

I Can Copy, Right? Oh No, Copyright!

A Copyright Law Primer

By Robert S. Gerber¹

Thanks to Napster, iPods, DVD burners, and TiVo, stories infused with the law of copyright have peppered the news over the last five years. Necessarily overlooking many of the complexities and nuances of copyright law, this brief primer may help you better comprehend those articles in your morning newspaper.

What is copyright?

It is a common misconception that copyright law protects ideas, or sometimes even novel or new facts. It doesn't. *Baker v. Selden*, 101 U.S. 99 (1879). Copyright protection is founded in our nation's Constitution (Article I, §8, cl. 8). The Copyright Act – Congress' statutory implementation of that Constitutional provision, comprehensively revised thirty years ago – protects only the *original expression* of ideas or facts, defined as "original works of authorship." See 17 U.S.C. §101 *et seq.* Furthermore, the Act only protects works which are "fixed in a

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tangible medium,"² which broadly means embodied, written down or recorded in some non-transitory fashion (note that in addition to literary works, motion pictures and music, many other things such as Web sites, architectural designs, paintings, and even sculpture and pantomime can be protected by copyright if fixed in a tangible medium). 17 U.S.C. § 101. It is also a common misconception (based on old versions of the Act) that copyright rights are contingent upon publication or registration with the U.S. Copyright Office, or are somehow only effective if a copyright "notice" is placed on the work (with or without the © symbol). Instead, since 1978, copyright protection automatically begins immediately with the work's creation. 17 U.S.C. §§ 302(a) and 408(a). Indeed, since 1989, even use of a copyright notice is no longer required to maintain protection. Finally, copyright law does not protect procedures, methods, systems, processes, concepts, principles, discoveries, devices, titles, names, short phrases, slogans, symbols, designs, ornamentation, lettering, or coloring (but some of these may be protected by other intellectual property laws, such as patent, trademark, trade secret, or trade dress). *See generally* 17 U.S.C. § 102(b).

Who owns the rights protected by copyright law?

The author of a work is always the original owner of all exclusive rights under copyright. 17 U.S.C § 201(a). But who is the author? Identifying "author" and, in turn, the "owner" can be tricky in many situations, such as in cases involving (a) allegedly "jointly" authored works, (b) "specially commissioned" works or works made "for hire," (c) works made by employees, (d)

² In an effort to protect authors, actors, script writers, musicians, producers, and other artists, the California Legislature adopted Cal. Civ. Code § 980, which uses state law to protect works of expression which are *not* yet fixed in any tangible medium of expression.

works purportedly derived from other works, and (e) works which are created under an express or implied license or assignment. In these situations, who constitutes the "author" and/or "owner" often requires intense statutory, common law, contractual, and factual analysis by a skilled copyright lawyer – or worse, a judge. You should not assume that the nominal "author" is the guaranteed "owner" of every copyrightable work. In addition, except for certain transfers accomplished by operation of law, exclusive rights under copyright may only be transferred in a *written* document. Finally, virtually any copyright interest may be *modified* by contract. Accordingly, an intended owner should always create a document signed by all relevant parties specifically identifying the author and what rights are to be owned by whom.

What are the rights to a work protected by copyright law?

There are five basic rights afforded *exclusively* to the copyright owner. They are: (1) the right to reproduce (*i.e.*, copy) the work; (2) the right to prepare derivative works;³ (3) the right to distribute copies of the work; (4) the right to perform the work publicly; and (5) the right to display the work publicly. 17 U.S.C § 106. Each of these rights can be transferred and owned separately, usually by way of contract such as a license or assignment, and sometimes by operation of law. 17 U.S.C. § 201(d).

How and why is federal copyright registration done?

³ "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

The benefits of federal copyright registration are great. First, registration provides a public record of the work (searchable online – go to <http://www.copyright.gov/records/#locis>) which deters other good faith authors from infringing upon it. Second, registration is required to sue for infringement and, if done within three months of publication, or at least before the infringement commences, allows the owner to seek statutory (not just actual) damages, as well as attorneys' fees, for infringement. 17 U.S.C. § 411(a) and 412. Third, if the work is registered within five years of publication, it will establish *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate of registration. 17 U.S.C. § 410(c). Fourth, registration allows the owner to register the work with U.S. Customs, to help protect against importation of infringing copies. *See* 19 C.F.R. Part 133. The burdens of copyright registration are minimal. Basically, copyrights are registered with the U.S. Copyright Office by sending the required form, submitting a \$30 registration fee, and depositing a copy of the work (special rules apply to certain works such as computer source code, which may contain trade secrets). *See* 37 C.F.R. Part 202. Fairly good instructions and the necessary forms are available at <http://www.copyright.gov/pubs.html>. However, while the forms appear deceptively easy to fill out, any erroneous entries of facts concerning "authorship" and "ownership," as well as answers to other material questions on the form (such as dates of authorship and publication) can confound later efforts to enforce the owner's copyright rights. Accordingly, the advice of learned counsel should be sought by copyright authors or owners before submitting any copyright registration form.

How long does copyright protection last?

There is virtually no way, in a brief primer, to answer this question briefly *and* accurately. The answer is: it depends. There are three factors: when the work was created, when it was published and/or registered, and what Congress may do in the future. At present, copyright rights in a work originally created on or after January 1, 1978 (regardless of publication or registration) last for 70 years after the author's death (anonymous and pseudonymous works last longer). Works originally created before January 1, 1978, but *not* published or registered before that date, have the same protection, except that for such pre-1978 works published on or before December 31, 2002, in no case does the term of the copyright expire before December 31, 2047. As for works originally created *and* published with a copyright notice or registered before January 1, 1978, the works, if renewed under various Copyright Act provisions and amendments, could last for as long as 95 years. Finally, as terms of copyright protection have neared their end, Congress has repeatedly lengthened the term of copyright protection through statutory amendment. Its last foray into this area, the Sonny Bono Copyright Term Extension Act of 1998 (Public Law 105-298), was the subject of extensive litigation. *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003). In that case, the U.S. Supreme Court gave great deference to Congress' Constitutional authority to implement the powers conveyed to it by the Copyright Clause, and thus further copyright term extensions are not out of the question ("[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Id.* at 211.) So how long will copyright last? As a very rough rule of thumb, if the work was published on or after 1923 or if the author has been dead for fewer than 70 years, the work is likely protected somewhere (even if not in the United States).

How are copyright disputes litigated and what are the remedies for infringement?

The federal district courts have exclusive jurisdiction over copyright *infringement* actions. 28 U.S.C. § 1338(a). Civil remedies for infringement can include: (a) injunctions, (b) impoundment and disposition of infringing articles, (c) actual damages and disgorgement of profits; and (d) statutory damages (up to \$30,000 for each non-intentional infringement, and up to \$150,000 for each willful infringement). *See* 17 U.S.C. § 502-505.⁴ However, one common misconception is that mere disputes over copyright *ownership* "arise under" the Copyright Act and must be litigated in federal court. To the contrary, disputes *solely* over copyright *ownership* cannot be litigated in federal court. Copyright ownership issues arise under state law, and must be litigated in state court. *See Scholastic Entertainment, Inc. v. Fox Entertainment, Inc.*, 336 F.3d 982 (9th Cir. 2003).

What are the limitations and defenses to alleged copyright infringement?

There are a whole host of statutory and common law limitations and defenses to copyright infringement claims. *See generally* 17 U.S.C. §§ 107-122. By far the most common of these raised in litigation is the "fair use" exception, codified at 17 U.S.C. § 107. A "fair use" of another's copyrighted work (that is, an excused but otherwise infringing use without permission) is generally for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. *Id.* Courts are instructed to use four factors in determining whether the use is a "fair" one: (a) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

⁴ Under certain circumstances, willful copyright infringement can also be prosecuted and punished as a crime. *See* 17 U.S.C. § 506 and 18 U.S.C. § 2319.

(b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (d) the effect of the use upon the potential market for or value of the copyrighted work. *Id.* Whole bodies of case law have been developed on each of these four prongs of the fair use test, which are too substantial to summarize here. However, one of the most comprehensive, newsworthy, and interesting recent fair use cases in the Ninth Circuit is *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2002). In that case, the infamous file-sharing service "Napster" was sued for direct and vicarious copyright infringement by a host of music labels because of its software's users trading copyrighted music tracks and entire CDs over the Internet. The district court had entered a preliminary injunction against Napster's services, rejecting, among others, Napster's fair use defense. The Ninth Circuit panel did an exhaustive review of Napster's fair use defense, agreeing with the district court's analysis. The case is a good primer on this defense, touching upon many of the key arguments often made in a wide variety of copyright infringement cases. Remember, "fair use" is not a positive statutory right to be exercised. Instead, it is an affirmative defense which you or your client will have the burden of proving should a copyright infringement claim be made.

What about the rest of the world?

This article, by necessity, has focused only on U.S. copyright law. Of course, works of any value are almost always exploited everywhere, including the 160 countries which are members of the Berne Copyright Convention. Don't assume that other copyright laws are like our own. Although they have many similarities, the duration of copyright is often different and may even provide for such unusual things as "wartime extensions" of copyright covering disruptions from War Wars I and II and "moral rights" of individual authors, to require authorship credit and to

object to offensive changes (which can last *forever*). U.S. law does not generally recognize "moral rights." In addition, most countries have no "work for hire" doctrine, which means that employers may never be considered the legal authors of copyrightable works by their employees within the scope of their employment. Finally, since use of works on the Internet may subject you to jurisdiction in any of these countries, you may wish to consult with counsel before uploading works to the Internet.

What is the Digital Millennium Copyright Act?

You may also find yourself facing questions under the Digital Millennium Copyright Act of 1998. While not an affirmative grant of, or limitation on, copyright rights, the Act does provide a measure of comfort thought necessary for establishing an online marketplace in copyrighted works by prohibiting (a) the circumvention of technological measures designed to limit access to such works, and (b) the trafficking in devices which enable such circumvention. It also prohibits removal of Copyright Management Information ("CMI"), such as digital "watermarking," which is often embedded in digital works to identify the owner and to discourage any unauthorized dissemination.

Conclusion: Why is copyright law important?

The Internet has changed the way we do business, and computer technology has changed the way we experience and distribute works of artistic expression. The digital world empowers people to take copies of original, copyrighted works of authorship, break them into billions of electronic bits, and distribute them instantaneously around the world – with or without permission of the author or owner. Thus, the threat of copyright infringement – and the economic damage and

deterrence it causes to creative minds around the world – has increased exponentially. If you don't understand and appreciate copyright law, you should. It's here, it's hot, and it's affecting the pocketbooks of everyone from artists, to consumers, to entire industries who profit from the creation and distribution of such works – as well as intellectual property lawyers. So read this article, learn from it, but please – don't copy it or send it to anyone without my permission!

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