THIS CHAPTER IS FROM THE INTERNET LAW AND BUSINESS HANDBOOK

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(the book is currently out of print, but being revised, to reserve a copy send an email to mradcliffe@sonic.net)

CHAPTER 1

COPYRIGHT LAW

There are four major intellectual property laws in the United States that are important for Internet users:

- Copyright law
- Patent law
- Trademark law
- Trade secret law

In this chapter, we will discuss copyright law, the most important of the intellectual property laws for Internet users. Patent law, trademark law, and trade secret law are discussed in chapter 2.

Ownership of copyrights and other intellectual property is discussed in chapter 3. Other laws that create rights somewhat like intellectual property law rights—privacy and publicity laws–are discussed in chapter 7. Laws protecting copyright management information and copy prevention devices are covered in chapter 24.

INTRODUCTION

Copyright law in the United States is based on the Copyright Act of 1976, a federal statute that went into effect on January 1, 1978. We'll refer to this statute throughout the book as the Copyright Act. The Copyright Act (Title 17 of the United States Code) is available online in Adobe Acrobat PDF format at http://www.loc.gov/copyright/title17. The United States Copyright Office, part of the Library of Congress, handles copyright registrations (discussed later in this section) and provides information on copyright law on its Web site, www.loc.gov.

States cannot enact their own laws to protect the same rights as the rights provided by the Copyright Act. 17 USC δ 301. For example, a state cannot pass a law to extend copyright protection on works in the state beyond the term of protection given by the Copyright Act. State "copyright" laws exist, but they are limited to works that cannot be protected under federal copyright law. (Requirements for federal protection are discussed in "Standards," later in this chapter.)

Copyright law is important for Internet users for three reasons:

- Much of the material that is on the Internet is protected by copyright, making copyright law a concern for those wishing to use material they find on the Internet. This topic is discussed in "Using Materials from the Web," chapter 9.
- The types of pre-existing material used for Web site content—text, graphics, photographs, and music—are copyrightable, and much of this material is protected by copyright. Web site owners and developers and Web product designers and publishers must avoid infringing copyrights owned by others, as explained in chapters 9 and 10.
- Copyright protection is available for Web sites and new Web content. This topic is discussed in "Copyright Protection," chapter 26.

TYPES OF WORKS PROTECTED BY COPYRIGHT

Copyright law protects "works of authorship." 17 USC δ 102(a). The Copyright Act states that works of authorship include the following types of works:

- Literary works. Novels, fictional characters, nonfiction prose, poetry, newspaper articles and newspapers, magazine articles and magazines, computer software, software documentation and manuals, training manuals, manuals, catalogs, brochures, ads (text), and compilations such as business directories.
- Musical works. Songs, advertising jingles, and instrumentals.
- Dramatic works. Plays, operas, and skits.
- Pantomimes and choreographic works. Ballets, modern dance, jazz dance, and mime works.
- Pictorial, graphic, and sculptural works. Photographs, posters, maps, paintings, drawings, graphic art, display ads, cartoon strips and cartoon characters, stuffed animals, statues, paintings, and works of fine art.
- Motion pictures and other audiovisual works. Movies, documentaries, travelogues, training films and videos, television shows, television ads, and interactive multimedia works.
- Sound recordings. Recordings of music, sounds, or words.
- Architectural works. Building designs, whether in the form of architectural plans, drawings, or the constructed building itself.

STANDARDS

To receive copyright protection, a work must be "original" and must be "fixed" in a tangible medium of expression. 17 USC δ 102(a). Certain types of works are not copyrightable.

Originality

The originality requirement is not stringent: A work is original in the copyright sense if it owes its origin to the author and was not copied from some preexisting work. A work can be original without being novel or unique.

Example: John's book, *Designing Web Sites,* is original in the copyright sense so long as John did not create his book by copying existing material–even if it's the millionth book to be written on the subject.

Only minimal creativity is required to meet the originality requirement. No artistic merit or beauty is required.

Prior Widespread Use

While most works make the grade on the originality requirement–because they possess some creative spark, no matter how obvious—a phrase or slogan that has been in widespread use may lack the originality necessary for copyrightability. A federal appeals court held that a music publishing company could not claim copyright in the phrase, "You've got to stand for something, or you'll fall for anything," because the phrase lacked originality. *Acuff-Rose Music Inc. v. Jostens Inc.*, 155 F3d 140 (2d Cir 1998). Short phrases rarely meet the originality requirement and are usually not copyrightable. However, they may qualify for trademark protection, discussed in "Trademark Law," chapter 3.

A work can incorporate preexisting material and still be original. When preexisting material is incorporated into a new work, the copyright on the new work covers only the original material contributed by the author.

Example: Web Developer used preexisting photographs and graphics (with the permission of the copyright owners) in a Web design project. The Web site as a whole owes its origin to Developer, but the photographs and graphics do not. Web Developer's copyright on the Web site does not cover the photographs, just the material created by Developer.

Facts owe their origin to no one and so are not original. In the United States, a compilation of facts (a work formed by collecting and assembling data) is protected by copyright only to the extent of the author's originality in the selection, coordination, and arrangement of the facts.

Example: Ralph created a neighborhood phone directory for his neighborhood by going door-to-door and acquiring his neighbors' names and phone numbers. The directory's facts (names and phone numbers) are not original. Ralph's selection of facts was not original (he "selected" every household in the neighborhood). His coordination and arrangement of facts (alphabetical order by last name) is routine rather than original. The directory is not protected by copyright.

Facts and databases are discussed in "When You Don't Need a License," chapter 9.

Selection and Arrangement

In the case Urantia Foundation v. Maaherra, the court had to decide whether a book believed by both parties to be the words of celestial beings was copyrightable. The foundation claimed copyright ownership. The defendant, who had distributed a computer disk version of the book without the permission of the foundation, maintained that the book was not copyrightable because no human creativity was involved in creating the book. The court held that even if the book's content

originated with a celestial being, there had been sufficient human selection and arrangement of material to satisfy copyright law's "originality" requirement. 114 F3d 955 (9th Cir 1997).

Fixation

According to Section 101 of the Copyright Act, a work is "fixed" when it is made "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." It makes no difference what the form, manner, or medium is. An author can "fix" words, for example, by writing them down, typing them on an old-fashioned typewriter, dictating them into a tape recorder, or entering them into a computer. A live television broadcast is "fixed" if it is recorded simultaneously with the transmission.

Uncopyrightable Works

Works prepared by federal government officers and employees as part of their official duties are not protected by copyright. 17 USC δ 105. Consequently, federal statutes (the Copyright Act, for example) and regulations are not protected by copyright. This rule does not apply to works created by state government officers and employees.

Titles of works are not copyrightable. However, titles may be protectible under trademark law. See "Titles," chapter 15.

The design of a useful article is protected by copyright only if, and to the extent that, the design "incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 USC δ 101 (definition of "pictorial, graphic, and sculptural works"). For example, while a standard belt buckle design is not protected, a three-dimensional belt-buckle design with a dolphin shape qualifies for limited protection.

Uncopyrightable works and works for which copyright protection has ended are referred to as

"public domain" works. See "Public Domain Works," chapter 9.

PROCEDURE FOR GETTING PROTECTION

Copyright protection arises automatically when an original work of authorship is fixed in a tangible medium of expression. 17 USC δ 102. Registration with the Copyright Office is optional (but you have to register before you file an infringement suit, if you are a United States citizen or corporation).

The use of copyright notice is optional for works distributed after March 1, 1989. Copyright notice can take any of these three forms:

- © followed by a date and name.
- "Copyright" followed by a date and name.
- "Copr." followed by a date and name.

17 USC δ 401.

The benefits of registering a copyright and using copyright notice are discussed in "Copyright Protection," chapter 26. The role of notice for works distributed prior to March 1, 1989, is discussed in "Public Domain Works," chapter 9.

THE EXCLUSIVE RIGHTS

According to section 106 of the Copyright Act, a copyright owner has five exclusive rights in the copyrighted work:

- **Reproduction Right.** The reproduction right is the right to copy, duplicate, transcribe, or imitate the work in fixed form. Scanning a copyrighted work for use on a Web site is an exercise of the copyright owner's reproduction right.
- **Modification Right.** The modification right (also known as the derivative works right) is the right to modify the work to create a new work. A new work that is based on a

preexisting work is known as a "derivative work." Altering a photograph is an exercise of the modification right, as is creating an interactive version of a novel or creating a sequel to a computer game or motion picture.

- **Distribution Right.** The distribution right is the right to distribute copies of the work to the public by sale, rental, lease, or lending. Whether using copyrighted material on the Internet is an exercise of this right is discussed in “When You Need a License,” chapter 9.
- **Public Performance Right.** The public performance right is the right to recite, play, dance, act, or show the work at a public place or to transmit it to the public. In the case of a motion picture or other audiovisual work, showing the work's images in sequence is considered "performance." Showing scenes from a copyrighted motion picture in sequence on the Web is an exercise of the public performance right, as is the use of a copyrighted musical composition on the Web.
- **Public Display Right.** The public display right is the right to show a copy of the work directly or by means of a film, slide, or television image at a public place or to transmit it to the public. In the case of a motion picture or other audiovisual work, showing the work's images out of sequence is considered "display." Posting copyrighted material on the Web is an exercise of the public display right.

The exclusive rights are discussed in more detail in “When You Need a License,” chapter 9, and “Determining What Rights You Need,” chapter 10. .

INFRINGEMENT

Anyone who violates any of the exclusive rights of a copyright owner is an infringer.

Example: John scanned Photographer's copyrighted photograph, altered the image by using digital editing software, and used the altered version of the photograph on an e-commerce site. If John used the photograph without Photographer's permission, John infringed Photographer's copyright by violating the reproduction right, the modification right, and the public display right.

A copyright owner can recover actual or, in some cases, statutory damages from an infringer (see "Copyright Protection," chapter 26). The federal district courts have the power to issue injunctions (orders) to prevent or restrain copyright infringement and to order the impoundment and destruction of infringing copies.

There are two essential elements to an infringement case: (a) that the defendant copied from the plaintiff's copyrighted work; and (b) that the copyright was improper appropriation. Copying generally is established by showing that the defendant had access to the plaintiff's work and that the defendant's work is substantially similar to the plaintiff's work.

Most copyright infringement cases are civil cases. However, copyright infringement also can be a criminal offense. According to Section 506 of the Copyright Act, two types of willful copyright infringement are criminal offenses:

- Willful infringement for purposes of commercial advantage or private financial gain.
- Willful infringement by reproducing or distributing copies or phonorecords of copyrighted works having a total retail value of more than $1000 in a 180-day period.

Barter Boards

David LaMacchia, an MIT student, invited users to post commercial software on his bulletin board

for exchange with other users. LaMacchia made no money from the exchanges. He was arrested, but the court dismissed the suit because the criminal copyright law in effect at the time of the prosecution applied only to willful infringement for commercial motive or private gain. Congress then amended the law, adding the second violation category discussed in the paragraph immediately above. Prosecutors can use the provision to shut down barter boards through which pirated copies of software and computer games are traded.

The difference between civil and criminal cases is discussed in “Civil and Criminal Cases,” in appendix A.

DURATION OF THE RIGHTS

The duration of copyright law is very complicated because it depends on when the work was created, when the work was “published” (distribution of copies to the general public), the author of the work and, in some cases, the type of work. However, works created under the Copyright Act of 1976, the copyright term for works created by individuals is the life of the author plus seventy years. 17 USC δ 302(a).

The copyright term for "works made for hire" is ninety-five years from the date of first "publication"or 120 years from the date of creation, whichever expires first. 17 USC δ 302(c). Works made for hire are works created by employees for employers and certain types of specially commissioned works. See "The Work Made for Hire Rule," chapter 3, and “Copyright Ownership,” chapter 6.

The duration of copyright for older works is discussed in "Public Domain Works," chapter 9.

LIMITATIONS ON THE EXCLUSIVE RIGHTS

The copyright owner's exclusive rights are subject to a number of exceptions and limitations that give others the right to make limited use of a copyrighted work. Major exceptions and

limitations are outlined in this section. (They are discussed in detail in "When You Don't Need a License," chapter 9).

Ideas

Copyright protects only against the unauthorized taking of a protected work's "expression." It does not extend to the work's ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries.

Facts

A work's facts are not protected by copyright, even if the author spent large amounts of time, effort, and money discovering those facts. In the United States, copyright protects originality, not effort or "sweat of the brow."

Extracting Facts from a Web Site

In *Ticketmaster Corp. v. Tickets.com, Inc.,* the court held that extracting facts from a Web site is not copyright infringement. "This falls in the same category of taking historical facts from a work of reference and printing them in a different expression," the court stated. 54 USPQ2d 1344 (CD Cal 2000). The court also held that using facts from a Web site is neither an unfair business practice nor unjust enrichment.

Independent Creation

A copyright owner has no recourse against another person who, working independently, creates an exact duplicate of the copyrighted work. The independent creation of a similar work or even an exact duplicate does not violate any of the copyright owner's exclusive rights.

Fair Use

The "fair use" of a copyrighted work, including use for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. Copyright

owners are, by law, deemed to consent to fair use of their works by others.

The Copyright Act does not define fair use. Instead, whether a use is fair use is determined by balancing these factors (discussed in "When You Don't Need a License," chapter 9):

- 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.

- The effect of the use on the potential market for, or value of, the copyrighted work.

INTERNATIONAL PROTECTION

U.S. authors automatically receive copyright protection in all countries that are parties to the Berne Convention for the Protection of Literary and Artistic Works, or parties to the Universal Copyright Convention (UCC). Most countries belong to at least one of these conventions. Members of the two international copyright conventions have agreed to give nationals of member countries the same level of copyright protection they give their own nationals.

Example: Publisher has discovered that bootleg copies of one of its software are being sold in England. Because the United Kingdom is a member of the Berne

Convention and the UCC, Publisher's work is automatically protected by copyright in England. When Publisher files a copyright infringement action in England against the bootlegger, Publisher will be given the same rights that an English copyright owner would be given.

The copyright laws (and other intellectual property laws) of a number of countries are posted at www.wipo.int/clea.

Works of foreign authors who are nationals of Berne or UCC-member countries automatically receive copyright protection in the U.S., as do works first published in a Berne Convention or UCC country. Unpublished works are subject to copyright protection in the U.S. without regard to the nationality or domicile of the author.

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