790.[11] To accomplish this, the copyright owner sells his copyright in the work to the Creative Commons for $1.00 and the Creative Commons gives him an exclusive license to use the work for fourteen or twenty-eight years.[12] After that time, the copyright is abandoned to the public domain.[13] This amounts to a delayed copyright abandonment. The large computer book publisher O'Reilly & Associates has adopted Founders Copyright for hundreds of its titles.[14]

[2]—Creative Commons Licenses

As previously discussed, most users of the Creative Commons Web site choose not to dedicate their work to the public domain.[15] Instead, they use one of several open content licenses developed by the Creative Commons. These licenses were developed to "let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry."[16] It has been suggested that the Creative Commons licenses amount to a limited abandonment of copyright.[17] If this is the case, it may mean that such licenses cannot be terminated by the author after thirty-five years under the 1976 Act's statutory termination provision.[18]

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[11] See, "Founders' Copyright," http://creativecommons.org/projects/founderscopyright/ (last visited April 7, 2007).

[12] *Id.*

[13] *Id.*

[14] See http://creativecommons.org/projects/founderscopyright/oreilly (last visited April 7, 2007).

[15] See § 6.04[1] *supra*.

[16] Creative Commons, "About Us," http://creativecommons.org/about/history (last visited April 7, 2007). For a detailed description of Creative Commons licenses, see Loren, "Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright," 14 Geo. Mason L. Rev. 271, 288-294 (2007).

[17] See Loren, "Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright," 14 Geo. Mason L. Rev. 271, 325-327 (2007).

> "By adopting a Creative Commons license and tagging her work with a Creative Commons notice, a copyright owner is engaging in an overt act evidencing her intent to relinquish certain rights granted by the Copyright Act."

See also, Merges, "A New Dynamism in the Public Domain," 71 U. Chi. L. Rev. 183, 199 (2004).

> "This is in effect a partial dedication to the public domain, rather than a complete one. The user selects some of the sticks in the metaphorical [copyright] bundle and waives the right to enforce them, dedicating those particular rights to the public."

See § 6.03[3] *supra* for a discussion of limited abandonment of copyright.

[18] 17 U.S.C. § 203 provides that an author of a work other than a work made for hire has the nonwaivable right to terminate "the exclusive or nonexclusive grant of a

Copyright owners may choose among six basic types of licenses that allow varying degrees of permission-free use of the work involved.[19] Every license allows any member of the public to make use of the work for noncommercial purposes. This includes permission to copy and distribute the work, display or perform it publicly,

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transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978" by serving a written notice of termination on the grantee any time during the five-year period beginning (1) at the end of thirty-five years from the date of publication of the work, or (2) at the end of forty years from the date of execution of the grant, whichever term ends earlier. Arguably, this provision should not apply to an abandonment of copyright because an abandonment of copyright rights is not the same as a "grant" of such rights: "A 'grant' is a transaction between two or more parties. In contrast, an abandonment is the unilateral act of one party." Kreiss, "Abandoning Copyrights to Try to Cut Off Termination Rights, 58 Mo. L. Rev. 85, 113 (1993).

[19] See http://creativecommons.org/about/licenses/meet-the-licenses (last visited April 11, 2007. The types of licenses offered are:

> **"Attribution Non-commercial No Derivatives (by-nc-nd)**
> "This license is the most restrictive of our six main licenses, allowing redistribution. This license is often called the "free advertising" license because it allows others to download your works and share them with others as long as they mention you and link back to you, but they can't change them in any way or use them commercially."
>
> **"Attribution Non-commercial Share Alike (by-nc-sa)**
> "This license lets others remix, tweak, and build upon your work non-commercially, as long as they credit you and license their new creations under the identical terms. Others can download and redistribute your work just like the by-nc-nd license, but they can also translate, make remixes, and produce new stories based on your work. All new work based on yours will carry the same license, so any derivatives will also be non-commercial in nature."
>
> **"Attribution Non-commercial (by-nc)**
> "This license lets others remix, tweak, and build upon your work non-commercially, and although their new works must also acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms."
>
> **"Attribution No Derivatives (by-nd)**
> "This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to you."
>
> **"Attribution Share Alike (by-sa)**
> "This license lets others remix, tweak, and build upon your work even for commercial reasons, as long as they credit you and license their new creations under the identical terms. This license is often compared to open source software licenses. All new works based on yours will carry the same license, so any derivatives will also allow commercial use."
>
> **"Attribution (by)**
> "This license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered, in terms of what others can do with your works licensed under Attribution."

The site also offers three kinds of "sampling licenses" and a "music sharing license."

and create digital public performances of it (e.g., webcasting).[20] All the licenses are nonexclusive, apply worldwide, last for the duration of the work's copyright, and are non-revocable.[21] All require that attribution of the original copyright owner be provided when the work is used, but the copyright owner may require users to remove his name from derivative and collective works.[22]

The licenses differ in imposing restrictions on creation of derivative works from the licensed work, and whether the work can be used for commercial purposes.[23] For example, the "Attribution Non-commercial No Derivatives" license permits only noncommercial use of the original work with attribution and does not allow derivative works to be created from it.[24] The "Attribution No Derivatives" license likewise bars creation of derivative works, but allows the original work to be used for commercial purposes (with attribution). Two "share alike" licenses permit derivative works to be created, but require that they be made available to the public under the same "share alike" license. One of these licenses allows commercial use of the work, the other does not.[25] The most permissive license is the attribution attribution-only license permitting any use of the work so long as attribution of the original copyright owner is provided.[26]

Creative commons licensed material placed on the Internet is supposed contain a Creative Commons logo consisting of two "C"s within a circle.[27] Clicking on the logo or a plain text hyperlink sends the user to a page on the Creative Commons Web site that contains a "Creative Commons deed"—an easy to read brief description of the license. The deed in turn contains a hyperlink that sends the user to a copy of the complete version of the license, referred to as "legal code."[28]

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[20] "Baseline rights and restrictions in all licenses," http://creativecommons.org/about/licenses/fullrights (last visited April 7, 2007).

[21] *Id.*

[22] *Id.*

[23] See N. 19 *supra*.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] See "How to Tag Works," http://creativecommons.org/technology/web (last visited April 7, 2007).

[28] See "License Your Work," http://creativecommons.org/license/ (last visited April 7, 2007).