A PLAIN-ENGLISH GUIDE TO COPYRIGHT

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What is Intellectual Property?

Intellectual property consists of rights in things that you cannot touch and fall into several categories, the three major ones being: copyright, trademark and patent. Copyrights protect "works of authorship." We will discuss "works of authorship" in more detail below, but by way of example, a book, a piece of music, a website, and almost any other expression may be copyrighted. A patent, by contrast, protects processes or methods or designs that are useful, novel, and not obvious. Finally, a trademark protects distinct words, symbols, devices, sounds, colors, or even smells that are used in commerce to signify the source of goods and services.

What is a copyright?

A copyright is a form of protection provided by the laws of the United States to the authors of "original works of authorship" in any tangible medium of expression. Protections for creators were built right into the Constitution. Our Founding Fathers granted authors and inventors the exclusive rights to their writings and discoveries. The theory is simple: without protection, there would be no creation. If others could take and profit from their creations, there would be less incentive to create. Copyright law is governed exclusively by federal law: there are no state copyright statutes.

What Is Protected?

Generally, copyright protects the original expression of ideas. The ideas themselves are never protected by copyright, nor are facts or data. To qualify for protection, a work must be an "original work of authorship" that is "fixed in any tangible medium of expression."

What is an original work of authorship? A work of authorship is typically a literary work, musical work (and accompanying words), a dramatic work (and accompanying music), a pantomime or choreographic work, a pictorial, graphic, or sculptural work, a motion picture (or other audiovisual work), a sound recording, or an architectural work. Generally, an original work has two properties: 1) It came from the author--that is, it has not been copied from another source; and 2) It possesses at least a minimal amount of creativity.

Protectable works go far beyond that the ordinary person would think of as works of art, and include such items as the pattern on a piece of carpeting or the face on a plastic doll. There are certain types of work, however, which are typically not copyrightable, including blank forms or other works designed for recording information but which do not themselves convey information and diaries/address books/calendars.

Rights Included in Copyright

A person who possesses a copyright has a bundle of rights in the work. This bundle is comprised of the exclusive right to reproduce the work, distribute copies of the work, make adaptations based on the work (called "derivative works") and perform or display the work publicly. These rights are exclusive, unless they are sold or given away. With a few exceptions, anyone who exercises these rights without the permission of the copyright owner is liable for copyright infringement.

Of these rights, the two most common pitfalls for users of works are the right to reproduce and the right to make derivative works.

The most basic right associated with copyright ownership is the exclusive right to make copies of the work. Anyone who has visited a Kinko's or a camera shop in the last decade has had this fact forcibly explained to them. The sign above the do-it yourself machines states: IT IS ILLEGAL TO REPRODUCE IMAGES UNLESS YOU ARE THE RIGHTSHOLDER. Typically, the only person with the right to reproduce that image is the photographer. Making copies without permission violates the photographer's copyright.

The copyright owner also has the exclusive right to create derivative works: a new work based on preexisting copyrighted material. Recasting or transforming a work into a different format or medium is creating a derivative work. Even celebrity artists get caught up in the intricacies of this set of rights. For example, a photographer created an image of two people holding eight puppies. Jeff Koons used the photo as the model for creating a series of sculptures. He did not get permission from the photographer. The photographer found out about the use of his image and did what any American would do in similar circumstances: he sued. The United States Circuit Court held that the sculptures were a derivative work based on the photo and held that the photographer was entitled to damages.

Who Is The Owner?

Generally, the initial copyright owner is the author of the work: the person who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.

However, there are two circumstances in which the individuals who created the work are not considered the "author" of the work. These works are called "works made for hire". First, an employer is the "author" of a work prepared by employees within the scope of their employment. To determine whether a person is an employee or a contractor, courts apply the common law of agency. Common considerations include: the amount of direction and control over the creation of the work by the hiring party, skill required, employee benefits/tax treatment, and whether additional projects could be assigned.

Second, a hiring party may own a copyright to a work created by an independent contractor if and only if:
1) the parties enter a *written* agreement signed by both parties that explicitly states the work being commissioned will be a work made for hire; and 2) the work being commissioned fits into one or more of the following categories: a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, a supplementary work (a work that is "adjunct" to another work, such as an introduction, conclusion, annotation, illustration, explanation, index, forward, chart, table, bibliography), a compilation, an instructional text, a test, answer material for tests, or an atlas.

Joint Ownership

When two or more authors prepare a work with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole, the work is a "joint work" and the co-authors are co-owners of the copyright. Thus authors of a work will be joint authors for the purpose of copyright if they both contribute original expression (not just inspiration) and they work together or further a common design. Under these circumstances, each author takes an undivided interest in the whole work -- even if one author actually contributed more than the other. In addition, each author can exploit the work as desired without the consent of the other owners, although each owner must account to the other for profits (with an assumption of an equal share). When one co-owner dies, his share passes by will or other applicable law of descent and distribution.

Fair Use

The doctrine of 'fair use' is the subject of much misunderstanding, including the idea that any use by a non-profit organization is fair use. Fair use permits the use of copyrighted materials without a license for criticism, comment, parody, news reporting, teaching, scholarship or research. Even if the use falls into one of these categories, the courts will still analyze whether the use was commercial, whether the whole work was used, and whether the use would impact on the market value of the work. Unfortunately, the public often erroneously considers fair use to be a much broader exception than courts have been willing to recognize.

A reliance on fair use may be particularly difficult in business contexts; the defense is more favorably viewed in connection with artistic or academic activities. Duplication of a page from a book by a teacher for distribution to the six children enrolled in the free kindergarten would qualify for the fair use doctrine. Distribution of an artist's image on a brochure for an association conference would not.

Registration

A myth about copyright is that only works which are registered with a governmental authority are protected. Under recent amendments, copyright protection automatically applies to all covered works. No registration is necessary. Specifically, the Copyright Act does not require copyright registration for works created after January 1, 1978, or for works still in their first term of copyright before January 1, 1978. Thus, there is no relationship between registration and acquiring the rights associated with copyright law.

However, the Copyright Act does provide certain incentives for copyright owners to register their works, including:

- Registration is a prerequisite for filing an infringement lawsuit. Rights accrue from the moment the work is fixed, but relief from a court is not available until the work is registered. If a lawsuit is necessary involving an unregistered work, however, the Copyright Office has special handling procedures to register works quickly.

- Timely registration may entitle plaintiffs to an award for statutory damages and

attorneys' fees against infringers. Ordinarily, infringement damages are based on actual damages and additional infringer's profits. However, if the work was registered *before* the infringement occurred, a plaintiff may elect to take "statutory damages," which are damages set by the court not dependent on the actual damage caused by the infringement. These damages range from $750 to $30,000 per infringement and up to $150,000 per infringement for willful infringement. Statutory damages are also available for published works registered after the infringement, so long as the registration occurred within three months of publication.

- The Registration Certificate that is obtained for a work within five years of its publication constitutes *prima facie* evidence of the validity of both the copyright and the facts cited on the registration certificate.

Copyright Notice

Simply because words or an image have no copyright notice attached to them does not mean they can be used without permission. For works published after March 1, 1989, you need not give notice of your copyright in order for the copyright to be valid. However, notice has its benefits: If notice appeared on works copied by an infringer, that infringer will be unable to assert a defense of "innocent infringement," which can reduce the damages you can recover in an infringement lawsuit.

A proper notice consists of three parts which may appear in any order and which should be placed in such a way as to give others reasonable notice of the claim of copyright: 1) © or Copyright or Copr., 2) the year the work was published, and 3) the name of the owner of the copyrighted work.

Example: Copyright 2015 Barnes & Thornburg

The phrase "All rights reserved" is *not* required by the Copyright Act and adds nothing legally in the United States. In some countries, however, this phrase may be necessary.

Copyright On The Internet

What if it's posted on the Internet? Isn't everything on the Internet in the public domain? This common supposition is the latest addition of the copyright myths. An author or artist does not grant the right to freely use a work by displaying it on the Internet. The same need to obtain written permission to use the work applies to works displayed on the Internet as applies in any other medium.

Copyright Duration

The term of copyright in the United States was recently changed to extend the time period during which creators are protected. Copyright for more recently produced works now extends for the lifetime of the creator plus 70 years. If the work is made-for-hire, the term is the shorter of 95 years from the date of first publication or 120 years from the date of creation. A visual work is first published when it or a copy is first sold or

otherwise transferred. Once a copyright expires, the work becomes part of the public domain and the creator is not entitled to protections of the copyright law.

Copyrights in works created and/or published before the law changed is somewhat more complicated. For example, copyrights in works published with notice between 1923 and 1963 had a life of 28 years and could be renewed for a second term of 67 years. If not renewed, these works are now in the public domain. Because of the many alternatives to duration of copyright under the various amendments to the Copyright Act, the attached copyright duration chart will be helpful in ascertaining the status of a work.

That is not the last word on the creator's rights, however. The laws of different countries vary on the protection of intellectual property rights. Some states have enacted special protections for creators of works.

Transferring Rights and Licensing

Given the maze of rules applying to intellectual property rights usage, it is no surprise that the licensing of rights is big business. Anyone embarking on a commercial venture using words or images of another will not want to risk proceeding without having the necessary rights granted in writing, or making sure all rights have expired. The user need not obtain a copyright in the words or images to use them, but will need a license from the copyright holder. A license is a grant of use and may be limited to only some of the rights in the copyright bundle, and typically provides very specific language to limit what the user may or may not do with the words or image.

An important point about licenses is that the copyright holder retains all rights not specifically granted in the license. Except in special cases where the unstated use was necessary for the licensee to obtain the value of the stated license, courts have been unsympathetic to licensees who have defended infringement claims with the excuse of "but I assumed...", or "we really meant..." If a license is granted for a specific purpose, no other is implied. That is why the wording of the license agreement is crucial to ensure that the user will get all the needed rights.

For example, an association may obtain a one year license to reproduce and distribute an image on brochures. At the end of the year, the association may have an inventory of brochures. Too bad. The license period is over. The association only had permission to distribute the image during the one-year license period. The association would be required to get the artist's permission for further sales, for which an extra fee may be required.

How Do I Register My Copyright?

The registration process is straightforward: fill out a form, pay a fee, and submit copies of the work for deposit in the Library of Congress. You will need the title of the work; the name, birth year (or death year), and citizenship of the author; whether the work was work made for hire; what the author contributed to the work; the year the work was created; the date of publication (if published); claimant's name and address; whether the work (or an earlier version of the work) has been registered; and whether the work is

a derivative work or a compilation that incorporates preexisting work. In addition, you will need two copies of the "best edition" of the work for deposit with the Library of Congress.

Note: The Copyright Act requires two copies of the "best edition" of all published works within three months of publication. However, this requirement is fulfilled by submitting the deposit copies along with copyright registration. Thus, in registering a copyright for a published work, you will be fulfilling a legal obligation that you already have (albeit one that is not usually enforced).

If I Have A Copyright, Can I Prevent *All* Reproduction and Sale of the Work?
No. Common exceptions exist, including:

Fair Use: See Above.

First Sale Doctrine: The rights of a purchaser of a creative work are wrapped up in the 'first-sale doctrine.' The owner of a particular copy lawfully made under the Copyright Act is entitled to sell or otherwise dispose of the possession of that copy, without the consent of the copyright owner. Exceptions: A person cannot rent, lease, or lend sound recordings or computer programs for profit without permission.

For example, an artist who sells a work to a museum can not prevent the museum from selling the work to another museum, even if it will be shipped out of the country, or held in a private collection where it will never see daylight. When an artist sells a work, the artist loses control of that copy of the work (although he may have the right to prevent defacement of his work or other alteration which would harm his reputation.).

Note the important qualifier. The artist only loses control of that copy of the work which is sold. The purchaser has no automatic right to make another copy. Only if the artist grants additional rights to the purchaser is the purchaser able to make additional copies.

Here's an example. A client saw a fetching design on a quilt and wanted to use the design as a border for his business web site. He obtained the permission of the owner of the quilt to use the design. Not good enough. He would have to go back to the creator of the design to get permission. And that may or may not have been the person who stitched the quilt. The design might have been copied from a pattern. Did the pattern package give the purchaser the right to use the pattern for one time use only? Or for non-commercial purposes only? Hearing the lengthy trail he would have to follow, the client surrendered and made up his own design. What the client would have needed is a license to use the design from the creator of the design.

Bad Ideas
Thinking no one will notice. Assuming it's in the public domain. Trusting someone who told you the artist doesn't mind. These are all thoughts that flit through the minds of associatin staff from time to time. They lead inevitably to problems - maybe not today or tomorrow, but probably soon. The certain knowledge that you will be surrounded by

lawyers for long periods of time should be enough to banish these thoughts and replace them with more productive ones. Get solid advice from professionals. Get the rights you need in writing. Review the wording carefully to make sure everything you need is included in the contract, clearly and unambiguously. You'll sleep better that night. And you'll be protecting the association.

COPYRIGHT DURATION

Duration of copyright is dependent upon date of creation, date of publication and in certain instances the life of the author. The following chart can be used to determine the duration of a particular copyright.

DATE WORK CREATED	DATE WORK PUBLISHED	DURATION
January 1, 1978 and after	Irrelevant	Life of author plus 70 years. Corporate authors/works made for hire: 95 years from publication, or 120 years from creation, whichever is shorter
Irrelevant	Before 1923	Work in public domain
Irrelevant	Between 1923 and 1963 WITH NOTICE	Initial 28 year term Renewable for second term of 67 years (if not renewed, work in public domain)
Irrelevant	Between 1964 and 1977 WITH NOTICE	Term of 95 years (initial 28 tear term plus an automatic 67-year renewal term)
Before January 1, 1978	Not published	Life of author plus 70 years or December 31, 2002, whichever is greater
Before January 1, 1978	Published between January 1, 1978 and December 31, 2002	Life of author plus 70 years or December 31, 2047, whichever is greater