The Application of Federal Laws in . . .

American Samoa
Guam
The Northern Mariana Islands
The U.S. Virgin Islands

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Department of the Interior
Bruce Babbitt, Secretary

Office of the Solicitor
Ruth G. Van Cleve
Washington, D.C.

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C-2

Title 17 - COPYRIGHTS

** Contains recommendations for changes in the law.

Memorandum Number	Subject	17 U.S.C. sections
17-1	** Copyrights	101-914

Memorandum No. 17-1
October 1985
March 1986

Subject: Title 17 of the United States Code
Copyrights[1/]

Purpose: To afford protection to the author of literary works, musical works, and other "original works of authorship fixed in any tangible medium of expression" (17 U.S.C. 102).

Territorial Application: The Federal copyright laws apply fully in the Virgin Islands, Guam, and the Northern Marianas. They do not apply within American Samoa or the Trust Territory, but American Samoans can obtain copyright protection elsewhere in the United States, and Micronesians who are U.S. domiciliaries can also do so. The law pertaining to the transmission by cable television to the public of a videotape obtained as a result of a transmission by a television broadcast station contains a lenient provision that applies to Guam, the Northern Marianas, and the Trust Territory, and arguably to the Virgin Islands and Samoa as well.

Recommendation: The application of the Federal copyright laws to the Virgin Islands, Guam, and the Northern Marianas ought not to be disturbed. There does not appear to be any immediate, pressing need to include American Samoa among the areas in which they apply, but when it is convenient to do so, the law ought to be modified to recognize Samoa. Given the Trust Territory's changing status, it requires no further attention now in the copyright laws. The particular provision concerning transmission by cable systems in offshore areas (17 U.S.C. 111(e) and (f)) is doubtless of value to them, but it

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[1/] Given the content of this Title, it does not seem necessary to analyze it by chapter. The headings of the nine chapters, and their section numbers, are the following: 1., Subject Matter and Scope of Copyright, secs. 101-118; 2., Copyright Ownership and Transfer, secs. 201-205; 3., Duration of Copyright, secs. 301-305; 4., Copyright Notice, Deposit, and Registration, secs. 401-412; 5., Copyright Infringement and Remedies, sec. 501-510; 6., Manufacturing Requirements and Importation, secs. 601-603; 7., Copyright Office, secs. 701-710; 8., Copyright Royalty Tribunal, secs. 801-810; and 9., Protection of Semiconductor Chip Products, secs. 901-914.

appears to contain an inconsistency that ought to be corrected.

Discussion: The copyright laws in general. The United States Constitution, in Article I, Section 8, Clause 8, grants to the Congress the 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.

From 1790 forward, the Congress has carried out this power by enacting copyright laws--which, together with the patent laws and trademark laws (considered in Memoranda No. 35-1 and 15-5(j)) and various other laws, constitute what are sometimes called the Intellectual Property Laws. The copyright laws were most recently revised in a major way in 1976, in the Copyrights Act of that year, to become effective for the most part on January 1, 1978. They are codified as positive law in Title 17.

The copyright laws provide protection to "original works of authorship fixed in any tangible medium of expression . . ."; from which they can be perceived, reproduced, or otherwise communicated . . . "; and such works of authorship include

(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; and
(7) sound recordings. (17 U.S.C. 102 (a))

Provision is made for, among other things, the ownership of the copyright and how it may be transferred (17 U.S.C. 201); the notice of copyright and how it may be registered (17 U.S.C. 401, 408); and the duration of the protected term, now

in general the author's life plus fifty years (17 U.S.C. 302(a)). None of the general provisions of the copyright laws make special provision for the offshore areas (except for the cable television section, discussed below), and none is known to create any peculiar problems for them.

Territorial application.

The copyright laws extend to an author who is "a national or domiciliary of the United States" (17 U.S.C. 104(b)(1)), and to works first published "in the United States" (17 U.S.C. 104(b)(2)). When the term "United States" is used in these provisions, as in other sections of Title 17, it is usually used in a geographical sense, and when so used it is defined to comprise

> the organized territories under the jurisdiction of the United States Government. (17 U.S.C. 101)

That definition is unusual in Federal law, but not difficult to apply.[2/] An "organized territory" is one for which the Congress has provided an organic act (United States v. Standard Oil Co., 404 U.S. 558, 559 n. 2 (1972)), and both the Virgin Islands and Guam are the subjects of such acts (48 U.S.C. 1541, et seq., 1421, et seq., respectively). American Samoa is not. Nor is the Trust Territory, which is not in any event a "territory" of the United States as a matter of law.

[2/] Title 17 as it appears in the United States Code is replete with historical and revision notes of great length, following almost all sections of the Title and derived from the Report of the House Judiciary Committee (H. Rept. 94-1476, 94th Cong. (1976)) that gave rise to the Copyrights Act of 1976. Regrettably, as to the definitions section (17 U.S.C. 101), the note states that the "significant definitions in this section will be mentioned or summarized in connection with the provisions to which they are most relevant". A careful search reveals no occasion in which any note elaborates upon or even refers to the definition of "United States" or "State".

Whether the Northern Marianas will, upon trusteeship termination, when the Commonwealth of the Northern Mariana Islands ascends to a de jure existence, then have the status of an "organized territory" is, perhaps mercifully, a question that need not here be considered. That is so because the copyright laws unarguably have been extended to it by operation of law, under section 502(a)(2) of the Northern Marianas Covenant. That section makes applicable to the Northern Marianas, effective January 9, 1978, such laws of the United States in effect on that date as are "applicable to Guam and which are of general application to the several States . . .". Title 17 is such a law.

Title 17 contains one other definition of interest, that of the term "State", which "includes . . . any territories to which this title is made applicable by an Act of Congress" (17 U.S.C. 101). That definition leads to the same result: the Virgin Islands, Guam, and the Northern Marianas are included; Samoa and the Trust Territory are not. This follows from either the "Act of Congress" represented by the definition of "United States", discussed above, and appearing in the same section of Title 17, or from an examination of other laws: the 1936 Organic Act of the Virgin Islands made the copyright laws applicable to the Virgin Islands (48 U.S.C. 1405q) and the 1954 Organic Act perpetuated that application (48 U.S.C. 1574(c)); the copyright laws were expressly extended to Guam by section 24 of the 1956 Guam Omnibus Act (70 Stat. 908, 911, 48 U.S.C. 48 U.S.C. 1421n).[3/] Extension to the Northern Marianas follows by operation of section

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[3/] The Commission on the Application of Federal Laws to Guam concluded, in its 1951 report, that the copyright laws "probably" applied to Guam, but recommended legislation to clarify the matter in light of the explicit extension of the copyright laws to the Virgin Islands (H. Doc. 212, 82 Cong., p. 6, para. 23). The 1956 Act implemented portions of the Commission's recommendations, and in its legislative history discusses the copyright question (1956 U.S. Code Cong. and Admin. News 4062, 4071-72). The copyright laws that the Guam Commission examined in 1951 did not contain the definitions of "United States" and "State", discussed above, that are contained in the present law. At that time, therefore, the question of applicability to Guam could not be answered with the confidence that is possible today.

502(a)(2) of the Covenant. But there are no comparable of Federal laws extending the copyright laws to Samoa or the Trust Territory.

The purpose of the 1976 copyright law was to preempt the subject matter for Federal action, and to abolish the earlier dual Federal-State system of copyright regulation that had proved complex and confusing. The legislative history states that

> One of the fundamental purposes behind the copyright clause of the Constitution, as shown by Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. (1976 U.S. Code Cong. and Admin. News 5745)

And further:

> The intention [of the 1976 law] . . . is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright . . . (1976 U.S. Code Cong. and Admin. News 5746).

In light of the foregoing, the Congress has preempted the subject matter of copyrights with respect to the Virgin Islands, Guam, and the Northern Marianas. It has not done so in the case of Samoa or the Trust Territory. But because a copyright may be obtained by a person who is not a citizen of the U.S., but who is instead either "a national or domiciliary of the United States" (17 U.S.C. 104(b)(1)), United States copyright protection is available to Samoans in general and to

Trust Territory citizens who are also U.S. domiciliaries.[4/] That protection, however, would not extend to the Samoan or Micronesian author "at home" in Samoa or the Trust Territory, because the Federal law does not extend to either Samoa or the Trust Territory.[5/]

Beyond that, both Samoa and the Trust Territory could if they chose enact their own copyright laws. The field has not been preempted as to them. Neither has done so, and it is likely that no need has arisen in either area that has required giving attention to this subject. Should a need arise in the case of Samoa, or should a convenient legislative vehicle for the purpose appear, Federal legislation to extend the copyright laws to Samoa should be considered. The familiar problem arising from the lack of a Federal district court in Samoa, or of one having jurisdiction in Samoa, would need to be dealt with, because copyright infringement jurisdiction reposes only in the Federal courts (17 U.S.C. 502, 508).

[4/] Samoans are, for the most part, nationals but not citizens of the United States. When the term "United States" is used in connection with nationality status, as in 17 U.S.C. 104(b)(1)--in referring to a "national . . . of the United States"--the term is thus used in a political instead of a geographic sense. In the context of nationality status, the term "United States" in a geographical sense would be without meaning. Micronesians in the Trust Territory are almost entirely aliens under U.S. law.

[5/] The copyright laws do not have "extraterritorial" application, a term often used in judicial decisions concerning copyrights, and meaning application beyond the areas defined as within the United States by 17 U.S.C. 101. As an example, in Robert Stigwood Group Ltd. v. O'Reilly, 530 F.2d 1096 (1976), the Court of Appeals for the Second Circuit was concerned with unauthorized performances of "Jesus Christ Superstar" in both the United States and Canada. It allowed the copyright holder to collect damages for copyright infringement for the U.S. performances, but not for those in Canada. The court observed that the copyright laws have no extraterritorial application, and while the Canadian performances may have been torts in Canada, they were not torts in the U.S. (at p. 1101).

As to the Trust Territory, it is likely that the trusteeship will be terminated well before copyright laws constitute a matter of moment there. The subject will then be the responsibility of the new Freely Associated States.

Cable television transmission.

The current copyright law deals with the issue of copyright infringement by cable television systems. Typically, cable television systems pick up broadcasts of programs originated by others (known as "primary transmissions") and retransmit such programs to their paying subscribers (known as "secondary transmissions"). The law provides in general for the payment of copyright royalties by the cable company to the primary transmitter when the cable company engages in the secondary transmission (17 U.S.C. 111). In addition, the law generally does not permit--except in one instance applicable to offshore areas--a cable system to tape or otherwise record a program off-the-air and then to retransmit the program later to its subscribers (17 U.S.C. 111(e)). Differently stated, in most circumstances cable systems must retransmit simultaneously with their receipt of the primary transmission. To do otherwise constitutes an act of copyright infringement, to which both civil and criminal penalties may attach.

As to the exception for offshore areas, the note following 17 U.S.C. 111 refers first to the general bar to nonsimultaneous transmission by a cable company of a primary transmission that it has recorded, and then states:

> The one exception involves cable systems located outside the continental United States, but not including cable systems in Puerto Rico, or, with limited exceptions, Hawaii. These systems [outside the continental United States] are permitted to record and retransmit programs under the compulsory license [from the Federal Communications Commission], subject to the restrictive conditions of subsection (e), because off-the-air signals

> are generally not available in the offshore areas.

A problem of internal inconsistency in 17 U.S.C. 111 arises, however, from the different language appearing in subsections (e) and (f). At 17 U.S.C. 111(e), nonsimultaneous transmissions by a cable company are actionable as acts of infringement unless they occur in Alaska or in parts of Hawaii or

> in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands . . . (17 U.S.C. 111(e)(2).

But at 17 U.S.C. 111(f), a "cable system" is defined as one "in any State, Territory, Trust Territory, or Possession" that receives signals from a television broadcast station and makes secondary transmissions to its subscribers; and a "secondary transmission" is one transmitted simultaneously with the primary transmission, except that it may be nonsimultaneous if the cable system is

> not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico.

The 17 U.S.C. 111(f) language in both instances is obviously broader than that of 17 U.S.C. 111(e), because it comprehends the Virgin Islands and American Samoa, while section 111(e) does not. The anomalous result is that a nonsimultaneous secondary transmission by a cable system in the Virgin Islands or American Samoa could be actionable under 17 U.S.C. 111(e)(2) as an act of copyright infringement, even though the definition at 17 U.S.C. 111(f) is designed to foreclose that result. The Copyright Office advises that these conflicting provisions had different origins, with one being devised on the House side, the other in the Senate; and that Office is also of the view that Samoa and the Virgin Islands are treated differently under the two subsections--whether intentionally or not cannot be proved, either way.

Should the issue arise, one can hope that a decisionmaker might conclude that the Virgin Islands and Samoa are among the beneficiaries of the exception contained in section 111(e)(2), even though they are not named therein, inasmuch as the official note (quoted above) describes the broader impact of 111(f), which clearly includes them. But the matter should be resolved and the inconsistency removed by corrective legislation.

Conclusion: The copyright laws should, when a practical need arises or when a convenient legislative vehicle is at hand, be extended to American Samoa. In addition, an inconsistency in the treatment of the offshore areas in 17 U.S.C. section 111, pertaining to cable television companies, ought to be corrected.

Federal agency comments: Comments were invited from the Department of Justice and the Copyright Office. All commented received have been reflected above.