COPYRIGHT 101

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CHAPTER 2

Copyright 101

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I. INTRODUCTION

The Copyright Act (Title 17, United States Code) protects works of authorship in any tangible medium of expression. It is important to note that ideas are not protectable, only the expression of those ideas. Under this law, creators of (among other things) books, theatrical works, computer programs, motion pictures, music, lyrics, choreography, works of art and recordings are granted certain exclusive rights to these works.

Copyrights, along with patents and trademarks, are sometimes also called "intellectual property." While some may debate the "intellectual" qualities of some forms of expression, such as recordings by The Spice Girls or the motion picture "Beavis & Butthead Do America," the key concept is one of a property right. Like other kinds of property, such as real property and personal property, the owner has certain rights in how the work is utilized. It may also be sold or licensed to third parties.

II. THE HISTORY OF COPYRIGHT

In medieval times, through the Renaissance, creative persons such as composers, playwrights, authors and artists, were supported by the state, the church or privately by wealthy patrons. As such, their works were made available to the public without cost since the needs of the artists were taken care of. With the demise of the ruling and the wealthy classes, certain limited rights were granted to these creators so as to encourage and reward them to continue their artistic endeavors. These rights gave the creators a property interest in their work so that they could sell or license it for reproduction.

In 1710, the British Parliament passed "The Statute of Anne," which provided the right to prevent the copying of "writings" for 14 years (renewable for another 14 years), vested in authors and their assigns. French laws of 1791 and 1793 encompassed other works of "fine art," granting authors rights to control the copying, distribution and sale of their works plus a fixed term of rights after each author's death.

III. COPYRIGHT IN THE UNITED STATES

The concept of protection for creative works in this country has been a part of our law since the country was born. Article I, Section 8 of the United States Constitution states, "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." It is these rights that are contained in the current Copyright Act.

Section 106 of The Copyright Act of 1976 (the "Act"), which took effect January 1, 1978, grants to copyright owners the exclusive rights to do and to authorize any of the following:

1. To reproduce the copyrighted work in copies or phonorecords (audio-only devices, such as records, compact discs or audio cassettes);
2. To prepare derivative works based upon the copyrighted work, such as converting a book into a movie;
3. To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
4. In the case of literary, musical, dramatic, and choreographed works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly. The performance may be live, by broadcast or over loudspeaker in a public place (store, museum, etc.). "Public" is defined as persons outside of your family or immediate circle of acquaintances;
5. In the case of literary, musical, dramatic, and choreographed works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture and other audiovisual works, to exhibit the copyrighted work publicly; and
6. In the case of sound recordings, to perform the work publicly by means of a digital audio transmission.[1]

There are some exceptions to these exclusive rights, such as reproduction by libraries and archives, educational and religious uses, fair use and parody. Each of these is defined (more or less precisely) by the Act and by the cases brought involving each exception.

But what do these rights really mean? It means that any person wishing to use a copyrighted work must secure the permission of the copyright owner and negotiate a fee for the use intended. Determining who owns the copyright is not always that easy. As a property right, copyrights can be bought and sold, therefore the ownership may change hands many times over the years. There may be multiple owners, each of whom may need to be contacted. Some agreements between co-owners allow for one controlling party to administer the entire copyright. Others require separate administration by each party for their respective shares.

With rare exceptions, permission and fees for the use of a copyright are totally negotiable. Those exceptions are the statutory mechanical rate for phonorecords and ringtones, and rates for tethered downloads and interactive streaming, which are based upon a compulsory license. Use without permission and negotiation with all relevant parties is infringement and can subject the offender to both monetary damages

[1] The sixth exclusive right flows from the Digital Performance Right in Sound Recordings Act ("DPRA"), which was adopted by Congress in 1995.

and an injunction against further distribution, to be discussed in more detail below.

IV. TERM OF COPYRIGHT

How long does copyright protection last? The rights discussed above are granted to the copyright owner for a limited time. After the expiration of that time, the work falls into the "public domain," which means that anyone can use or copy the work without permission or payment.

Under the 1976 Act, works created after 1978 are protected for the life of the author plus 50 years. If there is more than one author, the term is 50 years after the death of the last surviving author. In 1998, Congress passed legislation (the so-called "Sonny Bono Extension Act") to extend protection to life of the (last surviving) author plus 70 years.

The term for a "work made for hire" is 95 years from date of publication or 120 years from creation, whichever comes first. A "work made for hire" is (1) a work prepared by an employee within the scope of his employment or (2) a work specially ordered or commissioned for use as contribution to a collective work, such as a motion picture. For copyright purposes, the employer is considered the "author" of work and at no time does the creator have an ownership interest in the work.

The terms of copyright in foreign territories vary, although they are based upon the "life plus X years" concept. In the European community, the term is generally life of the author plus 70 years. In other territories, it may extend to life plus 99 years. Because of these different terms, a work could go into the public domain in the United States and still be protected in foreign territories, or *vice versa*.

Under the current Act, copyright protection exists in original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced or otherwise communicated. This means that a song that is sung, but not recorded or written down, is not protected.

The so-called "poor man's copyright," where you mail a sealed copy to yourself and never open it, is of limited value. While it allegedly establishes the date of the postmark as proof of the date of creation, it is not a substitute for proper registration.

V. INFRINGEMENT

The improper use of a copyrighted work, either without the permission of the owner or in violation of the terms of a compulsory license, is an infringement of that copyright. Infringement takes two basic forms: (1) the use of a copyrighted work without the necessary license, and (2) plagiarism.

For use without the necessary license, it is a relatively easy matter for the owner to prove the use and the lack of a license. It is in these situations where the defenses of fair use and parody usually come into play to alleviate the need for a license.

For plagiarism, proving the illegal copying is more complex. There are two key elements to proving a claim of plagiarism: (1) that the allegedly infringing work is "substantially similar" to the original work; and (2) the defendant had "access" to the original work in order to have copied it. These are issues for the trier of fact to determine and must be proved by the plaintiff in that sequence, i.e., if there is no substantial similarity, access doesn't matter.

VI. BENEFITS OF REGISTRATION

While copyright registration is not a condition of copyright protection, there are certain advantages to registering your copyrights with the Copyright Office.

1. Registration is a prerequisite to filing an infringement suit in court for works of U.S. origin.

2. If registration is made within 3 months after publication of the work or prior to an infringement of the work, statutory damages[2] and attorneys' fees will be available to the copyright owner. Otherwise, the copyright owner may only obtain an award of actual damages and/or profits of the infringing party.

3. Registration establishes a public record of the copyright claim, and, if made before or within 5 years of publication, registration will establish prima facie evidence of the validity of the copyright.

4. Registrations may be recorded with the U.S. Customs Service for protection against the importation of infringing copies. For more information, go to the U.S. Customs and Border Protection website at http://www.cbp.gov/xp/cgov/trade/priority_trade/ and click on "Intellectual Property Rights."

[2] Statutory damages are provided in Title 17, Section 504 of the U.S. Code. Basic damages for copyright infringement are currently between $750 and $30,000 per work, at the discretion of the court; however, plaintiffs who can show willful infringement may be entitled to damages up to $150,000 per work. Defendants who can show that they were "not aware and had no reason to believe" they were infringing copyright may have the damages reduced to $200 per work.

VII. BASIC REGISTRATION PROCESS

1. Select Method of Registration: Paper, Form CO[3], or Electronic.

2. Select Proper Form:

If filing by paper, you must call the Copyright Office at (202) 707-3000 and request that they mail you the proper form – Form TX (literary works); Form VA (visual arts works); Form PA (performing arts works, including motion pictures); Form SR (sound recordings); and Form SE (single serials).[4]

If filing with Form CO, go to the Copyright Office website at www.copyright.gov and click on "Forms."

If filing electronically, access eCO by going to the Copyright Office website at www.copyright.gov and clicking on "electronic Copyright Office."

3. Complete Application: The application may be completed by the author, the copyright claimant, the owner of exclusive right(s) or the authorized agent of such author, other copyright claimant or owner of exclusive right(s). [Under certain circumstances, multiple works can be registered with one application and one fee.]

4. Pay Fees: Effective August 1, 2009, registration fees for basic claims[5] are $65 for paper filings, $50 for Form CO filings and $35 for eCO filings. The method of accepted payment varies based on the type of filing.

5. Submit Deposit: Pay special attention to the deposit requirements as they vary based on the type of work being registered. Generally, unpublished works and works first published outside of the U.S. require a deposit of one complete copy or phonorecord. Works first published in the U.S. on or after January 1, 1978 require two complete copies or phonorecords of the "best edition[6].

6. Receipt of Registration Certificate: The Copyright Office website states that 90% of electronic (eCO) filers should receive a certificate with 6 months of completing their application; Form CO-filers within 8 months; and paper filers within 18 months. Regardless of the time needed to process the application, the effective date of registration is the date that the Copyright Office receives *all required elements in acceptable form*. Therefore, it is very important to read all instructions on the application to make sure you are submitting the application, fees, and deposit in the manner indicated, which is always subject to change. This is especially true now that there are three distinct methods of applying for registration.

[3] Form CO is a new fill-in form for basic registrations, which replaces Forms TX, VA, PA, SE, and SR. It is basically a hybrid of the electronic filing and paper filing system because you fill in the form on your personal computer, but then you print and mail the form in to the Copyright Office for processing.

[4] Certain applications must be completed on paper, such as Form RE renewals of copyright claims and forms for group submissions. These forms are still available on the Copyright Office website at www.copyright.gov/forms/.

[5] Basic claims include (1) a single work; (2) multiple unpublished works if they are all by the same author(s) and owned by the same claimant; and (3) multiple published works if they are all first published together in the same publication on the same date and owned by the same claimant.

[6] The Copyright Office has interpreted this to mean that eCO filers may still need to mail in a hard copy or copies to comply with the "best edition" language of the Copyright Act. For example, if you are applying for registration of a published CD on eCO, you must currently mail in hard copies of the CD as the actual CD is considered the "best edition" of the published work (not the electronically uploaded files). You must print out a shipping slip from the eCO website to accompany such deposit.