The Myths and Traps of Copyright Law

by
David G. Henry, JD
(Munck, Wilson & Mandala / Baylor Law School)

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A. Copyright's Foundation.

Article II of the U.S. Constitution gives Congress the explicit power "To promote the progress of science…by securing for limited times to authors…the exclusive right to their…writings…." Copyright laws are codified in Title 17 of the United States Code. Any work that embodies originality in the expression of ideas or information is legally protectable if it is "fixed" in a "tangible medium of expression."[1] Copyright may apply to 1) literary works, 2) musical works, 3) dramatic works, 4) pantomimes and choreographic works, 5) pictorial, graphic or sculptural works, 6) motion pictures and other audiovisual works, 7) sound recordings, and 8) architectural works.

B. Duration of Copyright Protection.

A work that was created (fixed in tangible form for the first time) on or after January 1, 1978, is automatically protected from the moment of its creation and is ordinarily given a term enduring for the author's life plus an additional 70 years after the author's death. In the case of "a joint work prepared by two or more authors who did not work for hire," the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.

Works Originally Created Before January 1, 1978, But Not Published or Registered by That Date have been automatically brought under the copyright statute and are now given federal copyright protection. The duration of copyright in these works is generally computed in the same way as for works created on or after January 1, 1978: the life-plus-70 or 95/120-year terms apply to them as well. The law provides that in no case would the term of copyright for works in this category expire before December 31, 2002,

[1] 17 U.S.C. § 102(a) lists 8 broad, non-exhaustive categories of works subject to copyright protection.

and for works published on or before December 31, 2002, the term of copyright will not expire before December 31, 2047.

Under the law in effect before 1978, copyright was secured either on the date a work was published with a copyright notice or on the date of registration if the work was registered in unpublished form. In either case, the copyright endured for a first term of 28 years from the date it was secured. During the last (28th) year of the first term, the copyright was eligible for renewal. The Copyright Act of 1976 extended the renewal term from 28 to 47 years for copyrights that were subsisting on January 1, 1978, or for pre-1978 copyrights restored under the Uruguay Round Agreements Act (URAA), making these works eligible for a total term of protection of 75 years. Public Law 105-298, enacted on October 27, 1998, further extended the renewal term of copyrights still subsisting on that date by an additional 20 years, providing for a renewal term of 67 years and a total term of protection of 95 years.

Public Law 102-307, enacted on June 26, 1992, amended the 1976 Copyright Act to provide for automatic renewal of the term of copyrights secured between January 1, 1964, and December 31, 1977. Although the renewal term is automatically provided, the Copyright Office does not issue a renewal certificate for these works unless a renewal application and fee are received and registered in the Copyright Office.

Public Law 102-307 makes renewal registration optional. Thus, filing for renewal registration is no longer required to extend the original 28-year copyright term to the full 95 years. However, some benefits accrue to renewal registrations that were made during the 28th year.

C. Enforcement of Copyright.

Federal District Courts have exclusive jurisdiction for all civil copyright infringement actions arising under copyright law.[2] Remedies under federal law include monetary damages, statutory damages and injunctive relief.[3] Monetary damages are based on either profits from the infringement or plaintiff's losses, but not both. Statutory damages by one unintentional infringer of one work are $750.00 to $30,000.00; damages from intentional infringement of multiple works are up to $150,000.00 per work. Additional

[2] 28 U.S.C. § 1338.
[3] 17 U.S.C. §501, *et seq.*

remedies may include forfeiture or destruction of the counterfeiting items, court costs, attorney's fees if the copyright had been registered, sanctions as well as criminal prosecutions.[4]

D. Copyright: Sometimes More, and Sometimes Less Than Often Believed.

While, as mentioned, copyright extends to the original *expression* of ideas and information, there is no copyright protection for the underlying ideas or pieces of information themselves. In this sense, copyright law provides less protection than many believe. Items that are not subject to the protection of U.S. copyright law include ideas, data, procedures, processes, systems, methods of operation, concepts, principles, natural laws or discoveries.[5] The mere listing of individuals or businesses and respective telephone numbers in a telephone directory, for example, is "mere information" which is devoid of original expression and outside the reach of copyright protection.[6] The same is true of a mathematical theorem, or the representation of a chemical formula, even if set out in a copyrighted textbook.[7]

Another area in which less than expected copyright protection may exists relates to the often-times assumed rule that one cannot legally reproduce, sell, or otherwise make available something that is similar to, or even exactly the same as a copyrighted work. Whether doing so would amount to copyright infringement depends on how one arrives at the near, or identical likeness of someone else's work. To state it most simply: "Copyright is about copying, not about the end result." So, if one arrives, through completely independent effort, at an end product that just happens to be even identical to another's copyright-protected work, this is no infringement. However, as discussed below, even a substantially *different* rendition of a copyrighted work may reflect infringement, if arriving at the final product involved even partial taking of the other party's work.

A realm of copyright law that provides *more* protection than often believed has to do with when the copyright begins. Copyright protection automatically starts from the

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[4] *Id.*

[5] *See* 17 U.S.C. § 102(b).

[6] *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 350 (1991)

[7] It should be noted that U.S patent and trademark law may provide protection to some subject matter that is excluded from copyright protection (See, respectively, 35 U.S.C. §101, *et seq.* and 15 U.S.C. §101, *et seq.*).

time the work is fixed in a tangible or material form.[8] As will be discussed below in more detail, the basic copyright is in no way dependent on the filing of any document with the government, or the use of any particular notice.[9]

The list of actions which may constitute copyright infringement also is more expansive than many assume. Section 106 of the 1976 Copyright Act gives the copyright owner (or holder) the exclusive right to do, or authorize others to do quite a few more things than many believe. These areas of exclusivity for a copyright owner include: 1) to reproduce or make copies of the work, 2) to prepare derivative works and compilations, 3) to distribute by sale or other ownership transfer, or by rental, lease or lending, 4) a qualified right of public performance, 5) qualified right to display the work, and 6) to perform sound recordings publicly via digital audio transmission.[10]

The exclusive rights of copyright extend far beyond those assumed by most people who are unfamiliar with copyright law basics, and therein lie traps for the unwary. As example of copyright infringement that might not occur to many as infringement would be the showing of a rented movie to one's entire neighborhood on an outdoor screen and projector (such as at a "block party"). Most everyone knows that outright duplication of a rented movie amounts to copyright infringement, while watching the recorded movie at home, in private, is perfectly acceptable. However, many might fail to recognize that the neighborhood performance of the very same movie would likely infringe the copyright in the motion picture as it applies to *public performance* or display – a right reserved to the copyright owner.

Another common example of an assumed (but nonexistent) way around the copyright of another is by mythical "percent change rule." As mentioned, copyright law not only affords its owner the exclusive right to make verbatim copies of a protected work, but *also* the *exclusive* right to make "derivative works" thereof. A derivative work is an adaptation, translation, abridgement, augmentation, or most any other form of "changing" a prior, copyrighted work. Many believe that, if a copyrighted work is changed to some

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[8] 17 U.S.C. § 401

[9] Although copyright notice is no longer required under U.S. law, it is nonetheless recommended because it informs the public that the work is copyright protected, it identifies the copyright owner and it indicates the year of first publication, and, under certain circumstances, deprives certain infringement defendants of any claim of innocent infringement (*See* 17 U.S.C. § 401).

[10] *See* 17 U.S.C. § 106.

degree (usually stated in terms of a percentage of change), then there is no copyright infringement. This is completely false! The very fact that one has changed or adapted an existing work, almost by necessity would mean that one has both reproduced it (to arrive at the starting point of the adaptation or change) and has, by changing it, created a derivative work.

It is worth emphasizing that, if one is accused of copyright infringement and professes to have changed the original, copyrighted work "enough", this may well amount to an *admission* of copyright infringement!

E. Copyright Ownership: "Before You Pay, Be Sure That You Really Will Get That Bridge", and Other Lessons.

Copyright ownership is a topic relating to another fertile ground for unexpected and unfortunate surprises. One trap for the copyright novice comes in the form of "works-for-hire", or rather works that are *not* works-for-hire, but are assume to be such. A pervasive myth surrounding copyright law is that, if one pays for the creation of a copyrighted work, or if one pays for the "original" of a copyrighted work, ownership of the copyright follows the acquired item. Without more, merely paying for a copyrighted work, or for its creation in no way transfers the copyright in the work from its creator to the paying party.

An individual or business entity can come to own copyrights in only a limited number of ways. An individual who creates a copyrightable work and fixes it in tangible form will own the copyright in that work[11], unless: (1) he or she created the work other than in the course and scope of employment for another[12]; (2) contractually assigned or agreed to assign the copyright to another (in writing)[13]; or (3) created, by commission, one of several limited number of items which may be deemed "works-for-hire" in writing[14] (such categories will be described below).

Generally, a business entity will only own the copyright in a work which: (1) is created by its ***employee*** in the course and scope of the employee's ordinary work duties

[11] 17 U.S.C. § 201(a)
[12] 17 U.S.C. § 201(b)
[13] 17 U.S.C. § 204
[14] 17 U.S.C. § 101

(this is one of only two forms of a true "work-for-hire"); or (2) is assigned to it through a written assignment.

A person or business entity will own the copyright in a commissioned work, so long as that work is expressly agreed (in writing) to be a "work-for-hire" ***and*** is a work that is specially ordered or commissioned for use: (1) as a contribution to a collective work, (2) as a part of a motion picture or other audiovisual work (3) as a translation, as a supplementary work, (4) as a compilation, (5) as an instructional text, (6) as a test, (7) as answer material for a test, or (9) as an atlas.[15] Note than this is a very restrictive list of works that, even by contract, can be deemed a "work for hire". Finally, one can inherit a copyright, just as any other kind of property, and copyrights can be seized if pledged as collateral or in satisfaction of judgments.[16]

A description of the ways in which one can own a copyright is as important for that which it does *not* include, as for what it does include. A most dangerous, and often costly myth in the copyright realm provides that paying another to create a copyrightable work, without more, vests copyright in the paying party.

A common and unfortunate clash of the myth and reality often comes in the context of specially commissioned software. As is often the case, a business may hire an outside contractor (not a true ***employee***) to create special software, often at considerable expense. Because the software creator is not an employee of the hiring business, and because software is not on the list of items which can be designated as a "work-for-hire", unless the software creator signs an agreement which conveys the copyright to the hiring business (a "written assignment"), the copyright in the software remains with the creator, regardless of the amount paid for its creation. Upon completion of the software project, the paying business, under these circumstances, often assumes that it "owns" the software in all respects, but such is not the case. The unpleasant reality often becomes apparent when business management decides to have a different software designer create a newer version or upgrade (a "derivative work"), or decides to sell or license the software to a third party. It is then that the business may learn that, without a prior written assignment of the copyright, and regardless of how much was paid for the software

[15] *Id.*
[16] 17 U.S.C. § 201(d)(1)

development, the business possesses merely the right to *use* the software, *not* the right to change it, sell it, license it to others, or do most anything else outside of the originally anticipated nature of use(s) of the software.

Another instructive example is that of the purchase of an original work of art. Assume, for example, that a person purchases, at considerable expense, the "original" of a piece of art. Regardless of the price paid, without a written assignment of the copyright from the artist, or from someone who acquired the copyright from the artist, the purchaser merely holds the right to possess the one, physical manifestation of the copyrighted work.[17] Perhaps to the purchaser's surprise and consternation, he or she does not have the right to make copies, to put on public exposition, to create any derivatives works, etc.

F. Copyright Fair Use: "But I Copied It For Use In My Class!"

Yet another trap for the unwary relates to "fair use" of a copyrighted work. It is true that the rights afforded by copyright are not absolute, nor unlimited in scope. Sections 107 through 121 of the 1976 Copyright Act provide specific exemptions from copyright liability, or limit the reach of copyright exclusivity.

Simply stated: "fair use" of a copyrighted work is that which, though within the scope of activities explicitly proscribed under Section 106 of the Copyright Act, is permitted, without consent of the copyright owner, if the use of the copyrighted material is in a reasonable and limited manner, and, on balance, sufficiently meets certain statutory criteria.[18] Examples of fair use: when the copyrighted work is used in a review, criticism, or parody; short quote or small reproduction for scholarly (non-profit) work or by a teacher or student; summary for a news report or publication; reproduction by a library or for legislative or judicial proceedings; incidental, ancillary or fortuitous reproductions.

It is very important to realize that the Fair Use Doctrine does not reach nearly so many instances of copyright exploitation as many would like to believe, and there is no

[17] 17 U.S.C. § 202

[18] For a case in which these factors are applied, *see Hustler Magazine, Inc. v Moral Majority, Inc*., 606 F.Supp 1526 (C.D. Cal.), aff'd 796 F2d 1148 (9th Cir. 1985).

simple test to determine when it applies.[19] Many assume, for example, that, if copying is done for "educational purposes", this alone insulates the copier from copyright infringement liability. Fair use protection relating to education (or otherwise) is not nearly so broad as many would believe. Assume, for example, that a teacher, perhaps under pressure from a school to save money, copies text book excerpts or student worksheets for his or her class. Particularly because the copyright owner's sole commercial exploitation opportunity of the work is in selling copies to schools, there is little chance that such copying will be found to be fair use, and both the teacher and the school could find themselves "in hot water." Buying a single professional journal, and making copies for multiple employees of a business is another practice, which is often assumed to be fair use. A number of companies have learned the hard way that such a practice rarely amounts to fair use, and can yield substantial copyright infringement liabilities.[20]

G. Copyright Registration: Optional, But Not Really.

Finally, the issue of copyright registration represents an area of considerable confusion and frequent mistakes. It is no longer required, as it once was, to register a copyright, for the copyright to survive after publication of a work.[21] So far as it goes, therefore, it is true, as many report, that copyright registration is no longer required in the United States. However, if a copyright owner publishes their work and fails to register the work before the latter of three months from publication, or before an act of infringement for which they wish to sue (whichever is the latter), the copyright owner will be deprived of any right in an infringement action to receive "statutory damages" (automatic damages which do not require strict proof of injury), as well as attorneys fees.[22] Therefore, failing to register one's copyright may well render an otherwise economically viable copyright infringement suit into one, which simply cannot be justified from an economics standpoint.

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[19] In *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), the Supreme Court confirmed that the task of evaluating fair use cases "is not to be simplified with bright line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." Id. at 1170, citing *Harper & Row v. Nation Enterprises*, 471 U.S. 539(1985) and *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 104 S.Ct 774 (1984), "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." *Acuff-Rose*, 114 S.Ct. at 1170-1171.

[20] American *Geophysical Union et al. vs. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

[21] 17 U.S.C. § 408

[22] 17 U.S.C. § 412

Another area of confusion relating to copyright registrations (as well as the use, or not, of copyright notices) relates to material found on the internet. This author has defended a number of companies whose marketing departments found and used images though an internet search and believed (because there was no copyright notice and/or merely because it was available to all on the internet) that the image was "fair game". As a starting point, one would most safely assume that every image and every article on the internet (or anywhere else, for that matter) is the subject of valid copyright protection. This would apply for anything that one is not certain to be quite old and beyond any reasonable reach of copyright (the *Mona Lisa*, for example). An unpleasant trap for the above-mentioned companies has been through lawsuits filed by persons or companies who derive their income from combing websites for images and verbiage that are the subject of copyright registrations. Even though the actual damages in any of these cases may be minimal (if any at all), if a copied image is registered within the applicable deadlines, the prospect of the award of statutory (automatic) damages and attorney's fees to the copyright owner, as well as the substantial litigation expenses for defending the case, often makes paying a settlement amount far in excess of any actual damage, or value to the company, the only "reasonable" business option. Bottom line: do not copy images or verbiage from third party sources (or make derivations of any such works), unless you have an express license to do so, or are absolutely *certain* that the work is in the public domain.

H. Conclusion.

In summary, a copyright applies to more things, provides more rights, is easier to infringe, and/or is harder to own than most people believe. In view of the severity of penalties for copyright infringement, it is important understand the basic principles discussed in this article, and to seek advice of knowledgeable and experienced counsel when subject to any uncertainty.

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ABOUT THE AUTHOR

David G. Henry, Sr. With nearly four decades of experience dedicated to advising clients around the globe on the inception, protection and monetization of all types of intellectual property

assets. David is the Lead Partner of the Waco office of Munck, Wilson & Mandala. His practice is focused on handling a wide variety of patent, trademark, trade secret and copyright matters, ranging from enforcement and defense of rights in litigation to strategic planning, prosecution, registration and licensing. David is a registered patent attorney with the United States Patent and Trademark Office (USPTO) and the Canadian Patent Office.

He has substantial experience in helping clients identify, strategically manage and protect both domestic and foreign intellectual property assets. At any given time, he is taking lead in a number of patent or trademark infringement actions before federal courts throughout the U.S., as well as certain, selected activities at the USPTO.

David has successfully resolved, through trial, pre-trial, mediation, administrative procedures, and other strategies *both* patent prosecution and litigation matters involving a broad range of technologies. He has both prosecuted and litigated patents concerning medical devices, petroleum exploration technologies, electrical grid management systems, food and beverage production technologies and devices, electronic election systems, space mission systems and animal care products.

In addition to his career pursuits, David serves on a judicial advisory panel for formulating patent case rules and procedures and is passionate about teaching the next wave of lawyers and entrepreneurs. He has served as a patent law professor at Baylor Law School since 1994, and now teaches in the Entrepreneurship Program of Baylor's Hankamer School of Business. David also serves as a co-director for the United States Patent & Trademark Office's licensed IP clinic program at Baylor Law School, through which he mentors provisionally-licensed law students in servicing under-privileged inventors and entrepreneurs. In addition, he is an accredited Continuing Legal Education presenter on Intellectual Property and Export Control Law issues for multiple bar associations as well as a speaker at periodic USPTO events.

From his many years as an accomplished pilot, David posts periodic updates (including unique, pilot-perspective photographs) on his popular website: **www.davidghenry.com**. He also channels his passion for aviation into his private practice as he flies, nation-wide, to meet clients and manage his various patent and trademark projects and cases. It is, in part, because of his well-known stance that “geography is never an issue when working with me”, that David’s practice extends throughout the United States (and beyond).

Finally, David is a Lieutenant Colonel in the United States Air Force’s Auxiliary where his unit flies humanitarian, search and rescue and disaster relief missions under auspices of the U.S. Air Force and a variety of federal and state emergency services agencies.