



IP INNOVATIONS CLASS

Copyright Questions & Answers Under U.S. Law

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I. BASICS AND FORMALITIES



Q. What is a copyright?

- A copyright is a type of protection provided by U.S. Copyright law to creators of a variety of original works from books, music and art, to computer software and designs that appear on fabric. Protection also is available for vessel (boat) hulls. Section 106 of the U.S. Copyright Act gives the copyright owner the exclusive right to reproduce the work in copies; to prepare “derivative works” based on it (for example, a motion picture version of a book); to distribute copies; to perform the copyrighted work publicly (for example, a song at a concert); and to display the copyrighted work publicly (for example, a picture on a website).



Q. How do I obtain copyright in a work?

- Copyright commences, in the case of original works created after January 1, 1978, at the time the work is fixed in a “tangible medium” of expression; copyright vests in such an author immediately upon creation, and without the need to place a copyright notice on the work or secure a registration.



Q. Should I place a copyright notice on the work?

- Copyrights are forfeited and the work placed in the public domain in the case of U.S. works published (distributed to the public) prior to January 1, 1978, subject to the possibly saving “doctrine of limited publication.” Copyrights in U.S. works published without a copyright notice between January 1, 1978 and March 1, 1989 may still be lost but see 17 U.S.C. 405 (a).
- As for U.S. works distributed without the notice after March 1, 1989, copyrights will no longer be forfeited; however, it is recommended that a copyright notice be included on all copyrightable works whenever possible.



Q. What is the proper form of notice?

- The copyright notice consists of the following three elements:
 1. The symbol © (the letter C in a circle), or the word “Copyright,” or the abbreviation “Copr.” The letter P in a circle rather than C should be used in the case of phonorecords.
 2. The year of first publication of the work; and
 3. The name of the owner of copyright in the work.
- The notice should be affixed permanently to copies of the work in such manner and location as to give reasonable notice of the claim of copyright (for example, on the title page of a book; on screen, media labels and printouts for software).



Q. Should I register my copyright?

- Registration promptly after creation is generally recommended. Registration is necessary in order to maintain an infringement suit for a U.S. work. If made within five years of publication, registration will be prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate. Moreover, if registration is made within three months after publication of the work or prior to an infringement of it, statutory damages and attorneys' fees will be available to the copyright owner; otherwise, only an award of actual damages and profits may be recovered. Finally, registration (along with effort to add the notice) may prevent the forfeiture of copyrights in a work published without a copyright notice between January 1, 1978 and March 1, 1989 under 17 U.S.C. 405 (a).



Q. How do I register a copyright?

- By on-line submission or mailing to the Register of Copyrights, Copyright Office, Library of Congress, Washington, DC 20559 the following:
 1. A properly completed application;
 2. A check in the amount specified; and
 3. A non-returnable deposit of the work being registered.
- The type of deposit required varies, and the applicable application should be consulted. Care should be taken to redact trade secret information from deposit copies, to the extent permitted by the regulations of the Copyright Office, since deposit copies are available for public inspection.



Q. How do I register a copyright? (cont'd)

- The Form CO is the preferred form for registering copyrights for Literary Works, Visual Arts, Performing Arts Works (including motion pictures), Single Serials, and Sound Recordings. The Form CO application may be filled in and submitted on-line or filled in on-line, printed and mailed. If the client needs to sign and date the application as the claimant, then it will be necessary to choose the latter method for submitting the copyright application.



Q. Can I subdivide and license some, but not all, of the group of rights that comprise copyright?

- The group or “bundle” of rights that comprise copyright may be subdivided almost infinitely. For example, the author of a book or script may license the creation of a theatrical but not television motion picture; of a motion picture and television program, but not a television series; of all of the above but with the understanding that the work will be shown only in France, or for a term of only three years. Similarly, the creator of a copyrighted doll may grant the right to reproduce the image of the doll on T-shirts, in children’s stories, or in computer games; an artist may license reproduction on carpet (but not wall coverings) or on fabric used to create bedspreads (but not sheets).



Q. Is copyright recognized outside the United States?

- Virtually every country in the world recognizes copyright, although enforcement varies widely. Generally speaking, an American author will receive protection for and can license the exploitation of his or her work in countries throughout the world. Similarly, authors from other countries will receive protection for their copyright in the United States.
 - *Societe des Auteurs des Arts Visuels et de l'Image Fixe v. Google, Inc.*

Q. How long does a copyright last?

- The answer depends upon when a work was created. Copyright in a U.S. work created on or after January 1, 1978 subsists from its creation and, except as indicated below, endures for the life of the author plus 70 years after the author's death. In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author, plus 70 years. For an anonymous or pseudonymous work, or a work made for hire, the duration of copyright is for a term of 95 years from the year of first publication, or a term of 120 years from the year of creation, whichever expires first. Works created prior to January 1, 1978 generally had a duration of 28 years in their first term, plus 28 additional years if renewed, although there are a variety of qualifications and exceptions. Accordingly, sections 303 through 305 of the Copyright Act should always be consulted in the case of works created prior to January 1, 1978.



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II. OWNERSHIP



Q. Who is the owner of a copyrightable work created by an employee?

- Copyrights in a U.S. work prepared by a bona fide “employee” within the “scope of his or her employment” will automatically belong to the employer in the absence of an agreement in writing to the contrary between the parties. This is commonly referred to as “work made for hire.” To determine whether a person is an “employee,” the courts may examine a number of factors under general agency law, including whether the author performed his or her duties at the employer’s premises and during normal working hours, and whether taxes were withheld and benefits made available.




Q. What about “specially ordered or commissioned works”?

- Certain narrowly and specifically defined works - for example, artwork for a motion picture or television program; pictorial illustrations prepared as a secondary adjunct to a work by another author for the purpose of illustrating the other work - which are specially ordered or commissioned may also constitute “work made for hire,” the copyrights in which will belong to the commissioning party, if the parties expressly so agree in a written instrument signed by them. If a specially ordered or commissioned work does not fall into one of the specific categories enumerated by the Copyright Act, however, a written assignment generally will be required for transferring ownership of copyright from the author (independent contractor) to the commissioning party.



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III. INFRINGEMENT



Q. How close must a work be to a copyrighted work in order to infringe it?

- A work must be “substantially similar” to a copyrighted work in order to infringe it. Obviously, generalizations are not particularly helpful in dealing with such a phrase. While minor or unimportant similarities usually will be insufficient to prove infringement, works need not be identical. Copyright in a work produced through significant creative effort - such as a novel or a motion picture - ordinarily will receive greater protection than a work of minimal creativity, such as a work that borrows heavily from the public domain. Similarly, although “useful” works such as instructions or textbooks may be “creative” as that term ordinarily is understood, courts frequently accord them less protection than more fanciful works. Where only the copyright owner’s idea has been copied, however, there should be no infringement, even though the work is “creative.”

– *PLAY BOYS NIGHT OUT / BOUNCE WIT ME*



Q. Who may be liable for copyright infringement?

- In addition to an individual or corporation principally responsible for infringing activity, corporate officers and other participants may be found liable under the doctrines of “contributory infringement” or “vicarious liability.” As a general proposition, a contributory infringer is one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. Under the doctrine of vicarious liability, a corporate officer may be held individually liable for infringement committed by the corporation if the officer has the right and ability to supervise the infringing activities and a financial interest in them.

– *BMI Cases*



Q. What are the remedies available for copyright infringement?

- A successful copyright owner can recover either actual damages suffered and the non-duplicative profits of the infringer; or provided there has been a timely registration of copyright, statutory damages, the amount of which will be assessed in the discretion of the court and may range from as little as \$750 for all infringements with respect to any one work to as high as \$150,000 in the case of willful infringement. The successful copyright owner also may recover from the other party (or if unsuccessful, may be required to pay to the other party) reasonable attorneys' fees. Finally, a copyright owner may secure an injunction against further infringements and, in certain cases, an order confiscating and directing the destruction of infringing copies and articles used to produce them.

– *Legg Mason Article*



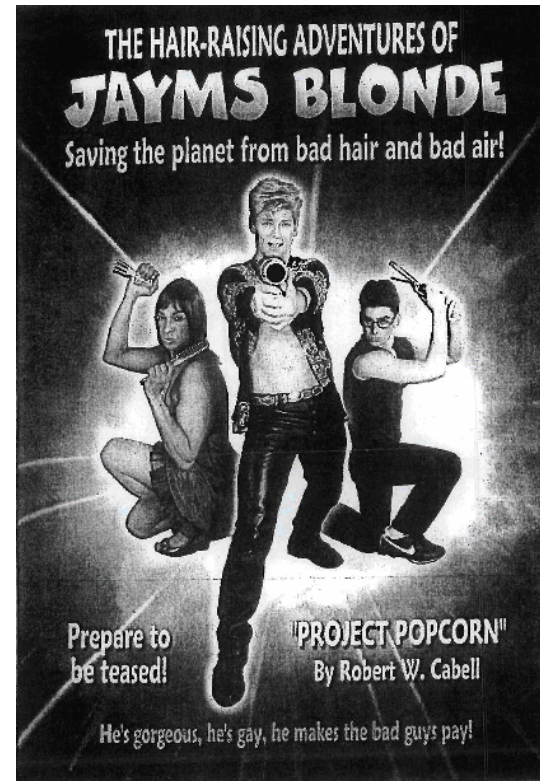
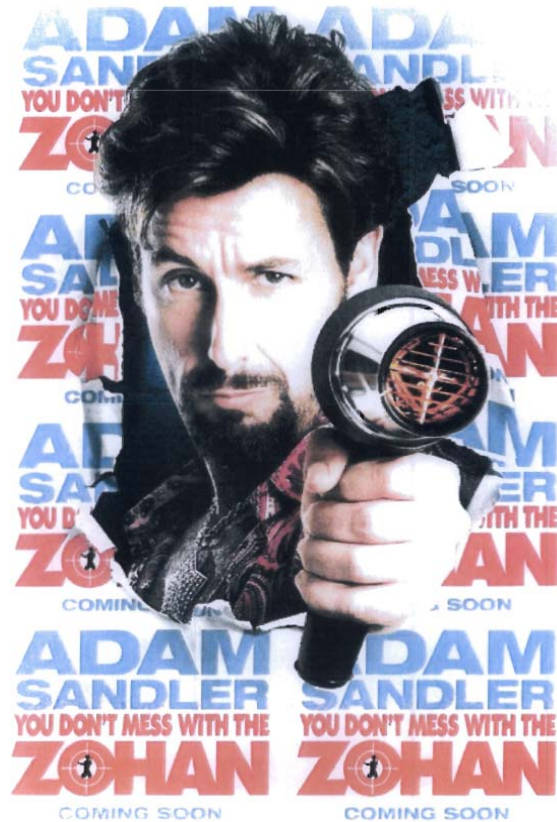
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IV. OTHER INTELLECTUAL PROPERTY RIGHTS

Q. Will copyright protect my idea?

- Copyright protects the expression of an idea as it is embodied in a copyrightable work, but not the idea itself. To take an example - an author of a sales training manual or a motion picture script generally would receive greater protection under copyright law than someone who merely summarized the idea for the manual in a memo or created a “treatment” (synopsis) of the movie concept. This is because the protectable “expression” contained in the summary or synopsis ordinarily would be less than the protectable “expression” found in the training manual or script. Ideas which are novel and confidential may be protectable under “idea submission agreements,” subject to variations among the laws of the states.
 - *Cabell v. Sony Pictures, Columbia Pictures, Adam Sandler, et al.*

Cabell/Jayms Blond and Adam Sandler Images of pointing a hairdryer like a pistol



New Pride 2008 Front Book Cover

Q. What about fair use?

17 USC § 107. Limitations on exclusive rights: Fair use

- Notwithstanding the provisions of **sections 106** and **106A**, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 2. the nature of the copyrighted work;
 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 4. the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.





Q. Fair Use (cont'd)

- *Campbell v. Acuff Rose*
 - PLAY MUSIC
- *SunTrust v. Houghton Mifflin*
- *The Author's Guild v. Google Inc.*



Q. How do copyrights differ from patents and trademarks?

- Copyrights protect original works of authorship. They prevent an unauthorized party from creating, distributing, performing or displaying a “substantially similar” work without permission. Copyrights protect the expression of the idea embodied in the copyrightable work, not the idea itself. Patents, on the other hand, cover novel, unobvious and useful processes, machines, products or composition of matter. Design patents protect novel, unobvious and ornamental (non-functional) designs for articles of manufacture. Trademarks protect words, symbols and designs which are used to distinguish products in commerce. Service marks distinguish services in commerce. As a general rule, copyright is unavailable for words, symbols and slogans. Similarly, designs for useful articles such as wearing apparel and household appliances are not protectable by copyright, although the design of a useful article can be subject to copyright protection to the degree its pictorial, graphic or sculptural features can be identified as existing independently of the totalitarian object.





Q. How do copyrights differ from privacy and publicity rights?

- Copyright is a right conferred upon original works of authorship - for example, upon the creator of an original photograph. The right of privacy, by comparison, enables a person to prevent the use of his or her image - for example, as recorded in the copyrighted photograph. Famous personalities such as sports figures or entertainers may exploit a right of publicity, a species of the right of privacy, through licensing the use of their name and likeness for commercial use - for example, on a T-shirt.

– *Rosa Parks v. Outkast*

Q. What about “moral rights”?

- “Moral rights” is the term traditionally used to identify the droit moral recognized in some countries, particularly in Europe. In the United States, these rights are codified in section 106A of the Copyright Act to include the rights of “attribution” and “integrity.” These rights are available for authors of “a work of visual arts” - basically for paintings, drawings, prints or sculptures existing in single copies or limited editions signed and consecutively numbered by the author. Certain still photographic images also may qualify. Acquirers of a “work of visual art” - for example, of a sculpture or painting for a corporate headquarters - should be aware that limitations may be placed upon their subsequent use of the work, and even if they acquire copyright in the work.
 - Cite Beck/Scott Article
 - *Societe des Auteurs des Arts Visuels et de l'Image Fixe v. Google Inc.*



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Questions?

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