WHAT ARTISTS AND AUTHORS NEED TO KNOW about COPYRIGHT

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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?

Copyright

Intellectual Property:

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

Protects the rights of individuals and groups in:
- Original works of authorship
- Fixed in tangible medium

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

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)
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)

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

Copyright

What is the Visual Artists’ Rights Act?
VARA

Defining “visual artist”
Defining “moral rights”
  Right of integrity
  Right of attribution
  Following Rights

VARA

Waiving “moral rights”

How do I get a copyright in my work?
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.

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

How do I register my copyright in my work?
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

Copyright Registration

http://www.copyright.gov
Form
$35 (e-filing)
Copy of the work

When can I use the “©”?
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

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

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

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

BUT ...

Copyright Ownership

One exception:

“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
Copyright Ownership

AP —— Mannie Garcia

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

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?
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
Copyright Infringement Theories

Contributory
Substantial noninfringing uses?

Inducement

Copyright Infringement Theories

Vicarious
Knowledge Profit

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
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

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.

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
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

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

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.
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.

Copyright

Infringement or parody?

Copyright

Infringement or parody?
How can I tell if something is copyrighted?

You can’t.
**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)

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**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

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**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
What about letting others use my work?

What is a Contract?
An agreement that the law will enforce
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

Types of Agreement

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

Legal Representation

- Contract Negotiation
- Contract Drafting
- Contract Review
  - Agent Agreement
  - Publishing Agreement
Do It Yourself

- Oral agreement
- Letter or email

Contracts

When dealing with publishers ...

Contracts

Agent agreement

Publishing agreement
Agent Agreements

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

Publishing Agreements

Grant of Rights under Copyright

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

Publishing Agreements

1. License (permission to use the work)
2. Terms:
   a) Standard Contract Terms
   b) Standard License Terms
   c) Publisher’s Boilerplate Terms
Standard Contract Terms
1. Recitals
2. Grant of rights
3. Royalties
4. Parties’ Rights and Obligations
5. Representations and Warranties

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

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

Public Art Contracts

1. Reproductions
2. Merchandise
3. VARA Waiver
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