What You Need to Know About Copyright Law

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Why do lawyers need to know about copyright law? If you or your clients have ever created, adapted or used others' expressive materials, including writings, photographs, graphics, computer programs, compilations, or other material, you need a basic understanding of copyright law.

In the United States, copyright law is a statutory scheme of intellectual property protection dating back over 200 years to the Constitution. Although Franklin, Madison and Hamilton never used laptop computers or the Internet, they nevertheless established a scheme of protection that applies today by giving Congress the right to grant authors and inventors exclusive rights in their writings and discoveries for limited periods of time.

Congress enacted the first Copyright Act in 1790 and the current act in 1976. Under the law the author of a copyrighted work has the exclusive right to reproduce, distribute, and publicly display and perform his or her work and any derivative versions, and to authorize others to do so during the term of the copyright.

The author of a copyrighted work has the right to prevent others from using the work without permission and to bring suit against violators who infringe the copyright. Copyright protects "original works of authorship fixed in any tangible medium of expression." These include a wide range of expressive works such as literary works like books, articles, short stories, poems, and computer programs; works of the performing arts such as musical and dramatic works, pantomimes and choreography, and motion pictures and audiovisual works; pictorial, graphic, sculptural, and architectural works; sound recordings; and original compilations of facts and information, such as commercial databases of court decisions and records. It is important to understand that copyright does not protect underlying facts, ideas, procedures, processes, concepts, principles or discoveries, but only the particular way underlying information is expressed in an original way.

The Fair Use Doctrine

Although the copyright owner is granted a bundle of exclusive rights, under certain conditions a person may be able to make "fair use" of all or part of a copyrighted work. Under the fair use doctrine, if the use is for a purpose deemed beneficial to society such as criticism, comment, news reporting, teaching, scholarship or research, the use may be allowed despite the copyright owner's exclusive rights.

In determining whether a particular use is a fair use, the law states that certain factors should be considered, including the purpose of the use, such as whether it is for commercial or nonprofit educational purposes; the nature of the work; how much of the work is used and how substantial that portion is in relation to the entire work, both quantitatively and qualitatively; and the effect of the use upon the potential market or value of the work.

Ownership and Work for Hire

The owner of a copyright is its author, who may be an individual or multiple persons. If the authors consist of two or more persons, then the work is considered a joint work. A joint work is defined in the Copyright Act as a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. Thus Lennon and McCartney's Beatles songs are joint works. On the other hand, the musical "Cats" is not a joint work since it uses T.S. Eliot's preexisting poems for its lyrics combined with the much later composed music of Andrew Lloyd Webber. There was no original intention on the part of Eliot to merge his contribution with Webber's, so the work is not a joint work.

Another important concept regarding copyright ownership is the work for hire doctrine. Under the Copyright Act, a "work made for hire" can arise in one of two ways. One is a work prepared by an employee within the scope of his or her employment. Thus, a person working for a magazine as a staff writer or photographer or a computer programmer has "sold his soul to the company store" in the sense that the copyright in his or her writings, photos, or programs automatically belong to the company as a work for hire, without the necessity of a written agreement or other document.

The second type of work for hire is a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in writing that the work will be considered a work for hire. A work can be a work for hire under this second prong only if the creator of the work agrees in writing. Thus, an independent writer, photographer, or programmer hired by a magazine on a freelance basis would own the copyright in his or her contribution rather than the publisher unless the author signed a document expressly agreeing that the contribution would be deemed a work for hire.

Term of Copyright

The term of a copyright depends on a number of factors, including when it was created or published. For works created after January 1, 1978, the term is the life of the author plus 70 years. For works made for hire, and anonymous and pseudonymous works, the term is 120 years from creation or 95 years from first publication, whichever comes first.

For works created prior to 1978 whose terms have not yet expired, the term is 95 years from first publication. Works published before 1923 are in the public domain and can be used freely because, prior to 1998, the term of copyright for pre-1978 works was 75 years. The term of any work published in 1922 or before that thus expired by the end of 1997.

Works published after 1923 may still be covered by copyright. That's partly because of the Sonny Bono Copyright Term Extension Act of 1998, which extended the term of copyright by twenty years. Although the law was named after the late Congressman/singer who was killed in a skiing accident shortly before the law was passed, the law might better have been named for Walt Disney. The Disney Company was a strong advocate of the law to extend the copyright term because otherwise Walt's cartoon characters, Mickey Mouse, Pluto, Goofy, and Donald Duck, would have expired this decade, along with a host of other works created in the 1920s and 1930s such as "Happy Birthday."

"Happy Birthday" was composed in 1893 (as "Good Morning to You"), but not published until 1935, and its term now runs through 2030. The song earns about a million dollars a year in royalties and the current owners bought it about a decade ago for $12 million based on the value of its expected royalties at the time. When the term was extended, they obtained an additional twenty years of royalties, so it turns out that they really bought it for a song!

Copyright Registration and Enforcement

Before a copyright can be enforced in federal court, the owner must register the work with the U.S. Copyright Office in Washington, D.C. This can be done by completing an application and depositing a copy or copies of the work with the Copyright Office. Registration is not a prerequisite for copyright protection but a U.S. copyright owner cannot sue to enforce his or her rights without first obtaining a registration certificate. Similarly, the copyright owner does not have to mark copies of the work with a copyright notice, but it is advisable to do so. The statutory copyright notice consists of the word "Copyright" the abbreviation "Copr.", or the symbol ©, and the date and the author's name, e.g. © 2007 Ima Lawyer.

Once a case of copyright infringement is brought and proven, the court may issue an injunction prohibiting further infringement, order the seizure and destruction of infringing items and the means to make them, and award damages to the copyright owner based on the author's lost profits or the infringer's ill-gotten gains. If registration has been made prior to the infringement (or within three months after first publication of the work), the owner may ask the court to award statutory damages ranging from $750 to $30,000 for each work infringed, plus attorney's fees. In the event of willful infringement, statutory damages can be increased to $150,000 for each work infringed, and under certain circumstances, criminal penalties can be imposed.

Conclusion

Copyright law is a growing field, of great importance socially and economically to our society. Each of us encounters copyrights every day in the publications we read, the music we listen to, the films, television programs and other media we view, and the technology we use. Consequently, attorneys in all fields of practice should take the time to learn about and become familiar with the basic concepts of copyright law.

David Ellis is a Largo attorney practicing copyrights, trademarks, patents, trade secrets, and intellectual property law; computer and cyberspace law; business, entertainment and arts law; and franchise, licensing and contract law. A graduate of M.I.T. and Harvard Law School, he is a registered patent attorney and the author of the book, A Computer Law Primer. He has taught Intellectual Property and Computer Law as an Adjunct Professor at the Law Schools of the University of Florida and Stetson University.

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