TOP TEN COPYRIGHT MYTHS

COMMITTEE ON COPYRIGHT AND LITERARY PROPERTY

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The New York City Bar Association's Committee on Copyright and Literary Property includes attorneys whose practices and passions are centered in copyright. Over the years, our members have again and again encountered the same misunderstandings about copyright law – what we refer to here as "copyright myths." To help educate our fellow lawyers and the public about copyright law and bust these repeat offenders once and for all, we are pleased to illuminate the Top Ten Copyright Myths in this report.

This report was prepared by the Copyright Myths Subcommittee, whose members are identified on the final page.

COPYRIGHT MYTH #1: "You must register your work to own a copyright in it."

FACT: ***Copyright does not require registration, but you probably should register it anyway***.

Becoming the owner of a copyright is more a metaphysical process than a bureaucratic one. Copyright attaches and you own it, effortlessly, at that transforming moment when you, the "author," "fix" your "original" "work" in a "tangible medium of expression": when you record your song on tape, write your words on paper, put your oils on canvas. 17 U.S.C. § 102. The result of this alchemy is that you automatically have a "copyright, meaning a bundle of exclusive rights in your work: (1) the right to reproduce it; (2) the right to prepare derivative works based on it (like a film adaptation of a novel or a stage version of a film); (3) the right to distribute copies to the public; (4) the right to perform it publicly (if it's a performable kind of work), and (5) the right to display it publicly (if it's a kind of work that can be displayed). 17 U.S.C. § 106. And "exclusive" means that no one else is allowed to do or authorize others to do those things without your permission.

Though registration is optional, it does have its benefits. First, you can't sue someone for infringing your copyright unless you register it first. While you can meet that requirement by registering before filing a complaint, there are other compelling reasons to register early. If you don't register your copyright before an infringement takes place, you may be blocked from recovering statutory damages and attorney's fees from the infringer.[1] You still may be able to recover actual damages and profits from the infringement, but doing so is notoriously tricky to prove in copyright cases. Considering that, timely registration may easily be worth the minimal investment ($35) and effort.

[1] Statutory damages can run up to $150,000 per infringed work and attorney's fees often are significant in copyright lawsuits.

COPYRIGHT MYTH #2: "You must put a copyright notice ("©") on your work to protect it."

FACT: ***Copyright notices are no longer required, but using them is still good practice.***

This myth was once the law in the United States -- a work published without a copyright notice could lose U.S. copyright protection permanently. The notice requirement was abolished when the United States adhered to the Berne Convention on March 1, 1989, so the notice is not a mandatory condition of protection for works first published now.

Though using a copyright notice is now optional, doing so is the wiser choice. A notice may discourage infringement by telling potential users that the work is protected and identifying the copyright owner. The notice may also allow the owner to collect more money from an infringer: a successful "innocent infringement" defense reduces the amount the owner can recover, but a proper notice can block the infringer from raising the defense.

The three general elements of a copyright notice: (1) The symbol © (letter C in a circle) or the word "Copyright" or "Copr." (or a circled "P" on a phonorecord of a protected sound recording); (2) the year of first publication; and (3) the name of the copyright owner. *Example:* *© 2014 New York City Bar Association.* For more specific guidance see U.S. Copyright Office Circular 3, *Copyright Notice*.[2]

COPYRIGHT MYTH #3: "If someone steals my idea for a movie or TV show, I can sue for copyright infringement."

FACT: ***Copyright does not protect ideas.***

There is a widespread belief that concepts for movies, television shows and other creative works are proprietary and, if someone produces something based on your idea, you're entitled to compensation for it. Not so. If you develop your idea into a "tangible medium of expression" (put it in writing, record it on video, etc.) copyright will protect that expression, but not the underlying idea.

The more advanced the development of an expression becomes – the more detailed and specific, the less general and indefinite – the stronger the protection gets. You couldn't win a suit against Lucasfilm just because you first had an idea for making a movie about the struggle between good and evil a long time ago, probably even in another galaxy. But you'd have a better chance if you'd turned your idea into a screenplay and you could show that they'd lifted your characters, your dialog, or your specific plot.

Copyright law strives to respect this "idea/expression dichotomy." That objective is voiced in the Copyright Act: "In no case does copyright protection for an original work of

[2] Accessible at http://copyright.gov/circs/circ03.pdf.

authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . .” 17 U.S.C. § 102(b).

Important policy underlies this rule. The Constitution authorizes limited monopolies for authors and inventors “to promote the progress of the sciences and useful arts” by encouraging the production of creative work but without hindering future creativity. The idea/expression dichotomy rewards an author’s developed accomplishments while letting others create their own works from the common resources of tradition and human imagination.

(Note that laws other than copyright may protect certain ideas – for example, where a claimant proves that he or she was induced to disclose an idea by a broken promise to pay for the idea, or where the taking violated a contract or involved a fiduciary relationship. Cases like this depend on proof of special facts that wouldn’t be required for copyright infringement claims.)

COPYRIGHT MYTH #4: “Copyright protects hard work.”

FACT: ***Hard work may be rewarded, but copyright doesn’t reward hard work alone.***

If the work is just collecting or reorganizing existing facts or information, copyright won’t stop others from using that work product without your permission.

The obsolete “sweat of the brow” or “industrious collection” doctrine mistakenly asserted that copyright rewards the work that goes into researching and compiling facts. That notion ultimately was discarded because it ignored a basic requisite of copyright: *Originality*.

It may seem unfair that “the fruit of the compiler’s labor may be used by others without compensation,” but copyright protection extends only to original expression and not “the ideas and information conveyed by a work,” which others are free to use. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991).

But don’t despair entirely. Even though copyright won’t protect the existing material you’ve spent your time and effort compiling, it may protect your original selection or arrangement of the material or any other original elements you’ve added to the project.

COPYRIGHT MYTH #5: “If I hire a freelancer to create a work, it’s a ‘work made for hire’ and I will own the copyright”.

FACT: ***A work will be deemed “made for hire” only under certain conditions.***

First, if the work is created by a true “employee” working within the scope of his or her employment, the employer will automatically own the copyright and the law treats the employer as the “author” of the work. 17 U.S.C. §201(b). But if a freelancer (*i.e.*, an independent contractor) creates the work for you, it won’t be considered to be made for hire – even if you pay for it -- unless three things happen: (i) Both you and the freelancer must sign a written agreement saying so explicitly; (ii) The work must be specially ordered or commissioned; and

(iii) it must be ordered or commissioned for use in one of nine categories listed in the copyright statute.[3] 17 U.S.C. §101.

If the work doesn't qualify for work-for-hire treatment, you still should be able to acquire ownership of the copyright if the author assigns his or her rights in the work (in writing). However, assignments don't provide the same benefits. For example, the assignment will be subject to termination after 35 years under §203, and the term of the copyright will be different. If you don't have either for-hire status or an assignment, the extent of your rights in the work will depend on your particular circumstances but will predictably be less than full ownership. (Parties who commission material under for-hire agreements often include backup assignment language in case the work is ultimately found not to qualify.)

The bottom line: If you engage a freelancer to create something, don't assume that you'll own the work just because you've paid for it: You'll have to get your documents in place too.

COPYRIGHT MYTH #6: "I can use up to 10% of a copyrighted work without permission, or four bars of a song, because that would be a 'fair use' and not an infringement."

FACT: ***Fair use has no bright lines.***

The "fair use" doctrine is a complicated area of copyright law. There is no single, clear or simple test for deciding whether any use is "fair," and there is no bright-line rule for how much you can take without permission from the copyright owner. The law requires a flexible, fact-driven analysis in every case, and the amount of the material taken is only one of the factors that goes into it.

The fair use doctrine is codified in Section 107 of the Copyright Act and has been interpreted in a multitude of court decisions. At the highest level, fair use allows you to use copyrighted material without the owner's permission if the harm to the owner is outweighed by the benefit of your use to society in creativity and innovation, as judged within guidelines recognized by the law.

Section 107 says fair uses include those made for purposes like criticism, comment, news reporting, teaching, scholarship, or research. It also prescribes four factors to be evaluated in each case: (1) the purpose and character of the use, including whether it is commercial or nonprofit/educational; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; and (4) the effect of the use on the potential market or value of the copyrighted work. Other factors may be considered too: For example, courts often decide that a use was fair because the second work – the one doing the taking – "transformed" the first. No single factor controls the analysis in isolation: all are weighed and balanced against each other

[3] Those categories include only works commissioned for use as one of the following: (1) a contribution to a collective work, (2) part of a motion picture or other audiovisual work, (3) a translation, (4) a supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test, or (9) an atlas. Section 101 also provides special definitions of the terms in categories (1), (2), (4) and (5). Note that pre-1978 works are treated somewhat differently under the prior law.

and the result will depend on the "totality" of the factors, not an arithmetic tally. *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569 (1994).

While it may seem intuitive that you should be allowed to use just a small portion of a work, the third factor (amount and substantiality) is qualitative as well as quantitative. If the portion you take is especially important, the taking could be an infringement even though the amount seems small. In one important case heard by the Supreme Court, a magazine had quoted only 300 words of President Ford's 200,000-word memoir, "A Time to Heal." Yet, the brevity of the quote didn't excuse the taking because the Court found that the excerpt – which related to Ford's pardon of Nixon –was "the heart of the work." *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985). In another Supreme Court case, the Court held that you can be liable for infringement for taking only a few notes from a song if those notes are the "hook" that made the song popular. *See Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569 (1994). (On the other hand, the use of an entire work has been allowed when the use was judged "transformative." *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd*., 448 F.3d 605 (2d Cir. 2006).)

The bottom line: There are no valid formulas that allow or prohibit the use of any particular amount of somebody else's copyrighted work. The popular rules of thumb that persist out there are seductive but unreliable.

COPYRIGHT MYTH #7: "I may use protected material without permission if I use it strictly for educational purposes and give the author credit."

FACT: ***There is no blanket exception for all educational use.***

The general rule is that *only* the copyright owner may copy, distribute or perform protected material, display it publicly, or make "derivative" uses of it like adaptations for other media (17 U.S.C. § 106). Anyone else, including educators, must get permission.

There are exceptions, including some for educational uses. For example, instructors and pupils may perform or display protected material "in the course of face-to-face teaching activities of a nonprofit educational institution," in a classroom or a similar place devoted to instruction (17 U.S.C. § 110(1).) (This may not apply if they use an unlawful copy of a movie or video.)

Also, no permission is needed for "fair use" (17 U.S.C. § 107), and if a use is for a nonprofit educational purpose, that fact will be considered in deciding if the use was "fair" (17 U.S.C. § 107(1).) But that alone won't be dispositive: the decision will require a multifactor, fact-intensive analysis.

Finally, as to attribution: Despite a widespread but mistaken belief, giving the author credit won't shield the user from liability for an unauthorized use of protected material. Attribution could factor into a fair use analysis but it is not, standing alone, a recognized defense against an infringement claim. In fact, attribution plays practically no role under copyright law in the United States, although failure to give credit could be an independent ground for a claim if the material concerned is "visual art" (*e.g.*, a painting or sculpture) (17 U.S.C. § 106A).

COPYRIGHT MYTH #8: "If it's on the Internet, it's free."

FACT: ***Copyright law applies equally to the Internet.***

Many think everything on the Internet is free for the taking because copying and sharing of Internet content is easy and widespread. In fact, copyright-protected material found on the Internet is subject to the same rules against infringement as material distributed in the offline world. This means that unauthorized copying or sharing of material from the Internet, even if non-commercial, can infringe copyright and lead to a claim unless it is covered by fair use or another exemption under copyright law.

There are exceptions here, too. Courts have held that sharing videos and images by embedding links on webpages isn't "direct" copyright infringement if the media are hosted on and streamed from someone else's server. *See Flava Works, Inc. v. Gunter*, 689 F. 3d 754 (7th Cir. 2012); *Perfect 10, Inc. v. Google, Inc.*, 653 F. 3d 976 (9th Cir. 2011). Also, the Digital Millennium Copyright Act, passed during the rapid expansion of the Internet in the mid-1990s, exempts online service providers (video sharing websites, social media platforms, search engines, web hosts, etc.) from liability for infringements caused by users of the services rather than by the service providers themselves. (The DMCA does not protect end users who upload the content.)

If you wish to use copyright-protected material you find on the Internet, the safest course is to get permission from the copyright holder or consult an attorney with experience in copyright law (or do both). A possible alternative is to use material published on the Internet under a "Creative Commons" or similar license that allows use without further permission under specified conditions, such as providing attribution and using the material for a non-commercial purpose only. If you can't get a conventional license for the material you want on satisfactory terms, and if you can live with the conditions, you may be able to find acceptable substitute content published under one of these alternative licensing systems.

COPYRIGHT MYTH #9: "If I make a good faith effort to get permission to use a copyrighted work but can't find the owner, I'm allowed to use it without permission."

FACT: ***There is no protection for using "orphan works" without permission.***

Even the best intentions won't get you off the hook if the copyright owner emerges and sues you for infringing.[4]

If this seems harsh to you, you have company. Even the U.S. Copyright Office has expressed discontent with the "uncertainty surrounding the ownership status of orphan works". (It defines these as "original work[s] of authorship for which a good faith, prospective user

[4] When the University of Michigan announced an Orphan Works Project that was going to make a list of purported orphan works available for the University of Michigan community to view, print and download, The Authors Guild brought a lawsuit to stop the project from proceeding.

cannot readily identify and/or locate the copyright owner(s) in a situation where [their] permission . . . is necessary as a matter of law." *Copyright Office Notice of Inquiry, Orphan Works and Mass Digitization*, 77 Fed. Reg. 64555 (Oct 22, 2012).)

The Copyright Office is not alone in recognizing the frustration and liability risks that orphan works create for good faith users. Several bills have been introduced in Congress to address the issue but none have been enacted so far. And the Supreme Court has declared the problem one for legislative, not judicial resolution. *Golan v. Holder*, 132 S.Ct. 873, 893-94 (2012).

The bottom line: if you're unsure if a work is protected by copyright and you can't find the owner, the only sure way to avoid liability is not to use the work.

COPYRIGHT MYTH #10: "International copyright will protect my work throughout the world."

FACT: ***There is no unified global copyright law or unitary international copyright.***

Copyright protection is "territorial": It depends on the separate national laws of each country, even in the age of the Internet, and none of those laws has any extraterritorial effect outside the enacting country.

However, most countries offer protection to foreign works through international treaties and conventions. The United States is a party to a number of these, including the Berne Convention for the Protection of Literary and Artistic Works, since March 1, 1989, the Universal Copyright Convention (UCC), since September 16, 1955, and others. The U.S. also has bilateral agreements with other countries, which may supplement the protections conferred by the multilateral treaties. *See* Copyright Office Circular 38a, *International Copyright Relations of the United States*).

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