

WHAT ARTISTS AND AUTHORS NEED TO KNOW about COPYRIGHT

Robert C. Cumbow
Graham & Dunn PC

Tacoma Arts Symposium
November 15, 2008

Common Questions



- How do I get a copyright?**
- Who owns the copyright in the work I made for someone else?**
- When can I use the "©"?**
- What is the Visual Artists' Rights Act?**
- When is it OK to use other people's work?**
- How can I protect my work from being used?**
- How can I tell if something is copyrighted?**
- What about licensing my work to others?**

GRAHAM & DUNN PC

Copyright



Intellectual Property:

- Patent - protects inventions, formulas, processes
- Trademark - protects brands used on products

GRAHAM & DUNN PC

Copyright



Protects the rights of individuals and groups in:

- Original works of authorship
- Fixed in tangible medium

GRAHAM & DUNN PC

Copyrightable Matter



- literary works
- musical works, w/ accompanying words
- dramatic works, w/ accompanying music
- pictorial, graphic, sculptural works (photos, art)
- derivative works (translations; film from book)
- characters (graphic and literary)
- motion pictures and other a/v works
- sound recordings
- toys, games, dolls (designs)
- computer programs



GRAHAM & DUNN PC

Non-Copyrightable Matter

- ideas (but may be protectable as trade secrets)
- facts (but original selection / arrangement of unprotected elements *is* protected)
- titles (but trademark/unfair competition law provides protection in some situations)
- slogans and other short phrases (but trademark/unfair competition law may provide protection)

GRAHAM & DUNN PC



Non-Copyrightable Matter

- works of U.S. government (but government may own copyrights transferred to it)
- method of operation
- blank forms
- useful articles (but ornamental design is protected)

GRAHAM & DUNN PC



Copyright Owner's Rights

1. Reproduce
2. Derivative works
3. Distribute ("first publication")
4. Perform publicly
5. Display publicly
6. Digital Performance of Musical Work
7. Authorize (license) any of the above

GRAHAM & DUNN PC



Copyright



What is the Visual Artists' Rights Act?

GRAHAM & DUNN PC



Copyright



VARA

Defining "visual artist"

Defining "moral rights"

Right of integrity

Right of attribution

Following Rights

GRAHAM & DUNN PC



Copyright



VARA

Waiving "moral rights"

GRAHAM & DUNN PC



Copyright



**How do I get a
copyright in
my work?**

GRAHAM & DUNN PC



Copyright Ownership

Congratulations! You ALREADY DID!

Copyright vests in the creator of an original work as soon as it is fixed in a tangible medium

GRAHAM & DUNN PC



Copyright



How do I *register* my copyright in my work?

GRAHAM & DUNN PC



Copyright Registration

1. COPYRIGHT DOES NOT DEPEND ON REGISTRATION

Original work of authorship is copyrighted as soon as fixed in a tangible medium.

2. REGISTRATION HAS SIGNIFICANT ADVANTAGES

GRAHAM & DUNN PC



Copyright Registration

ADVANTAGES OF REGISTRATION

- a. Inexpensive (\$45 fee)
- b. Presumption of exclusive rights
- c. *Prima facie* evidence of validity, ownership, originality
- d. Ability to bring infringement action
- e. Election of damages + award of costs and fees

GRAHAM & DUNN PC



Copyright Registration

<http://www.copyright.gov>

Form

\$35 (e-filing)

Copy of the work

GRAHAM & DUNN PC



Copyright



**When can I use
the "©"?**

GRAHAM & DUNN PC



Copyright Notice

1. COPYRIGHT DOES NOT DEPEND ON NOTICE

Work is "copyrighted" as soon as it is fixed in a tangible medium.

2. NOTICE MAY BE USED ANY TIME AFTER WORK IS FIXED.

3. ADVANTAGES OF NOTICE

- a. Identifies owner
- b. Defeats defense of innocent infringement

GRAHAM & DUNN PC



Copyright Notice

4. NOTICE MUST BE IN PROPER FORM

Copyright, Copr., or ©

Date=date of first publication (or creation)

Owner=owner, not necessarily author

OK:

Copyright 1998 Ownername

© 1998 Ownername

Copr. 1998 Ownername

NOT OK:

(c) 1998 Ownername

© Ownername

© 1998

GRAHAM & DUNN PC



Copyright



Who owns the copyright in the work I made for someone else?

GRAHAM & DUNN PC



Copyright Ownership

Copyright vests in the creator of an original work as soon as it is fixed in a tangible medium

BUT ...

GRAHAM & DUNN PC



Copyright Ownership

One exception:

“Work Made for Hire”

GRAHAM & DUNN PC



Copyright Ownership

“Work Made for Hire”

Person or company *for whom* the work was made owns the copyright *if*:

- a. made by employee within scope of employment
- b. commissioned as contribution to a collective work, part of audiovisual work, etc., *if* parties agree in writing

GRAHAM & DUNN PC



Copyright Ownership

AP — Mannie Garcia



GRAHAM & DUNN PC



Copyright Ownership

- Creator unless work for hire
- Assignment (must be written and signed)
- Joint Ownership

GRAHAM & DUNN PC



Copyright



It's fair to use other people's work as long as it's not commercial, right?

How much do I have to change someone else's work before I can use it safely?

GRAHAM & DUNN PC

Copyright



Infringement



Copyright Infringement



1. Unauthorized doing of any of the protected rights
2. Federal court has exclusive subject matter jurisdiction
3. Elements of a *prima facie* case:
 - a. A valid, *registered* copyright
 - b. Copying of the protected work
 - (1) Admitted (verbatim)
 - (2) Inferred (substantial similarity + access)



Copyright Infringement Theories

1. Direct
2. Contributory



3. Vicarious



GRAHAM & DUNN PC

Copyright Infringement Theories

Contributory

Substantial
noninfringing uses?

Inducement



GRAHAM & DUNN PC

Copyright Infringement Theories

Vicarious

Knowledge

Profit



GRAHAM & DUNN PC

Copyright Infringement Defenses

1. Time-barred (Sec. 507)
-- 3-year Statute of Limitations
2. Waiver/acquiescence
3. The copyright is not registered
4. The registration is invalid
5. The work is unprotectable
(ideas; facts; *scenes a faire*)
6. The work is in the public domain
7. Defendant had no access to the work

GRAHAM & DUNN PC

Copyright Infringement Defenses

8. The works are not substantially similar
9. Licensed
 - a. Express
 - b. Implied
10. The use was incidental or *de minimis*
11. The use is protected as parody
12. The use is protected as Fair Use

GRAHAM & DUNN PC

Copyright Infringement Defenses



Fair Use [17 U.S.C. § 107]:

Use of a copyrighted work that is allowable by law for such purposes as criticism, comment, teaching, news reporting, scholarship, research.

GRAHAM & DUNN PC

Copyright Infringement Defenses



Fair Use [17 U.S.C. § 107]:

Whether a use is fair depends on balancing four factors:

- a. Nature of use
- b. Nature of the copyrighted work
- c. Amount and substantiality of portion used in relation to copyrighted work as a whole
- d. Effect of the use upon the potential market for or value of the copyrighted work

GRAHAM & DUNN PC



Copyright Infringement Defenses

FAIR USE FACTORS:

- a. Nature of the use:
 - (1) commercial or nonprofit educational
 - (2) transformative
- b. Nature of the copyrighted work
 - (1) factual or fictitious
 - (2) published or unpublished

GRAHAM & DUNN PC



Copyright Infringement Defenses

FAIR USE FACTORS:

- c. Amount and substantiality of portion used in relation to copyrighted work as a whole: "heart of the book"
- d. Effect of the use upon the potential market for or value of the copyrighted work

GRAHAM & DUNN PC



Copyright



It's fair to use other people's work as long as it's not commercial, right?

No—all four factors must be considered.

GRAHAM & DUNN PC



Copyright



How much do I have to change someone else's work before I can use it safely?

No matter how much you change it, it's still a derivative work. Better to be original.

GRAHAM & DUNN PC



Copyright

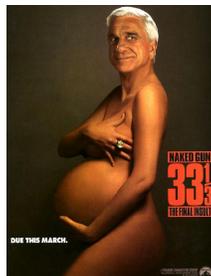
Infringement or parody?





Copyright

Infringement or parody?





Copyright

AP — Shepard Fairey



GRAHAM & DUNN PC



Copyright

How can I tell if something is copyrighted?



GRAHAM & DUNN PC



Copyright

You can't.



GRAHAM & DUNN PC



Duration of Copyright



1. Works published before 1923: Public Domain
2. Works created *before* 1/1/78: Total of 95 years (depends on renewal and applicable law)
3. Works created *since* 1/1/78: Life + 70; WMFH 95 (Sonny Bono Copyright Term Extension Act)
4. Copyright Office search (not conclusive)

GRAHAM & DUNN PC



Copyright

How can I tell if something is copyrighted?



Look for the notice ("©")

Consider the date of first publication
(1923 or earlier = PD)

When in doubt, assume it's
copyright-protected

GRAHAM & DUNN PC



Copyright



Do Fair Use analysis

Do risk analysis

When in doubt, ask for permission

When asked (by a publisher or distributor) to clear copyrights,
always make Fair Use part of the equation

GRAHAM & DUNN PC



Copyright



What about letting others use my work?

GRAHAM & DUNN PC



CONTRACTS for ARTISTS



What is a Contract?

An agreement that the law will enforce

GRAHAM & DUNN PC



Elements of a Contract

1. Offer
2. Acceptance
3. Meeting of the Minds
4. Agreement to be bound
5. Mutuality (not mere promise)
6. Consideration

GRAHAM & DUNN PC



Types of Agreement

1. Confidentiality/nondisclosure
2. Agency agreement
3. Publishing agreement
4. Option Agreement
5. Production Agreements
6. Licensing agreement
7. Assignment

GRAHAM & DUNN PC



Legal Representation

- Contract Negotiation
- Contract Drafting
- Contract Review
 - Agent Agreement
 - Publishing Agreement

GRAHAM & DUNN PC



Do It Yourself

- **Oral agreement**
- **Letter or email**

GRAHAM & DUNN PC



Contracts

When dealing with publishers ...

GRAHAM & DUNN PC



Contracts

Agent agreement

Publishing agreement

GRAHAM & DUNN PC



Agent Agreements

1. Whatever the parties agree
2. Commission on all works
3. Option on future works
4. Read fee

GRAHAM & DUNN PC



Publishing Agreements

Grant of Rights under Copyright

1. License (permission to use)
2. Assignment (transfer of ownership)

GRAHAM & DUNN PC



Publishing Agreements

1. License (permission to use the work)
2. Terms:
 - a) Standard Contract Terms
 - b) Standard License Terms
 - c) Publisher's Boilerplate Terms

GRAHAM & DUNN PC



Standard Contract Terms

1. Recitals
2. Grant of rights
3. Royalties
4. Parties' Rights and Obligations
5. Representations and Warranties

GRAHAM & DUNN PC



Standard Contract Terms

6. Indemnification
7. Breach and cure
8. Choice of Law/Forum
9. Integration
10. Signatures / Dates

GRAHAM & DUNN PC



License Terms

1. Exclusive or nonexclusive
2. Territorial limitation
3. Term or perpetual
4. Limitations on use
5. Royalty or non-royalty

GRAHAM & DUNN PC

Publishers' Boilerplate Terms

1. Copyright registration in author's name
2. Who must clear rights (in photos, quotes, etc.)
3. Royalty provisions
4. Advance against royalties
5. Disposition of other rights
6. Author's Warranty of Originality and Noninfringement
→ Indemnification

GRAHAM & DUNN PC

Publishers' Boilerplate Terms

7. Electronic publication rights
8. Option on next book
9. Cross-collateralization
10. Out of Print/Reversion of Rights
11. Assignment/Right of approval
12. Audit Rights Provision

GRAHAM & DUNN PC

Public Art Contracts

1. Reproductions
2. Merchandise
3. VARA Waiver

GRAHAM & DUNN PC

WHAT ARTISTS AND
AUTHORS NEED TO KNOW
about
COPYRIGHT



Robert C. Cumbow
Graham & Dunn PC

Tacoma Arts Symposium
November 15, 2008
