

1-1-2015

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Recommended Citation

IP Basics: Copyright in Written Work, IP BASICS (UNH Law, Franklin Pierce Ctr. For Intellectual Prop., Concord, NH), Jan. 1, 2015.

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IP Basics: Copyright in Written Work

By Thomas G. Field, Jr., Professor Emeritus, University of New Hampshire School of Law Franklin Pierce Center for Intellectual Property

Last updated 2015

Introduction

Copyright encourages the creative efforts of authors, artists, and others by securing the exclusive right to reproduce and otherwise derive income from their work.

Copyright arises automatically once some aspect of a project has been fixed in a tangible medium (including digital media). Notice is not required. Registration is required only if legal action is warranted. However, notice and prompt registration provide important remedial advantages in the U.S. Such matters, as well as fundamental distinctions based on ownership and key issues to consider when transferring rights are addressed below.

Notice, Registration and Deposit

Formalities are unnecessary for copyright. Appropriate kinds of work (all forms of text, including software) are protected by copyright when they are fixed in a tangible medium, whether or not they can be directly perceived by human senses. Copyright notice is unnecessary, but it eliminates a potential defense of a copier.

Also registration is unnecessary to have copyright but it is necessary for owners of domestic works to bring suit, and prompt registration improves remedies. Statutory damages up to \$150,000 and attorney fees can be obtained only if works are registered promptly. For published works, “prompt” means within three months of publication. If the work is unpublished, registration must predate any unauthorized use for which relief is sought.

Deposit requirements

Whether one registers or not, copies of most domestic publications must be deposited with the U.S. Copyright Office in Washington.

Information about exceptions for such things as expensive limited editions or special requirements for works distributed only digitally is available at the Copyright Office website. In any event, sanctions for failure to deposit are not imposed until a publisher fails to respond to an official demand for copies.

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Registration requirements and effective dates. Registration is inexpensive and often straight-forward. Simple forms, containing basic instructions, are available online. Registration is accomplished by returning a form (TX for text works) with a modest fee and identifying materials as explained on the form. Registration certificates may take several months to issue, but, if everything is in order, they are effective as of their filing dates.

Single work or multiple works? A single author may register a group of works for a single fee. This can save money, but some argue that rights in individual components are not as strong as they would be if they were separately registered. This choice probably should not be made without close study or advice going well beyond anything that can be offered here.

Copyright Ownership and Duration

Employees. Absent contrary agreement, employers own all rights in works created by their employees within the scope of their employment. These are called "works for hire." Copyright in such works (as well as those created anonymously or under pseudonyms) last for 120 years from creation or 95 years from publication.

Commissioned works. Under limited circumstances, commissioned work may be "for hire." When free-lance authors agree in advance and in writing, their work may be so regarded if, for example, it introduces or illustrates a larger work. A translation may also be so regarded, but agreeing that most free-standing manuscripts are "for hire" is unlikely to make it so.

Free-lance works. Some commissioned work aside, free-lance authors own copyright in their work unless they later transfer rights to others. In that regard, the Supreme Court's 2000 Tasini decision warrants mention. Since then, free-lance newspaper work, for example, cannot be included in electronic data bases such as Nexus, without additional permission. Many writers complain, but, now that implicit permission does not exist, informed publishers are likely to insist on explicit permission.

Copyright in not-for-hire works extend 70 years beyond the lifetimes of identified (or identifiable) authors. Also, assigned rights may be recaptured after at least 35 years. That and Tasini both seem likely to discourage publishers' use of free-lance work.

Joint works. Absent agreement, all coauthors are free to use joint work, but any who receives income must share it equally. For such works, the 70-year component of the copyright term does not begin to run until death of the last surviving coauthor.

When Should Free-lance Authors Register?

As noted above, the best possible remedies are available if registration predates infringement of unpublished work. It should, however, also be noted that the need to sue is lessened by carefully selecting people with whom to do business. The results are likely to be more satisfying than being tied up in copyright litigation.

Moreover, in the case of contributions to periodicals or anthologies, for example, when copyrights of multiple authors are held by the publisher, one notice and one registration should serve the needs of all. If the publisher has agreed in writing to transfer rights back after publication, it is difficult to understand any author's need to hold all rights prior to then.

Selling and Licensing Rights

Even when copyright owners are faced with take-it-or-leave-it propositions, they should understand their agreements. One way or another, each of the following issues should be considered and resolved (preferably in writing):

- If the work is commissioned, is it or can it be regarded as "for hire?"
- If not, what rights are being transferred? All or them, only the right of first publication or, e.g., a right to use or reproduce for other limited purposes?
- Can the purchaser use the work (or parts of it) in another product line or change the method of selling it?
- Can the purchaser license others to use any part of the work in the same or unrelated kind of products? If so, must additional payment be made, on what basis?

- To what extent does a transfer limit the author's rights to produce similar works? Authors must understand that, as between them and others to whom they transfer copyright, they have no more (and probably fewer) rights than total strangers.
- What happens if the purchaser loses interest or goes out of business? Do rights return, or is the work orphaned, with rights being held by uninterested or unidentifiable people?
- Will payment be made, for example, as a lump sum or as royalties?
- If royalties are due, how frequently will they be paid and how will they be computed?
- Does the purchaser seek indemnification for the cost of defending third-party suits? This provision is common, but anyone can sue anybody for anything! Even if authors win, expenses can be high; they should consider whether they have insurance to cover the risk or, if not, whether they are being paid enough to accept it themselves.

Infringement and Limits to Copyright

Substantial similarity. The legal test for copyright infringement is "substantial similarity." This translates (roughly) into whether ordinary observers would regard a work as copied in whole or in part from an earlier one. But more is involved.

Works in the public domain. When copyrights expire, anyone is free to use a work. Yet, as noted above, their duration is substantial and vary according several factors. See, for example, Professor Laura Gasaway's chart, When Copyrights Expire.

Expressions, not facts or ideas, are protected. Reporters (or their employers) have rights in stories describing events; they have no rights in underlying facts (even if they turn out to have been fabricated). This explains, in part, stories in which one news source credits another but goes on to restate the facts. Giving credit may be not be legally required, but it can be useful if the original contains errors or omissions (not to mention fabrications.) A short story using only the basic plot from an earlier story does not infringe.

Independent creation is permitted. A short story, identical to an earlier one, for example, would not infringe if it were independently created. In such circumstance, infringement is certain if access can be proven -- a given if the author is the same. When access is doubtful, the better known the original and the more similar the alleged copy, the more likely that infringement will be found.

Fair use. Partial or limited reproduction of others' work is sometimes permitted if it fosters public interests such as criticism, education or scholarship. Uses that, for example, cut into another's income or potential income, however, are unlikely to be fair.

Bottom line

People often wonder whether some particular use of a pre-existing work is legally acceptable, but that is the wrong question. The vastly more important question is whether their use of the work is likely to generate a suit. Anyone who appreciates the significance of that proposition will either get permission or be sure that none is needed -- most likely because the material to be used is in the public domain!

The Need for Counsel

Authors should encounter little difficulty with registration (at least beyond sorting out for the first time the legal implications of group registrations).

Transferring rights may be more complicated. Anyone concerned about issues posed above (or others of that kind) need expert advice to lessen the risk, for example, of having sold more than intended or of having accepted unexpected liability.

Lawyers cannot determine whether deals are economically advantageous or professionally satisfying. Those familiar with copyright law, however, can explain the short and long-term legal implications so that their clients can decide for themselves.