FUNDAMENTALS OF COPYRIGHT LAW

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I. The Source of Copyright Protection.

1. U. S. Constitution:

   The Congress shall have the power . . .

   To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. Art. I, Sec. 8, Cl. 8.

2. Federal Copyright Legislation in the U. S. Code:

   a. Copyright Act of 1976, as amended, 17 U.S.C. §101, *et seq.* Applies to works created on and after January 1, 1978 (eliminated common law copyright)

   b. Copyright Act of 1909 applies to works created before January 1, 1978.

II. Works Protected by Copyright.

Copyright protection extends to 8 classes of works, but the statute indicates that the list is non-exclusive.

1. Literary works,
2. Musical works + accompanying words,
3. Dramatic works + accompanying music,
4. Pantomimes and choreographic works,
5. Pictorial, graphic and sculptural works,
6. Motion pictures and other audiovisual works,
7. Sound recordings, and
8. Architectural works.

Compilations are also protected by copyright. A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship (*i.e.* is independently created

and reflects at least a minimal level of creativity). A book of short stories is an example of a compilation. Copyright in a compilation extends only to the selection and arrangement of the compiled materials, and not to the materials themselves. So if one were to compile a directory of restaurants in a particular area, he or she could claim copyright in the arrangement of the restaurant information, but not in the information itself, which would constitute uncopyrightable facts.

Finally, copyright protection extends to derivative works, which are works 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.

To create a derivative work, an author must add sufficiently original new work to the underlying work on which the derivative work is based. Because the right to create or authorize a derivative work belongs solely to the copyright owner of the underlying work, the author of the new work must gain the permission of the copyright owner of the preexisting work to avoid infringing on the earlier copyright. The copyright in the derivative work extends only to the added material, not to the preexisting material.

For example, a screenplay is a derivative work if it is based on a novel. In order to avoid infringing the novelist's copyright, the screenwriter must obtain the novelist's permission to create a new work based on or incorporating the existing work. A relatively small amount of variation or originality will likely suffice to gain copyright protection in the new work. Even if 90 percent of a work is reproduced from another source and the other 10 percent of the derivative work is no more than the derivative author's interpretation of the existing work, the new work will likely qualify for copyright protection. Once again, the new copyright would apply only to the additions to the underlying work and would not affect the original copyright.

The derivative work must possess more than a trivial variation of the underlying work in order to be the subject of copyright protection. Reproducing an object with minor alterations is not sufficient to gain a copyright in the "new" object. For example, when a metal bank is reproduced in plastic, or in a larger size, the plastic or larger version is not the subject of copyright protection because a mere change in the medium or size of the work does not constitute a distinguishable variation in the work.

III. **Requirements for Copyright Protection.**

Copyright protects ORIGINAL WORKS OF AUTHORSHIP FIXED IN A TANGIBLE MEDIUM OF EXPRESSION.

- "Originality" and "authorship" require independent creation and a modicum (*i.e.* minimal level) of creativity.

- "Fixation" requires that a work be fixed in a tangible format in which it can be perceived, reproduced or communicated, either directly or with the aid of a machine or device — for example, a writing, recording, photo or video.

- Copyright protection exists UPON FIXATION of the work — neither registration nor notice is required.

IV. What is Not Protected by Copyright.

Copyright protection does not extend to:

- Any fact, idea, procedure, process, system, method of operation or concept. Copyright extends to the EXPRESSION of an idea, but not to the idea itself.

- Names, titles, slogans and short phrases are not copyrightable.

- Works that are solely utilitarian or functional are not copyrightable (basic forms, for example). However, if a work has an artistic aspect conceptually separate and independent from its utilitarian function, the work can be subject to copyright protection (a decorative belt buckle, for example).

- Merger Doctrine — When there are only a limited number of ways to express an idea, the idea and expression merge, and copyright protection of the expression is lost (contest rules, for example).

- Works created by U.S. government employees within the scope of their employment.

- Works in the public domain because the copyright has expired, or because they were published without the required copyright notice prior to 3/1/89.

V. The Benefits of Copyright.

A copyright owner enjoys 5 exclusive rights:

1. REPRODUCTION — the right to reproduce (*i.e.* copy or duplicate) the work.

2. MODIFICATION — the right to prepare DERIVATIVE works based on the work. A derivative work is a work based upon the original work — for example, a revision, new edition, translation, or any form in which a work may be recast, transformed or adapted.

3. DISTRIBUTION — the right to distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, license or lending.

4. PERFORMANCE — the right to perform the work (for example, a play).

5. DISPLAY — the right to display the work (for example, a painting or exhibit).

VI. Copyright Ownership.

1. General Rule. The author (*i.e.* creator) of a work owns the copyright. Independent contractors own the copyright to works they prepare.

2. Work Made for Hire.

- Employer Owned Works. The employer owns the copyright in works created by employees within the scope of their employment.

- Specially Ordered or Commissioned Works. A party owns the copyright in a work which is specially ordered or commissioned for use in connection with one of the following types of works, if such work is designated a work made for hire in a signed written agreement between the parties:

  - as a contribution to a collective work (a work combining a number of independent works, like a periodical issue)
  - as part of a motion picture or audiovisual work
  - as a translation
  - as a supplementary work (for example, indexes, forewords, illustrations and editorial notes to books)
  - as a compilation
  - as an instructional text
  - as a test
  - as answer material for a test
  - as an atlas

- Joint Ownership. A work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole is a joint work owned by all authors. Absent an agreement to the contrary, joint authors equally share the work. The relationship is a tenancy in common and the interest of a deceased joint author is bequeathable. One joint owner can exploit the work, without consent of the other owner, and can grant non-exclusive licenses. Where one joint owner grants a non-exclusive license, that owner is obligated to account to the other owner(s) for the non-licensing owner's share of profits derived from the use of the work.

VII. Term of Copyright.

Works created on or after January 1, 1978 have a copyright term of the life of the author plus 70 years. The copyright term of a joint work is measured by the life of the last surviving author. Works of corporate authorship (under the work for hire doctrine) have a copyright term of the shorter of 95 years from publication or 120 years from creation.

VIII. Copyright Notice.

Historically, the failure to affix a copyright notice on a work could result in loss of copyright protection. But, for works published on or after March 1, 1989, notice is not required to secure or maintain copyright protection. There are, however, good reasons to use a copyright notice, and it is highly recommended. The primary reason to affix a copyright notice is to defeat a mitigation of damages argument raised by an innocent infringer. After all, it is difficult to argue innocence in the face of a copyright notice.

A copyright notice should be placed on all copies of the work where it can be visually perceived, directly or with the aid of a machine or a device. A proper copyright notice includes the following elements:

1. the symbol © or the word "copyright" or the abbreviation "copr" (use (P) for phonorecords of sound recordings)

2. the year of first publication of the work; and

3. the name of the copyright owner

For example:

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IX. The Benefits of Copyright Registration.

While registration is not required to claim copyright, it provides important benefits. First, a copyright registration is prima facie evidence of the validity of the copyright and of the facts stated in the certificate of registration, thereby shifting the burden to the challenger to prove the copyright's invalidity. Also, registration (or submission of an application to register copyrights) is required BEFORE a copyright claimant can institute an action for copyright infringement. Most important, however, is that copyright registration is a prerequisite to certain remedies for infringement, including attorneys' fees and statutory damages. A copyright claimant cannot receive an award of statutory damages or attorneys' fees UNLESS he or she has registered the copyright to a published or unpublished work prior to the time the infringement takes place. But, where an infringement occurs after the first publication of a work, a copyright claimant has a 3 month grace period (from the date of first publication) in which to register his or her work to preserve the right to seek attorneys' fees and statutory damages.

The benefit of statutory damages and attorneys' fees is that a copyright owner may not be able to prove actual damages or profits on the part of the infringer, and the cost of the action may preclude the owner from suing. A claimant who elects statutory damages in lieu of actual damages and profits may recover from $750 — $30,000 for a non-willful infringement of a work, and up to $150,000 for a willful infringement of a work, as the court deems just in its discretion. A court also has the discretion to reduce an award of statutory damages to $200 for an innocent infringement of a work.

X. Copyright Infringement and Remedies.

1. Proving Copyright Infringement. Copyright infringement occurs when any of the exclusive rights granted to authors in their copyrighted work is violated without consent. These rights include reproduction, modification, public distribution, performance and display. For example, reproduction of a copyrighted work without permission of the owner infringes the copyright owner's exclusive right to reproduce the work.

   To win a copyright infringement case, the copyright owner must prove ownership of the copyright and copying of the work by the defendant. Intent to infringe need not be proven for there to be infringement, and innocent copying is not a defense (although it is relevant to the issue of damages). All a plaintiff needs to prove is that it owns the work, that the work is copyrightable subject matter and that the defendant copied the work.

   Copyright ownership is easily proven by registration of the copyright with the Copyright Office. Or, an owner can prove she is the author, or that she bought the work from a third party.

   A plaintiff can prove that the defendant copied the work by direct or circumstantial evidence. Since direct evidence of copying is hard to obtain, courts allow a plaintiff to prove that the defendant copied the work by circumstantial evidence of access to the copyrighted work and substantial similarity between the works. The defendant's access is generally a threshold question in infringement actions. The copyright holder will need to prove by reasonable evidence that the alleged infringer had access to the copyrighted work.

   To show that the defendant's work is substantially similar to the plaintiff's, the copyright holder must prove that the infringer's work is more than trivially similar to the copyrighted work. A verbatim copying, however, is not necessary to prove infringement; infringement can occur if a work is paraphrased. Infringement has also been found where only a few words were copied, where the copied material was the "heart" or essence of the work.

2. Remedies Available to the Copyright Holder.

All copyright infringement claims must be brought in the federal courts. Available remedies in a copyright action include injunctions, impoundment and destruction of infringing articles, actual damages suffered by the copyright holder and profits received by the infringer. Statutory damages and attorneys' fees may also be available if certain requirements are met, as noted in Section IX of this handout.

XI. Fair Use.

Although a copyright owner is granted five exclusive rights in his or her copyrighted work, the owner's rights are limited by the doctrine of "fair use." Fair use grants someone other than the copyright owner a limited privilege to use the copyrighted material in a reasonable manner, without the copyright owner's consent. Under the Copyright Act, the use of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship or research are generally not considered copyright infringement.

Four factors are considered in determining whether use of a copyrighted work is a fair use or an infringement. These factors, which are discussed in detail below, include:

- the purpose and character of the use;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use on the potential market for or value of the copyrighted work.

Fair use is determined by evaluating all circumstances surrounding the use of the copyrighted material. Courts equitably balance the four factors to determine whether a use is fair on a case-by-case basis.

In determining the purpose and character of the use, courts generally consider whether the work is for profit (commercial) or non-profit (educational). Educational use does not automatically shield a work from a finding of infringement. Similarly, a commercial purpose does not always mean it is not a fair use, although courts have typically, but incorrectly, viewed commercial use as presumptively unfair. To the extent an allegedly infringing work is transformative (*i.e.* it adds to or alters the original work with new expression or meaning), this factor will favor a fair use. Since fair use presupposes good faith, the intent of an alleged infringer is also a material consideration in a fair use determination.

The nature of the copyrighted work is the second factor to examine. Courts generally consider whether the work is creative as opposed to factual and informational. Informational or factual works are more likely to be considered a fair use as opposed to creative or nonfactual works.

Amount and substantiality of the portion used, the third factor, allows the court to evaluate the quantity (in terms of the percentage of the work used), as well as the quality of the copied portion. Generally, to qualify as a fair use, the user is not allowed to copy any more of the copyrighted work than is necessary for his or her purpose. Copying of an entire work, or large portions, would not be a fair use. Copying of only a small amount may still be actionable if the copied portion contains the true essence or "heart" of the matter. These determinations are very factually intense.

The effect of the use upon the market for or value of the copyrighted work is often considered the most important factor in determining whether a use is fair. Evaluation of this factor balances the public benefit if the use is permitted against the personal gain the copyright holder would be denied if the use is allowed. If the value of a protected work is destroyed or impaired by the use, it is probably not a fair use.

A parody may fall within the scope of fair use if the unauthorized user takes no more of the copyrighted work than is necessary to conjure up the original. A parody uses elements of a prior author's work to create a new one that comments on the first work.

XII. Assignment and Licensing of Copyrighted Works.

1. Assignment. An author may transfer all or part of the copyright in a work. Copyright may also be conveyed by operation of law and may be bequeathed by will or pass at the copyright owner's death as personal property by the applicable state law of intestate succession.

   Any part or all of the 5 exclusive rights (or subdivisions thereof) of a copyright owner may be transferred separately. In order to transfer copyrights in their entirety, or to grant an exclusive license to exploit certain rights, the transfer MUST BE IN WRITING and SIGNED BY THE COPYRIGHT OWNER. A transfer of copyrights is not valid in the absence of a writing signed by the owner of the rights conveyed. A non-exclusive license is not considered a "transfer of ownership" and thus does not require a written document. A transfer of copyright ownership may be recorded in the Copyright Office.

2. Negotiating a License. In negotiating a license, the following issues should be considered:

   - Is the license exclusive or non-exclusive?

- What is the term of the license and under what conditions will the license terminate, or is it irrevocable? Are there minimum requirements?

- What is the geographic territory covered by the license?

- What is the scope of the licensed rights? How do you intend to use the work product? Do you want the right to sublicense (authorize others to exercise the same rights you have been granted)?

- In what media are you authorized to exploit the work — print media, electronic media, multimedia, audio, etc.?

- What warranties and indemnifications are included in the license?

- What fees or royalties will be paid for the licensed rights?

- If the license requires royalty payments, there is usually a periodic accounting, along with the royalty payment, made to the licensor. Licensors also typically retain a right of inspection/audit with respect to the licensee's books and records as they relate to sales of the licensed work.

- Upon termination, what happens to remaining inventory of licensed product — is there a sell-off period?

- Is there a confidentiality provision?

- What party is required to defend the copyright in the event of infringement?

XIII. Important Contact Information.

Library of Congress
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
Public Information Office — (202) 707-3000
Forms and Publications — (202) 707-9100
Fax-On-Demand — (202) 707-2600
www.copyright.gov