

THE DAILY RECORD

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IP FRONTIERS

An introduction to copyrights

Copyrights are created everyday by people in their jobs, at home and while they doodle on a notepad by the phone. So what exactly is a copyright?

It is a form of protection that is granted to authors of "original works of authorship," like literature, artistic works, musical creations and sculptures, to name a few.

Protection extends to the author's original expression that is seen or contained in the work, but does not extend to any idea, fact, procedure, process, name or slogan. The protection gives the author the exclusive right to reproduce copies of the original work; prepare spinoffs or derivative works that are based on the original work, distribute copies of the work, perform or display the work publically, and prevent any modification to any visual art work that could harm the author's reputation.

For a work to qualify for protection it must meet two standards. First, it must be original to the author (i.e., the author didn't copy from someone else) with a minimal amount of original creative expression in the work. Second, the work must be "fixed," which means capturing the creative expression in a tangible form that is sufficiently permanent for reproduction. (e.g., fixed on paper, in film or on a recording).

The categories of works that can be protected are literary works, visual arts, performing arts and sound recordings. Literary works can include books, poetry, catalogs, ad copy, speeches, software code and computer programs. Visual arts may include paintings, drawings, photographs, sculptures, maps, graphic designs, cartoons and architectural works. Musical compositions, dramatic works, scripts, choreography and movies are examples of works that qualify as performing arts.

Copyright protection comes into existence the moment the work is created in a fixed form and becomes the property of the author who created it, unless other circumstances arise. The decision on whether to register your copyright with the U.S. Copyright Office is voluntary, however, many benefits accompany this act.

Specifically, it is a prerequisite for bringing an infringement lawsuit against anyone, if registration occurs before or within 5 years of publication, a legal presumption is created with regards to ownership and validity, and if registration occurs within 3 months of publication or prior to an infringement of the work, you

may recover statutory damages and attorney's fees.

Although placing the copyright notice on a work is no longer required, it is still a best practice to do this. It informs the public that the work is protected, identifies the owner and shows the year the work was first published. If the work is ever infringed upon and the notice appears on the work or copies of the work, a court will then give no weight to the defendant's claim of innocent infringement.

The notice has three elements that appear together, the first is the symbol that is the letter C in a circle (©) or alternatively, the word "Copyright" or the abbreviation "Copr." can be used. The second element to be included is the year of first publication of the work. The third element is the name or recognizable abbreviation of the owner of the copyright.

The Copyright Office website provides more information on where to place the copyright notice on the work.

For works created after Jan. 1, 1978, protection is automatic from the moment it is created and endures for the live of the author, plus an additional seventy years after the author's death. For works made for hire, anonymous works and pseudonymous works, the term of protection is ninety-five years from the date of publication or one-hundred twenty years from creation, whichever time period is shorter.

Ownership for works that fall under the "work-made-for-hire" doctrine is different. Typically, ownership in "work-made-for-hire" creations rests with the employer or person for whom the work was prepared. If a work prepared by an employee was within the scope of their employment or works are specially ordered pursuant to a signed written agreement for certain copyright categories, ownership rest with the employer.

A copyright owner may transfer any or all of their exclusive rights or any subdivision of those rights. A copyright may also be conveyed by a will or pass as personal property. Importantly, the transfer of any exclusive rights of a copyright is only valid if it is in writing and the writing is signed by the owner of the rights. The transfer of non-exclusive rights, for example, a non-exclusive license, does not have to be in writing.

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In order for a copyright owner to show that his/her work has been infringed, they must initially show that the work is protected and that the infringer violated any one of the exclusive rights (i.e., reproduction, creation of derivative works, distribution of copies, public performance, public display and performance of sound recordings publicly).

To prove one has actually copied the work and the work was not created by pure coincidence and falls within the independent creation defense, one must show that the infringer had access to the work and that the work was substantially similar to the copyrighted work.

Typically, the accused infringer will claim as a defense that their actions fall within the "fair use exemption." This exception allows, under limited circumstances, for a person to reproduce copyrighted work, including for the purposes of criticism, comment, news reporting, teaching, scholarship or research.

Four factors are looked at when determining whether or not a particular copyrighted use is "fair." These are:

- The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- 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 upon the potential market for, or value of, the copyrighted work.

A best practice rule to follow is to always ask permission from the copyright owner before using the protected material.

Relief in infringement actions comes in two forms: temporary and permanent injunctions or seizure orders; and monetary damages. These two forms of relief are not mutually exclusive. Two types of damages can be pursued, actual damages and profits or statutory damages. These two types of damages are mutually exclusive.

Statutory damages can be significant, ranging from a minimum of \$200 per work to a maximum of \$300,000 per work, depending on the facts of the case and the behavior of the infringer. For cases of innocent infringement, damages will range between \$200 to \$150,000 per work that is infringed.

If the infringement is willful, the awards amounts increase significantly, ranging from a minimum of \$750 per work to a maximum of \$300,000 per work.

Copyrights are created and encountered every single day, both at home and at work. If you create a copyrightable work it may have value so it is important to learn and understand what your rights are and how to protect and profit from your creativity.

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