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Copyrights

What is a copyright?

- Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression such as paper, canvas, film, or digital format. Copyright covers both published and unpublished works.

What is a copyright? (cont.)

- Copyright protects **original** works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, photographs, paintings and architecture.
- Artistic, literary, or intellectually created works
- Rights are divisible and assignable
 - Can license any individual right exclusively or not
 - Can assign portions of rights to third parties
 - Assignment of copyright right must be in writing
- Transfer of ownership of the underlying work (e.g., a book) does not transfer ownership of any of the exclusive copyright rights (e.g., right to reproduce the book or distribute the book).

What is a copyright? (cont.)

- Publication is not necessary for copyright protection.
 - “Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.
 - The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.
 - A public performance or display of a work does not of itself constitute publication.

What is a copyright? (cont.)

- Registration is not required for protection and copyright owner may use the © notice even without registration.



Why should I register my work if copyright protection is automatic?

Registration is not required to protect your work. However, registering will confer benefits:

- proof of authorship of the registered work
 - Evidence your copyright is valid.
- the ability to sue a copyright infringement in federal court
 - You must file an application for registration before you can sue someone for infringing your copyright, even if the infringement has already occurred.
- the ease in obtaining an injunction quickly
- the right to statutory damages and to seek attorney's fees
 - To be eligible for an award of statutory damages and attorneys' fees in a copyright infringement case, the copyrighted work must be registered before infringement commences, or, if the work is published, within 3 months of publication.

Why should I register my work if copyright protection is automatic? (con't)

- Providing public notice of ownership rights and creating a presumption of ownership in court (Certificate of Registration)
 - Filing your registration before or within 5 years of publishing your work will help you if you need to bring a copyright infringement lawsuit in court.
 - Your registration will satisfy a basic level of proof for the court of the validity of your copyright.
 - This does not mean that your claim of copyright ownership is guaranteed.
 - However, instead of having to prove that you are the actual copyright owner or that your work is protected by copyright, the other party will have to prove that you are not or that your work is not.
 - This means you are in a much stronger position in court if the presumption of copyright ownership is on your side.
- Registration is simple, inexpensive and requires submission of a form and of a copy of the work.

Why should I register my work if copyright protection is automatic? (con't)

- Copyright holders have the exclusive right to:
 - Reproduce the work
 - Prepare derivative works based upon the work
 - Distribute (sell, lease, rent, license, etc.) copies of the work to the public
 - Perform the work publicly
 - Display the work publicly
 - Prevents/enforces other people from copying or exploiting the creation without the copyright holder's permission

Samples of types of copyrighted works

- Operating manuals
- Website contents
- Books
- Music, lyrics, and musical performances
- Computer code
- Marketing brochures or bulletins
- Photographs
- Videos

What is Not Covered by Copyright?

- Unfixed works
- Domain Names (The Internet Corporation for Assigned Names and Numbers (ICANN))
- Titles, names, slogans, or short phrases (But could be protected as trademarks)
- Ideas, concepts, methods, procedures, systems, processes, methods of operation
 - You may express your ideas in writing or drawings and claim copyright in your description, but a copyright will not protect the idea itself as revealed in your written or artistic work.
- Facts
 - Statistics, sales numbers, dates

Example

- A mere listing of ingredients is not protected under copyright law.
- However, where a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions, or when there is a collection of recipes as in a cookbook, there may be a basis for copyright protection.
 - Note that if you have secret ingredients to a recipe that you do not wish to be revealed, you should not submit your recipe for registration, because applications and deposit copies are public records.

Difference from Patents? Trademarks?

- Copyright protects original works of authorship.
- A Patent protects inventions or discoveries.
 - Ideas and discoveries are not protected by the copyright law, although the way in which they are expressed may be.
 - Examples: Chemical compositions like pharmaceutical drugs or mechanical process like machine designs.
- A Trademark protects words, phrases, symbols, or designs identifying the source of the goods or services of one party and distinguishing them from those of others.
 - Protects the business reputation and goodwill associated with the word, phrase, symbol, and/or design.

Difference from Patents? Trademarks?

- Trademark: Coca-Cola for soft drinks
- Patent: A new type of hybrid engine
- Copyright: Song lyrics



Who owns a copyright?

- Your work is under copyright protection the **moment** it is created and fixed in a tangible form that it is perceptible either directly or with the aid of a machine or device.
- Copyright is generally owned by the creator of the work in the first instance.
- However, copyright ownership depends on a number of different things such as the type of work created or how the work was created, for example by an employee as part of their job.

How do you know who owns a copyright?

- Check to see if there is a notice of copyright in the work, which may appear on the copy itself or on packaging containing the copy.
- If you have a photocopy or other reproduction that does not contain a notice of copyright or any other information that indicates ownership, you may try to locate an original copy of the work. The absence of a copyright notice does not mean that the work in question may be freely copied.
- Always contact the copyright notice if you are unsure.

Who owns a copyright? (con't)

- In addition, your copy may not identify the current copyright owner.
- As a first step you can consult the publisher of the work who may be able to refer you to the current owner.
- For unpublished works, permission to copy can usually be obtained directly from the creator of the work.
- The U.S. Copyright Office maintains records of registered works by author and title.

Who owns a copyright? (con't)

- Materials can have multiple copyright owners. They will all have equal rights in the material, unless there is an agreement in place.
- There may be more than one copyright owner in certain types of works where there are layers of copyright. For example in films, copyright in the soundtrack, screenplay and the film itself may be owned separately.
- If the creator or copyright owner dies, copyright passes to the estate or a nominee.

Who owns a copyright? (con't)

- Where the copyright owner or creator cannot be identified, the work becomes an orphaned work.
- Orphaned works can still be used as permitted under copyright, but you need to seek permission from the Copyright Office.

Who owns a copyright? (con't)

- Copyright ownership is separate from owning the physical object/work.
- Just because you physically own an item does not mean that you will own the copyright in the item.
- An author or creator may sell you their work, but they will retain ownership of copyright. (Photography)
- Unless you made an agreement with the author/creator to transfer copyright, you will *not* own copyright.

Who owns a copyright? (con't)

- The creator will still have the right to reproduce, publish or communicate the work (as well as grant those rights to other people) that you own.
- If you do not own copyright in the work, you will not be allowed to use it without permission from the author or creator.

When does a copyright exist?

- The moment it is created and fixed in a tangible form that it is perceptible either directly or with the aid of a machine or device. Automatically created once material is fixed in a tangible medium.
- For works created after January 1, 1978, copyright protection lasts for the life of the author plus an additional 70 years.
- For an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first.

When does a copyright exist? (con't)

- Apply for registration from U.S. Copyright Office
 - Can only be enforced in Federal Court in U.S., and only if registered.
- Works created on or after January 1, 1978, are not subject to renewal registration.

Works made for hire

- To register a work with the U.S. Copyright Office, you generally must identify the author or authors of that work. In addition, you must identify the party that owns the copyright in the work. Ordinarily, the author is the person or persons who actually created the work you intend to register.
- “Works made for hire” are an exception to this rule. When a work is a “work made for hire,” the author is not the individual who actually created the work. Instead, the party that hired the individual is considered both the author and the copyright owner of the work.

Works made for hire (con't)

A copyrightable work is “made for hire” in two situations:

- When it is created by an employee as part of the employee’s regular duties.
- When a certain type of work is created as a result of an express written agreement between the creator and a party specially ordering or commissioning it.

When a work is a made for hire, the hiring or commissioning party is considered the author and the copyright owner.

Work made for hire (cont.)

- Not a regular employee (such as an independent contractor):
- Employer or company will own work as “work made for hire” only if three conditions are met:
 1. Company specifically ordered or commissioned the work.
 2. Written contract stating that work is a “work made for hire”.
 3. Work was commissioned for use as one of a finite number of works (Note: software or computer code is not explicitly identified as one of the works).



Work made for hire (cont.)

***Berg v. CI Investments, Inc.*, No. 15 C 11534, 2017 WL 1304082 (N.D. Ill. Apr. 7, 2017)**

- To determine whether a work was made within the scope of employment, a court must consider the hiring party's right to control the manner and means by which the product is accomplished
- Relevant facts include the skill required to create the work; the source of the instrumentalities and tools; the location of the work; whether the hiring party has the right to assign additional projects to the hired party; the hired party's discretion over when and for how long to work; the method of payment; whether the work is part of the regular business of the hiring party; the provision of employee benefits; and the tax treatment of the hired party.

What is a release?

- A legal document drafted and signed by the owner of a copyright.
- It gives the title of the protected work, the name of the author, and specifies who can do what with the work.
- For example, many photographers keep the copyrights to their pictures but provide clients with a copyright release giving them permission to make copies.
 - Limits can be placed on the release, such as allowing a work to be published only in North America or allowing a performance of the work only during a certain time frame.

What is a release? (con't)

- Any time you want to reproduce, distribute, display or perform a work protected by copyright, you will need a copyright release.
- For example, many people encounter the need for a copyright release when trying to print photographs through a photo processing store.

What is license?

- A copyright license gives a person or entity (“licensee”) the authorization to use a work from the copyright owner, usually in exchange for payment.
- Copyright licenses may be exclusive or nonexclusive, and the rights that come with them vary according to the specifics of each license.

What is license? (con't)

- One of the most common copyright license situations is when an author licenses their publisher to publish, distribute, and sell their work.
- In return, the author receives compensation and/or royalties.
- If you want to use someone else's copyrighted work, you should see obtain a copyright license agreement from the owner.
- If you are looking to license your work, register your copyright first so your rights to the work are clear.

Basics of Fair Use

- Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.
- Courts evaluate fair use claims on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry.
- This means that there is no formula.

Basics of Fair Use (con't)

- Section 107 of the Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use.

Basics of Fair Use (con't)

Section 107 calls for consideration of the following four factors in evaluating a question of fair use:

1. Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes
2. Nature of the copyright work
3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. Effect of the use upon the potential market for or value of the copyrighted work

Basics of Fair Use (con't)

Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes

- Courts look at how the party claiming fair use is using the copyrighted work, and are more likely to find that nonprofit educational and noncommercial uses are fair.
- This does not mean, however, that all nonprofit education and noncommercial uses are fair and all commercial uses are not fair.
- Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work. Considered more to be fair.

Basics of Fair Use (con't)

Nature of the copyright work

- Using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item).

Basics of Fair Use (con't)

Amount and substantiality of the portion used in relation to the copyrighted work as a whole

- Courts look at both the quantity and quality of the copyrighted material that was used.
- If the use includes a large portion of the copyrighted work, fair use is less likely to be found; if the use employs only a small amount of copyrighted material, fair use is more likely.
- Some courts have found use of an entire work to be fair under certain circumstances, and using even a small amount has been determined not to be fair because the selection was the “heart” of the work.

Basics of Fair Use (con't)

Effect of the use upon the potential market for or value of the copyrighted work

- Courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner's original work.
- In assessing this factor, courts consider whether the use is hurting the current market for the original work and/or whether the use could cause substantial harm if it were to become widespread.

Basics of Fair Use (con't)

Penguin Random House LLC et al. v. Frederick Colting d/b/a Moppet Books et., No. 17-cv-386 (S.D.N.Y. September 7, 2017)

Defendants published "a series of illustrated children's books" or "guides" with condensed, simplified versions of the novels

- *Breakfast at Tiffany's* by Truman Capote,
- *The Old Man and the Sea* by Ernest Hemingway
- *On the Road* by Jack Kerouac
- *2001: A Space Odyssey* by Arthur C. Clarke

Basics of Fair Use (con't)

Defendants argued that the guides were fair use because:

- They abridged the novels by substantially shortening them.
- They modified the novels for a younger audience by removing adult themes.
- They added a page or two of analysis, two pages of quiz questions, and a few pages of background information to the novels.



Basics of Fair Use (con't)

The Court held that the books were not fair use because the guides were commercial and not transformative

- “Fair use, however, is not a jacket to be worn over an otherwise infringing outfit. One cannot add a bit of commentary to convert an unauthorized derivative work into a protectable publication”.
- The novels were fiction. The application of the fair use defense must be narrower for fictional and fantasy works than in the case of factual works.

Basics of Fair Use (con't)

- In cases of parody, journalism, and criticism, fair use doctrine allows for more of a copyrighted work to be copied than where the purpose is less transformative”.
- But here nearly all of each guide was devoted to telling the copyrighted story, with only two pages purporting to analyze it.
- Analysis considered the effect of the guides upon:
 - the market for the original copyrighted novels, and the market for potential derivative works.
 - Did not matter that plaintiff never considered doing a children’s version of the novels. There is a market for them and the plaintiff could change its mind.

Remedies

- **Federal Court**

- If the copyright holder wishes to seek monetary damages and profits, attorneys' fees, and/or an injunction, the copyright holder In federal court, a copyright infringer may be subject to both civil remedies and criminal sanctions.
- If the copyright owner wishes to seek monetary damages and profits, attorneys' fees, and/or an injunction, the copyright owner can initiate a lawsuit in federal court against the alleged infringer for civil copyright infringement.
- If an infringement is willful and “for purposes of commercial advantage or private financial gain,” or the infringement involves the willful reproduction or distribution of multiple copies with a value of more than \$1,000 during a 180-day period, then the federal government may choose to bring a criminal copyright infringement case against the infringer.

Remedies (con't)

- **Injunctions**

- In federal court, a copyright owner may seek a preliminary or permanent injunction to prevent or restrain future or ongoing civil copyright infringement.
- Courts generally grant permanent injunctions where liability is established and there is a threat of continuing infringement.

- **Impoundment and Destruction**

- Federal courts may order the impounding of infringing goods at any time an action is pending.

Remedies (con't)

- **Damages**

- At any time before final judgment is rendered, a copyright owner may elect to recover actual damages and profits of the infringer or statutory damages (i.e., damages determined by the statute, here the Copyright Act).
- Actual damages may be awarded in the amount of the copyright owner's losses plus any profits of the infringer attributable to the civil copyright infringement.
- Statutory damages in federal court may be awarded in an amount between \$200 and \$150,000 per work infringed, with the former available only for "innocent infringers" and the latter available in cases of willful infringement.

- **Court Costs and Attorneys' Fees**

- Federal courts have discretion to allow the recovery of full court costs by or against any party, including the awarding of reasonable attorneys' fees to the prevailing party under certain circumstances.
- However, plaintiff copyright owners cannot be awarded attorneys' fees unless they have timely registered their works with the U.S. Copyright Office.

- **Criminal Penalties**

- If an infringement is willful and “for purposes of commercial advantage or private financial gain,” or the infringement involves the willing reproduction or distribution of multiple copies with a value of more than \$1,000 during a 180-day period, then the alleged infringer may be indicted by a federal grand jury and tried for criminal copyright infringement.
- If found guilty, the infringer may be imprisoned for up to five years and fined up to \$250,000.

Copyright Claims Board (CCB)

In 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020, which established the Copyright Claims Board (CCB) within the U.S. Copyright Office.

The Copyright Claims Board (CCB) is a voluntary alternative to federal court for resolving all types of creators and users of copyrighted materials. Criminal penalties are not available at the CCB, and only a limited set of civil remedies for copyright infringement may be awarded.

Damages

- The CCB can award monetary damages to the prevailing party. However, the total monetary damages awarded by the CCB cannot exceed \$30,000 in one case.
- Actual damages may be awarded in the amount of the copyright owner's losses plus any profits of the infringer attributable to the infringement (but total damages awarded in any one case may not exceed \$30,000).

Remedies (con't)

- Statutory damages at the CCB may be awarded in an amount between \$200 and \$15,000 per work infringed, with the former available only for “innocent infringers.”
- Unlike in federal court—where a work generally must be registered before the infringement in order to allow for an award of statutory damages—at the CCB a *limited* amount of statutory damages are available to copyright owners even if the work is not “timely” registered with the Copyright Office (up to \$7,500 per copyrighted work infringed and a total of \$15,000 for all works infringed that were not “timely registered”).

Remedies (con't)

- **Injunctions**

The CCB cannot issue injunctions. However, if the parties reach an agreement where one party agrees to cease a particular conduct, the CCB can include a requirement in its determination that the party abide by the agreement to cease the conduct.

- **Court Costs and Attorneys' Fees**

As a general rule, at the CCB, parties must pay their own attorneys' fees and court costs. However, there are exceptions to this rule when a claim is dismissed for failure to prosecute (i.e., the party that initiated the case stops participating), or where the CCB has determined that a party has pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact.

The Digital Millennium Copyright Act (DMCA)

- In 1998, Congress passed the DMCA, which amended U.S. copyright law to address important parts of the relationship between copyright and the internet.
 - (1) establishing protections for online service providers in certain situations if their users engage in copyright infringement, including by creating the notice-and-takedown system, which allows copyright owners to inform online service providers about infringing material so it can be taken down;
 - (2) encouraging copyright owners to give greater access to their works in digital formats by providing them with legal protections against unauthorized access to their works
 - (3) making it unlawful to provide false copyright management information (for example, names of authors and copyright owners, titles of works) or to remove or alter that type of information in certain circumstances.

Section 512

Safe Harbors and the Notice-and-Takedown System

- Congress recognized the legal uncertainty facing the internet industry resulting from online service providers' potential legal liability for copyright infringement that occurred on their services.
- To address this issue, Congress enacted section 512 of the Copyright Act, which (1) enabled copyright owners to have infringing online content removed without the need for litigation, and (2) facilitated the development of the internet industry by providing legal certainty for participating online service providers.

Section 512 (con't)

- Section 512 shields online service providers from monetary liability and limits other forms of liability for copyright infringement—referred to as safe harbors—in exchange for cooperating with copyright owners to expeditiously remove infringing content if the online service providers meet certain conditions.
- Section 512 has several different requirements based on the types of activities in which the service provider engages. It also requires online service providers to designate an agent to receive copyright owners' notices

Section 1201

Section 1201 prohibits two types of activities:

- Prohibits circumventing technological protection measures (or TPMs) used by copyright owners to control access to their works. For example, the statute makes it unlawful to bypass a password system used to prevent unauthorized access to a streaming service.
- Prohibits manufacturing, importing, offering to the public, providing, or otherwise trafficking in certain circumvention technologies, products, services, devices, or components.

Section 1201 (con't)

- Section 1201 establishes a rulemaking process to allow for consideration of temporary exemptions to the prohibition on circumvention.
- In this process, the Librarian of Congress, following a public proceeding conducted by the Register of Copyrights in consultation with the National Telecommunications and Information Administration of the Department of Commerce, may adopt exemptions permitting circumvention for certain noninfringing uses of copyrighted works.

Section 1202

- Section 1202 makes it unlawful to provide or distribute false copyright management information (CMI) with the intent to induce or conceal infringement.
- CMI is certain information, including the title, name of the author and copyright owner, and terms for use of the work, conveyed in connection with copies, phonorecords, performances, or displays of a work.
- Section 1202 does not apply to authorized investigative, protective, information security, or intelligence activities of certain law enforcement, intelligence, or government agencies, and it provides exemptions to these prohibitions for certain analog and digital transmissions by broadcast stations or cable systems.

David Bowie and Queen vs. Vanilla Ice

- When Vanilla Ice released his song “Ice Ice Baby”, the bass line was incredibly similar to that of David Bowie and Queen’s song entitled “Under Pressure.” The case was settled out of court.
- Songs may be protected in two ways, which include coverage for the composition and for the sound recording of the composition. If someone wants to legally use any part of a song that is protected by copyright, then it may be necessary to obtain two licenses from the copyright owner.
- A sync license may be granted for the composition while a master-use license is needed for the sound recording. It may be necessary to obtain the permission of the songwriter, the performer, the record label and the producer.
- Paying Bowie and Queen for a license would have been far less expensive than paying the out of court settlement.

Star Wars vs. Battlestar Galactica

- Following Star Wars' success in 1978, the first episode of Battlestar Galactica aired on television.
- Battlestar Galactica made an impression on executives at Twentieth Century-Fox, the studio responsible for Star Wars.
- Fox sued Universal Pictures because of Battlestar Galactica, claiming that the series was clear copyright infringement on Star Wars. Fox listed more than 30 similarities that they alleged were infringing. The case dragged out for half a decade only to eventually settled.
- Why did the two sides settle without going to trial?
 - It likely is because Fox would have had a difficult time proving that Battlestar Galactica was truly infringing rather than just being a copycat.
 - Star Wars would have had to prove that the elements at the heart of the case were original to Fox, that all of those elements qualified for copyright protection and that the TV series copied those elements.