

Copyrights: A Primer

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Introduction

There are many misconceptions about copyright law. Some think, for example, that registration is necessary or that photocopying requires express permission from the author in all cases, regardless of the intended use of the material. Others make mistakes regarding the most effective methods of registration and protection of their own creative works, or errors they commit in transferring rights and licensing of the use of their expression. Simply stated, copyright law is misunderstood.

The Copyright as Intellectual Property

A copyright is a type of intellectual property. An attachment of intangible rights occurs when certain rules are followed to defend improper use of the original "expression of the author." Unlike other types of intellectual property law, such as patents, trademarks or trade secrets, which guard confidential information or discoveries/inventions, a copyright seeks to ensure that the originality and the expression of the actual author is protected, as opposed to just his ideas.

Ownership of copyrighted material in a work is distinguishable from ownership of the object within which the copyrighted work is embodied. For example, when you go to the store to purchase a music CD, you are purchasing the media (a CD) and the right (or "license") to enjoy the author's expression of his art. However, in purchasing that CD you are not purchasing a license to the use artist's work embodied in the CD as you wish. If you were to use the music contained in the CD for any commercial use, you would need to purchase additional licenses from the author of that music.

Exclusive Rights & Transfers

"Exclusive rights" means that the copyright holder alone is allowed to do as they please at everyone else's "exclusion." A copyright holder (the one who holds the copyright regardless of who created the work) typically has exclusive rights to do the following with the work:

- make and sell copies
- import/export
- make derivatives
- perform publicly
- sell or assign these rights

Since a copyright is actually a bundle of different rights and licenses, all rights do not have to be transferred completely when the holder sells one particular license. The assignment or the ownership of the copyright may be transferred in whole or in part. In these examples, the person buying the copyright "owns" the copyright or the particular right at issue. Another situation occurs when a license is sold. As in the CD example mentioned previously, a purchaser can buy a music CD, and thereby purchase a license to listen to the music, but nothing else. Conversely, a purchaser can buy the rights to the song on the CD and use it at their discretion in any manner they choose. Therefore, copyrights may be granted, sold or relinquished. It is common for a copyright holder to contractually transfer rights to a corporation or individual in exchange for money or distribution assistance.

Securing Copyright

No publication, registration or other action is required to secure a copyright. This occurs automatically when a work is created. A work is "created" when it is fixed in a copy or recorded for the first time. "Copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device such as: books, manuscripts, sheet music, film, videotape, microfilm or computers.

Recordings are material objects embodying fixations of sounds such as cassette tapes, CD's, or LP's. Thus, a song (the "work") can be fixed in sheet music ("copies") or in digital recordings or both. If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date.

The Advantages of Registration

Registration is a legal formality intended to make a public record of the basic facts of a particular copyright. While registration is not a condition or requirement of copyright protection, the law provides several inducements to encourage participation.

Some of these advantages are as follows:

Registration establishes a public record of the copyright claim. It should be noted that before an infringement suit may be filed in court, registration is necessary for works of U.S. origin.

If made before or within five (5) years of publication, registration will establish prima face evidence in court of the validity of the copyright as well as the facts stated in the certificate.

If registration is made with three (3) months after publication of the work or prior to an infringement of the work, statutory damages and attorney fees will be available to the

copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.

The life of a copyright depends upon whether it was created before or after January 1, 1978. For copyrights created after January 1, 1978, expiration occurs (1) 50 years after the death of the author or (2) for copyrights owned by the employer of the author, 75 years from date of publication or 100 years from date of creation, whichever occurs first. For copyrights created before January 1, 1978, determination of expiration date is more complicated. Use of proper copyright notice, renewal, publication status and other factors affect expiration of copyrights created before January 1, 1978. Reference to the Copyright Statute is recommended for expiration questions regarding pre-1978 copyrights. See generally 17 U.S.C.S. §101 et seq.

Copyright Infringement

The law does not provide innocent infringement (i.e. - not willful) as a defense, though such cases often involve less monetary liability. Nevertheless, the innocent infringer may still be liable for damages and subject to other judicial remedies.

A copyright infringement claim focuses on the violation of the copyright owner's property rights. Generally, this is caused by the licensee's failure to comply with the terms of the licensing agreement.

There are two forms of copyright infringement that we will focus on for purposes of this article. The first is "copying" and the second is "unlawful" or "unlicensed" reproduction. Some examples of unlawful reproduction include claims of plagiarism or misappropriation of a copyrighted work. While examples of unlicensed reproduction include: infringing on a protected property right by using the product in violation of the terms of the license or continuing to manufacture the product after the license terminated (see notes below).

Practically speaking, it is rare to show actual evidence of an infringement upon a copyrighted material. Mostly, this is shown through circumstantial evidence. To be successful, a plaintiff would need to demonstrate through clear and convincing evidence that the alleged defendant infringer had access to the copyrighted work. If the plaintiff is successful in that effort, he must further show that the two works are "substantially similar" to the intended audience. However, the greater the similarity between the two works, the less necessary it becomes to demonstrate the defendant's access to the infringed material.

A successful plaintiff would then have three types of remedies available to him: monetary damages, injunctive relief, and recovery of costs, including attorney's fees. Depending on the nature of the infringement, and the timeliness of the copyright registration, the courts have wide latitude to fashion a remedy.

The Doctrine of "Fair Use"

The rights of a copyright holder are limited by the doctrine of "fair use." Under this doctrine, a work may be used without the permission of the copyright owner for purposes such as criticism, comment, news reporting, teaching, scholarship or research.

Courts look at four (4) factors to determine whether a use is fair, including:

the purpose and character of the use, including whether it is used for commercial or non-profit purposes;

the nature of the copyrighted work;

the amount and substantiality of the portion used in relation to the work as a whole; and

the effect on the potential market for the copyrighted work.

Each case will be judged on its particular merits and facts. "Fair use" is never presumed.

Conclusion

Copyright issues can arise in a variety of legal contexts. With a basic understanding of copyright law and its protections, the average person can know what questions to ask to better protect himself and guard against infringement of his own intellectual property or infringement upon another's rights.

Notes

Copyright infringement claims of this nature "arise under" federal copyright laws. See *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982) (a licensee's use of a copyrighted work that exceeded the license granted by the copyright owner constitutes a copyright infringement) (citation omitted); *Photofile, Inc. v. Graphicomp Sys., Inc.*, 1993 U.S. Dist. LEXIS 13177, 92 C 8414 (N.D. Ill. 1993) ("Even if the [licensee's] delinquent payment were not considered a failure to satisfy a condition or a material breach [of the license], plaintiffs allege that defendants' use of the photographs in a second printing of the brochure exceeded the scope of the licensing agreement. For this additional injury, plaintiffs can seek relief under the copyright laws.") (emphasis added); *Joseph J. Legat Architects, P.C., v. United States Dev. Corp.*, 601 F. Supp. 673, 676 (N.D. Ill. 1985) (where the court determined that it had subject matter jurisdiction under 28

U.S.C. § 1338(a) over plaintiff's copyright infringement claim; the plaintiff alleged that the defendant had copied and used his copyrighted architectural plans without authorization in violation of their contract); *Powell v. Green Hill Publishers, Inc.*, 719 F. Supp. 743, 745 (N.D. Ill. 1989) (where the court found that it had subject matter jurisdiction under 28 U.S.C. § 1338(a) over plaintiff's copyright claim; the plaintiff alleged that the defendant published a second printing of plaintiff's book even though the plaintiff had previously terminated the defendant's license).