

**UNITED STATES  
PATENT AND TRADEMARK OFFICE**



# Copyright basics and considerations for entrepreneurs and small businesses

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# The purpose of copyright

“The Congress shall have Power... **To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.**”

- Article 1, Section 8, Clause 8, U.S. Constitution



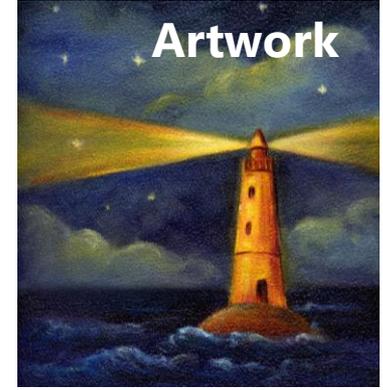
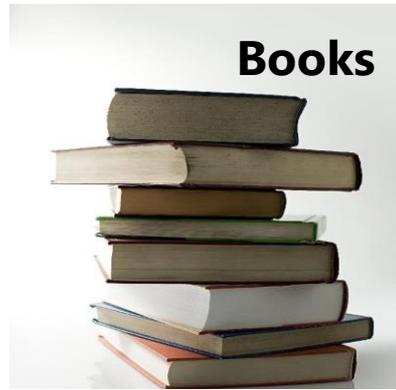
# What is copyright?

Copyright is a form of legal protection provided to the authors of “original works of authorship fixed in any tangible medium of expression.”

17 U.S.C. § 102(a)



# What does copyright protect?



... **plus** many other forms of creative works, including: plays, choreography, architecture, software, and compilations

# Why should I care about copyright?

Some business assets that **may** be protectable by copyright include:

- Advertising and promotional materials
- Instructional manuals
- Educational materials
- Software
- Website
- Artistic elements of logos (e.g., product logo artwork)
- Product design & packaging (rarely protected by ©)

# Requirements for © protection

- Must be an **original** work of authorship, i.e., work must be of independent creation (not copied from other works)
- Must exhibit a “modicum of creativity” – a very low level
- No requirement that work be novel/unique or have aesthetic merit
- Must be fixed in a tangible form of expression that is perceptible either directly or with the aid of a machine or device

# What works are not protected?

- Not fixed in a tangible form of expression, 17 U.S.C. § 102(a)
- Titles, names; familiar symbols or designs; mere variations of lettering; mere listings of ingredients or content, 37 CFR § 202.1(a)
- Individual words and short phrases, 37 CFR § 202.1(a)
- Ideas, procedures, concepts, principles, 17 U.S.C. § 102(b)
- Works of the U.S. Government, 17 U.S.C. § 105

# A bundle of exclusive rights

- Make copies of the work
- Prepare derivative works (i.e., adapt)
- Distribute copies of the work
- Publicly display the work
- Publicly perform literary, musical, dramatic, choreographic works, pantomimes, or audiovisual works
- Publicly perform a sound recording via a digital audio transmission



# Exclusive rights in action

- Allows an author or artist to stop others from making use of things they create, such as drawings, poems, and songs
- Gives the copyright owner the right to provide legal permission for authorized uses of works (license)

# International copyright law?

- **Berne Convention** for the Protection of Literary and Artistic Works (1886)
- TRIPS / WTO (1994)
- WIPO Copyright Treaty (WCT) (1996)
- WIPO Performances and Phonograms Treaty (1996)

# Securing protection

- Copyright protection is secured **automatically** upon creation (fixation). A work is “created” when it is fixed in a copy for the first time.
- No publication or registration is required. (There are, however, certain advantages to registration.)

# Notice

- Forms of notice: ©, the word "Copyright," or the abbreviation "Copr.", year of publication, and name of the copyright owner

© 2020 Jane Doe.

- **No notice is required** (for works published on or after March 1, 1989)

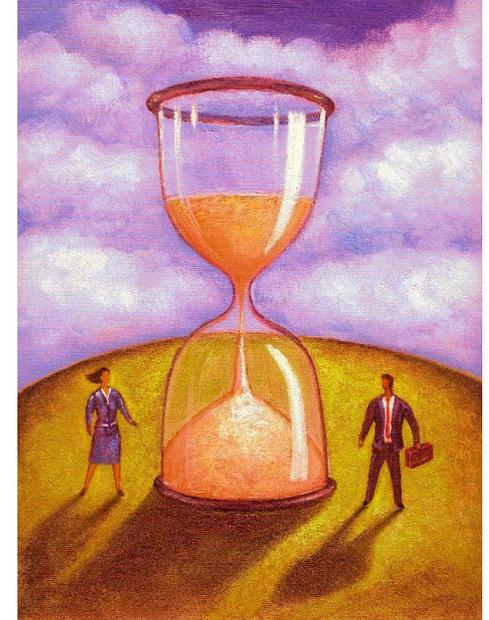
# Why use a copyright notice?

- Informs the public that the work is protected by copyright
- Identifies the copyright owner
- Shows the year of first publication
- May benefit the owner against an “innocent infringer” defense (which is not a defense against infringement, but may bear on the remedies)
  - TIP: Provide sufficient additional information so that a third party knows how to contact you to obtain permission to use the work.

# Term of copyright

For works created on or after January 1, 1978:

- **Life + 70:** In the U.S., copyright subsists from creation and lasts for the life of the author, plus 70 years after the author's death.
- **95 years from publication:** If the author is not a natural person, then copyright lasts 95 years from publication or 120 years from creation, whichever expires first.

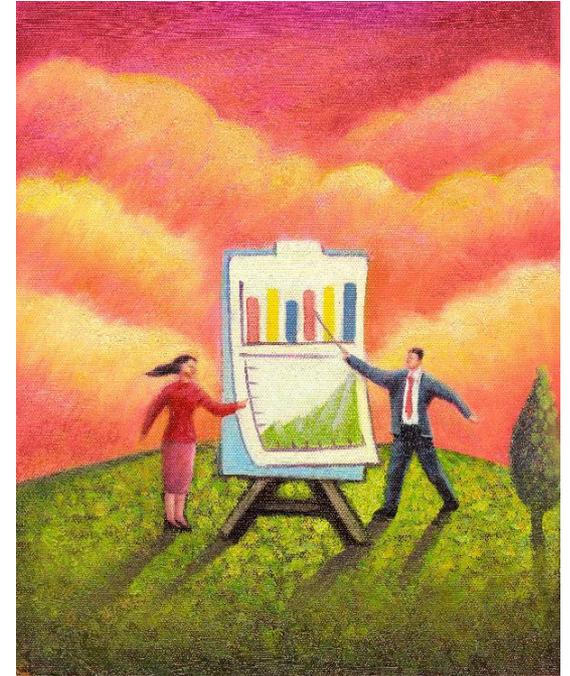


# Ownership of copyright

- Vests initially in person who conceives the work and fixes its expression in a tangible medium
- Joint authors are co-owners of (i.e., they have an undivided interest in) the copyright in joint works.
- Under the work-made-for-hire doctrine, the employer is the owner of the copyright for certain types of works created within the scope of employment.
- Special rules apply to “commissioned works”

# Who is an employee?

- Right to control the manner and means of production
- Skill required
- Employee benefits
- Tax treatment
- Right to assign additional projects
- Tools
- Location of work

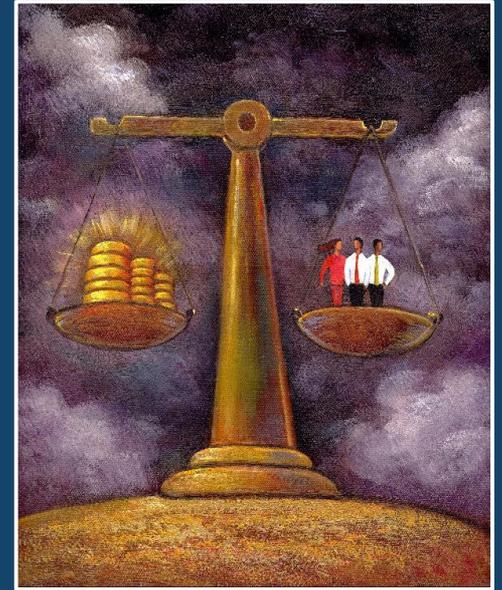


# Transfer of copyright

“Any or all of the copyright owner’s exclusive rights... may be transferred, but the transfer of exclusive rights is not valid unless that transfer is in writing... Transfer of a right on a nonexclusive basis does not require a written agreement.”

- U.S. Copyright Office Circular 1, Page 3

# Copyright infringement



# Copyright infringement (cont.)

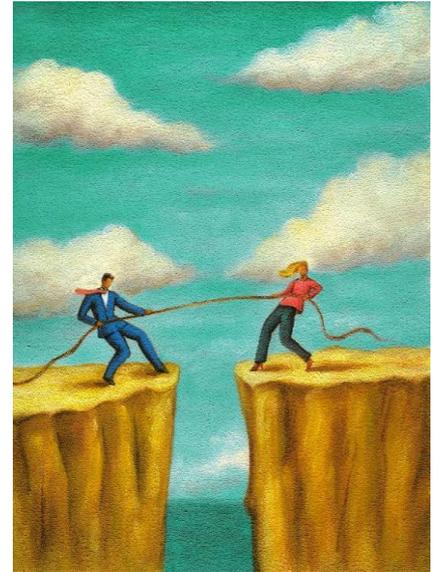
Infringement is a violation of any of the exclusive rights of copyright.

17 U.S.C. § 501



# Elements of a copyright infringement case

- Validity and ownership of a copyright
- Violation by the alleged infringer of at least one of the copyright holder's exclusive rights



# Liability for infringement

- Direct liability
- Secondary liability
  - Contributory liability
    - Knows or has reason to know of infringement (actual or constructive)
    - Material contribution to, or inducement of, infringing conduct
  - Vicarious liability
    - Right and ability to control the infringing activities
    - Direct financial interest in such activities



# Limitations & exceptions - Examples

- First sale doctrine
- Special exceptions for libraries, archives, and teaching
- Certain statutory licenses
- Certain television & radio exceptions
- Reproduction for those with disabilities
- Single software copy for archival purposes

# Fair use

- Allows the public to make reasonable use of copyrighted material, under particular circumstances, without copyright holder's consent or royalty payment
- Use for purposes such as:
  - Criticism or comment
  - News reporting
  - Teaching, scholarship or research



17 U.S.C. § 107

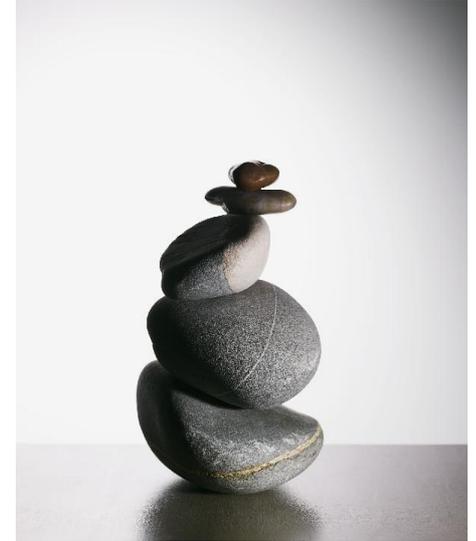


# Four factor balancing test

Courts weigh the following statutory factors:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107



# Fair use considerations

- Is the use of the work “commercial,” or for nonprofit purposes such as criticism, commentary, education, or news reporting?
- Is the nature of the work factual/functional or fictional/creative?
- Is the use “transformative,” “altering the original with new expression, meaning or message” to the copyrighted material?
- How much of the copyrighted material is being used?
- Does the use impact an existing market for the work, or one that is likely to be exploited in the future?

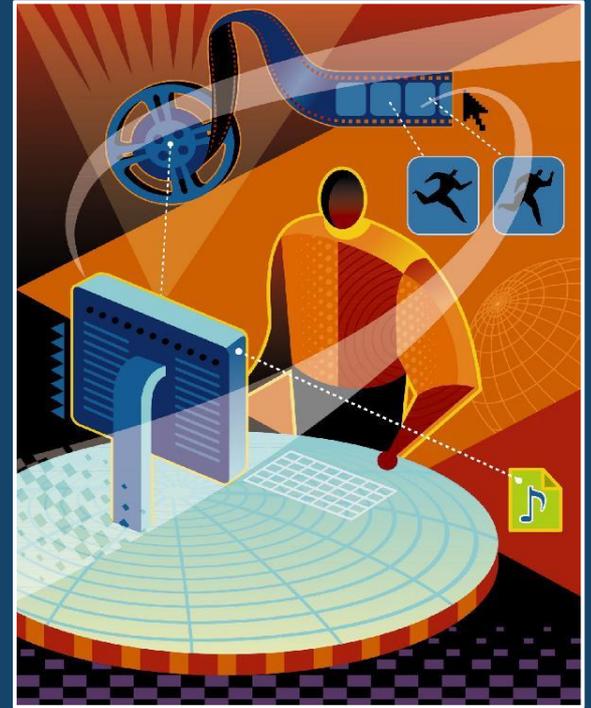
**NOTE:** There is no bright line rule for what constitutes fair use. Judicial opinions on fair use are inconsistent and often unpredictable. It is a case-by-case evaluation by the courts.

# Copyright infringement remedies

- Actual damages
- Statutory damages
- Injunctions, including temporary and permanent
- Impounding infringing copies
- Destroying infringing copies and the machinery and equipment used to produce them
- Attorney's fees and costs



# Protection of copyright in the digital age



# The WIPO “internet” treaties

- Negotiated in 1996 under the auspices of the World Intellectual Property Organization (WIPO), part of the United Nations
- The WIPO Copyright Treaty (WCT) entered into force with 30 ratifications on March 6, 2002
- The WIPO Performances and Phonograms Treaty (WPPT) entered into force with 30 ratifications on May 20, 2002
- The U.S. implemented the treaties through the Digital Millennium Copyright Act (DMCA) in 1998



# Three important obligations established

- The right of making available to the public
- Legal protection of technological measures to protect copyrighted works (“TPMs”)
- Legal protection of rights management information (“RMI”)

# Digital Millennium Copyright Act (DMCA)

- Prohibits circumvention of TPM
- Bans trafficking in circumvention devices
- Prevents tampering with RMI
- Violation of TPM/RMI is not act of copyright infringement, but a separate/independent offense
- Limits remedies for infringement liability for Internet Service Providers (ISPs) that meet certain criteria



# Notice and Takedown System

The DMCA limits remedies for infringement liability for Internet Service Providers (ISPs) that meet certain criteria

- Once certain ISPs receive proper notice alleging infringement, they must expeditiously take the material down and notify the user.
- The user may then respond to the notice objecting to the takedown and the ISP must put back the material (i.e., put-back-up) unless notified by the right holder that a copyright infringement suit has been filed.



# For more information...

- U.S. Copyright Office
  - <http://copyright.gov> (Be sure to check out Circular 1, "Copyright Basics" as well as the Compendium of U.S. Copyright Office Practices.)
- Stanford Copyright and Fair Use Center
  - <http://fairuse.stanford.edu/>
- "Copyright Term and the Public Domain in the U.S." [Chart]
  - <http://copyright.cornell.edu/resources/publicdomain.cfm>
- "Crash Course in Copyright" from University of Texas
  - <http://copyright.lib.utexas.edu/>
- "Copyright Navigator" by Lionel S. Sobel
  - <http://navigator.carolon.net/>





# Thank you!

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