

COPYRIGHT BASICS

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The Law Offices of Gary Marshall Represents Small Businesses, Individual Entrepreneurs and Artists:

- Computer/Internet Law & Litigation
- Intellectual Property (copyright, trademark, trade secret & licensing)
- Art & Entertainment Law
- Corporate/Business Law
- Complex Business Litigation

This brochure is not a substitute for legal advice. I have presented only an overview of the legal issues. There are many nuances and some exceptions to these legal principles. The law is constantly changing, especially in the area addressed in this article. In addition, real problems are usually very fact based. Every situation is different. If you have a specific legal problem, consult an attorney.

1. Copyright Law Basics

The basic form of legal protection for text and other forms of creative expression, including music, movies, and software is copyright law. Copyright law is federal law¹, which means that the law is the same for all fifty states. Copyright law is very rules based.

Congress has significantly updated the copyright law several times, most recently in 1976, 1988 and 1990. Because there have been many recent changes, the common knowledge of copyright law is rather inaccurate.

a) Where Copyright Law Comes From

Copyright law is authorized by the United States Constitution:

Article, 1, Section 8. Powers Granted to Congress ...

Clause 8. 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.

Based on this authorization, Congress passed a set of copyright laws. The law is contained in the United States Code of Law at 17 USC § 100 et. seq.

b) What Rights Copyright Law Protects

Copyright law grants the authors of original works five exclusive rights to the work:

- 1) to reproduce the work;
- 2) to modify the work (prepare derivative works);
- 3) to distribute the work (sell, lease, lend or rent);²
- 4) to perform the work publicly; and
- 5) to display the work publicly;³

¹ There is a small amount of protection for certain works under state common law, but it is a very obscure area of law.

² The right to distribute a work includes the right not to distribute the work, if the copyright owner so chooses, *Fox Film Corporation v. Doyal*, 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010 (1932).

³ 17 USC § 106 provides:

Exclusive rights in copyrighted works.- Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

c) Which Works Are Protected

There are three basic requirements for a work to be protected by copyright; 1) it must be "original" 2) it must contain "expression" and not just "ideas", and 3) it must be fixed in a "tangible" form. The exact wording is contained in Section 102(a) which extends copyright protection to:

original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

This sentence contains many subtleties of meaning.

"Original works of authorship" means that the author must have created the work by him or herself, rather than copying someone else's work. It also means that a work is copyrightable even if it is exactly the same as another work, as long as the author independently created it, without copying the other work in any way.

Facts are not protectable, because they do not originate with the author. But the particular way an author describes the facts is protectable. The law tends to protect even small amounts of creative expression added to a set of facts. Most non-fictional work will be copyrightable, as it is likely to contain a descriptive narration of facts, rather than a mere list of the facts.

The phrase "original works of authorship" also means that the creative expression of ideas can be protected by copyright but the ideas themselves cannot be protected. This distinction is very important when determining what types of material are or are not copyrightable. It is also important in determining what elements of an existing work can be legally copied or otherwise incorporated into a new work. Yet, often there is no easy way to distinguish between expression and idea. It is therefore impossible to develop a simple set of rules and guidelines to use when deciding which elements of a work are protected.

The general plot of a book consists of ideas and cannot be protected. But the particular way the author uses the plot, describes the characters and the action that takes place is protectable.

"Fixed in any tangible medium of expression" means that the work must be stored somehow. The written word is fixed in a tangible medium of expression. So is a computer or word processor data file. Speech is not by itself fixed in a tangible medium of expression and so is not copyrightable. But speech that is recorded onto an audio or video recording device is fixed in a tangible medium of expression.

"From which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" refers to the way that the work is stored. The written word can be perceived directly, provided that the author's handwriting is legible. A computer file can not be perceived directly but it can be perceived with the aid of a machine or device.

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

As long as a work meets these three requirements, copyright protection attaches automatically as soon as the work is created. So, for example, if a writer creates an original work of fiction consisting of creative expression, then copyright protection attaches to the words as they are written on the page. There are no additional steps necessary to take in order to obtain copyright protection.

d) Duration of Copyright Protection

The copyright normally lasts for a period of the life of the author plus 70 years. Where there are several joint authors, the copyright lasts for the life of the author who lives the longest plus 70 years.

There are several situations where the life of the author is not readily ascertainable. This would occur if the work is published pseudonymously (using a name not normally associated by the public with the author) or anonymously (with no name). It would also occur when a corporation is the copyright owner, since a corporation has an indefinite life. In each of these cases, the copyright rights last for ninety five (95) years from first publication or one hundred twenty (120) years from creation, whichever expires first.

For works copyrighted before 1978, the rules on duration of copyright are different, and rather complicated. If you need help in this area, you should contact your copyright attorney. Duration is based on the copyright date, which, under the old law, was the publication date or registration date, whichever occurred first. Duration is not measured from the date of creation. Generally, for older works the copyright lasts for 28 years from the date of copyright, and is automatically renewed for an additional 67 years, for a total of 95 years. But there are many exceptions.

e) The Copyright Notice Requirement

To protect one's copyright interest in the United States, it used to be necessary to put a notice on each copyrighted work. The reasoning behind the notice requirement was that the copyright owner must give adequate notice to the public that he or she holds a copyright in a particular work. The requirement that a notice has to be used was abolished on March 1, 1989. However, it is still recommended that a notice be placed on a work, as this gives the copyright holder certain protections that are not available if there is no notice.⁴

The copyright notice consists of at least three elements. The first element is the letter 'c' enclosed in a circle ("©"), or the word 'Copyright' or the abbreviation 'Copr.'. This wording is followed by the second element, the year of first publication and the third element, the author's name. An example is the copyright notice on the front page of this paper.

Many people are unsure which of the three copyright terms to use - the letter 'c' enclosed in a circle, the word 'Copyright' or the abbreviation 'Copr.'. The safest approach, in terms of protecting one's copyright rights, is to use both the word 'Copyright' and the letter 'c' enclosed in

⁴ The main advantage of putting a notice on the work is that it precludes the infringer from arguing that the infringement was innocent. The copyright owner is entitled to higher damages when the infringement is intentional, rather than innocent. 17 USC § 401(d).

a circle (“©”). The word 'Copyright' is easily understood by everyone in the United States and may encourage people to respect the rights of the copyright holder. However, some foreign countries do not recognize it as providing sufficient copyright notice. The letter 'c' in a circle is the only internationally recognized copyright symbol. Still, there is a problem in just using the letter 'c'. Some older computer and word processing printers are unable to print a circle around the letter 'c'. As a result, some authors use parentheses symbols instead of a circle. But there is some legal question whether the letter 'c' enclosed in parentheses - (c) - is sufficient notice by itself even under U.S. law.⁵

As an added precaution, the copyright notice should be followed by the words "All Rights Reserved". This latter wording used to be required notice for copyright protection in some South American countries, and arguably may still be required in some situations. While this will not be of concern to most authors, adding the extra wording requires so little effort that it is recommended even in situations where the author cannot imagine needing South American protection.

Where should the notice be placed? The law provides only very general guidance on this question. Section 401(c) of the Copyright Act states:

The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. 17 USC § 401(c)

In a work consisting of written words, such as a book, manuscript or magazine, the notice should be conspicuously placed near the front of the piece, usually on the title page.

f) Registration with the U.S. Copyright Office

A common misconception is that a work must be registered with the copyright office before it is protected by copyright. This is not true. Copyright protection exists as soon as the work is fixed in a tangible form. However, registration does offer certain advantages. Registration is required before a copyright infringement suit can be started.⁶ If the work has been registered prior to the infringement⁷, the owner of the work is entitled to statutory damages⁸, even if there are no significant actual damages, and is entitled to recover his or her costs and attorney's fees incurred in bringing the lawsuit.⁹ Registration within five years of first publication also constitutes prima facie evidence of the validity of the copyright and the facts stated on the copyright certificate.¹⁰

⁵ Two New York federal district court cases have held that the letter 'c' enclosed in parentheses does not meet the statutory notice requirement. *Goldsmith v. Max*, 1981 Copyright Decisions (CCH), paragraph 25,248 (S.N.N.Y. 1981) and *Holland Fabrics, Inc. v. Delta Fabrics, Inc.*, 2 USPQ.2d 1157 (S.D.N.Y. 1987).

⁶ 17 USC § 411. This rule does not apply to works first published outside the United States.

⁷ Or within three months of first publication, 17 USC § 412.

⁸ 17 USC § 412.

⁹ 17 USC § 412.

¹⁰ 17 USC § 410(c).

In order to register one's copyright in a work, the copyright owner must register the work with the U.S. Copyright Office. The registration procedures have changed recently. The U.S. Copyright Office treats these changes as an experiment, subject to further change. The procedures described below were current when this brochure was written, but you should check with the Copyright Office for the latest procedures and fees.

You can reach the U.S. Copyright Office at <http://www.copyright.gov/>. There is a new toll-free help line at 1-877-476-0778. The physical address is

Library of Congress
U.S. Copyright Office
101 Independence Avenue SE
Washington, DC 20559-6000
(202) 707-3000

The Copyright Office's preferred method of registration is on-line. The Copyright Office has a form available on its web site that you can fill in and submit on-line. The registration fee for filling out this form on-line is currently \$35.00. You can also fill in a different form on-line, print it out and submit it by mail. This fill-in form is fairly new, and is called the Form CO. The fee for using this form is currently \$50.

Traditionally, the Copyright Office used a series of paper forms for registration. These forms are still available. The fee for using these forms is currently \$65. Which form you use depends on the type of work to be registered:

Form TX: Non-dramatic literary works (books, manuscripts, magazine articles, and computer software)

Form SE: Serials and for works issued or intended to be issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely (periodicals, newspapers, magazines, annuals, journal, etc.).

Form PA: Works of the performing arts (musicals, plays and screenplays, pantomimes and choreographic works, motion pictures and other audiovisual works)

Form VA: Visual Arts (pictorial, graphic and sculptural works)

Form SR: Sound recordings

Regardless of which registration form you use, you can save some money by registering several works at once, provided that they are related to one another.¹¹ For example, you can

¹¹ 37 CFR 202.3(b)(3)(i) provides:

For purposes of registration on a single application and upon payment of a single registration fee, the following shall be considered a single work:

(A) In the case of published works: All copyrightable elements that are otherwise recognizable as self-contained works, that are included in a single unit of publication, and in which the copyright claimant is the same; and

(B) In the case of unpublished works: all copyrightable elements that are otherwise recognizable as self-contained works, and are combined in a single unpublished "collection". For such purposes, a combination of such elements shall be considered a "collection" if: (1) The elements are assembled in an orderly form; (2) the combined

register ten magazine articles on the same topic, or a series of prints of the same subject as a collection of articles for one registration fee.

There is a deposit requirement as well. Normally, the author must submit one copy of an unpublished work or two copies of a "published work" with the registration application. Copyright Law uses the word "publish" differently than it is commonly used. In copyright law, the word "publish" means the distribution of the work beyond the author and the author's immediate circle of friends. There is an advantage to submitting a work for registration before publication. If you submit one copy of a work, it goes into storage at the Copyright Office. If you submit two copies, as is required for published works, the second copy either goes on the shelves of the Library of Congress or is given away. There will be one copy of your work in public circulation without your having any control over where it goes.

You may submit your deposit as an electronic file on-line or mail it in in paper form or in a variety of other formats, depending on the nature of the work you are registering.

In order to maximize the copyright protection, the author should register the work anytime before or within three months after first publication.¹² If registration occurs within three months of publication, the author will be able to recover the full range of available remedies, including statutory damages and attorneys fees, against any infringement that took place from the time of publication. If the author registers later than three months after publication, the author loses the right to collect statutory damages and attorneys fees from infringements that take place prior to registration. If the work is unpublished, the author can only collect statutory damages and attorneys fees from infringements that take place after registration. The best advice is to register early.

g) The Work for Hire Doctrine

Copyright ownership in a work "vests initially in the author or authors of the work".¹³ It is not always clear who the author is. When a single person creates a work independently, that person is the author and the person owns the copyright in the work. On the other hand, when an employee of a company creates a work as part of the employee's job duties, the work for hire doctrine¹⁴ provides that the company is the author and the company owns the copyright in the work.¹⁵

But what happens when someone is working with a company but is not employed by the company? Then it depends.

elements bear a single title identifying the collection as a whole; (3) the copyright claimant in all of the elements, and in the collection as a whole, is the same; and (4) all of the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.

¹² 17 USC §§ 407-412.

¹³ 17 USC § 201(a).

¹⁴ The Copyright Act of 1976 uses the term "work made for hire". Most commentators and most courts use the term "work for hire" instead. This author shall use the term "work for hire", except when quoting from the Act.

¹⁵ 17 USC § 201(b).

In 1989, the United States Supreme Court clarified the law. In *Community for Creative Non-Violence (CCNV) v. Reid*¹⁶ the Court ruled that if the work is one of the types that are specifically listed in the Copyright statute, and if the parties agree in writing to call the work a work for hire, it will be a work for hire. The list includes contributions to collective works, screenplays, translations, forwards, afterwards, book illustrations, bibliographies, appendices and indices. It does not include books, poems, and plays, unless they are to be published as part of a collection.¹⁷

In all other cases the question is whether the individual was more like an independent contractor or more like an employee. If the individual was more like an independent contractor, then the individual owns the copyright. If the individual was more like an employee, the company owns the copyright.

Even under the common law of agency, it is not always clear when a person is an employee and when a person is an independent contractor. This distinction must be made on a case by case basis, taking into account all of the relevant factors pertaining to the particular case.¹⁸ Some of these factors are: the amount of control the hiring party has over the way in which the work is performed; which party pays the payroll taxes (social security, federal income tax withholding, etc.); which party furnishes the tools and materials used; where the work is performed; the duration of the relationship between the parties; the method of payment (by the hour, week, or month as distinguished from on a per-job basis); which party hires and pays assistants; and whether the party being hired is in a regular business and also works for other parties.

Applying this test, most people who are hired to create a particular work will be considered independent contractors and will retain the copyright rights to their work. But in some cases someone may be more similar to an employee and may still lose his or her copyright rights under the "work for hire" doctrine.

Many people are surprised by the application of this test. If you hire a photographer to take photographs of your wedding, then the photographer usually owns the copyright in the photographs. Similarly, if you hire someone to design a web site for you, that person, not you, may own the copyright in the web site design.

A good practice tip is that if you are hiring someone to create a work or part of a work for you, always have a written agreement that specifies who will own the copyright in the finished work.

There is an easy way to avoid having to be concerned with the work for hire doctrine. Anyone who creates a work of art for someone else should have a written agreement stating who is to own the copyright in the finished work. An oral agreement would not be binding on the

¹⁶ 490 US 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989).

¹⁷ 17 USC § 101.

¹⁸ At least two sources provide useful lists of factors to be considered. The first is from a large volume of recommended laws and commentary, called the Restatement of Laws. The specific text can be found at Restatement (Second) of Agency § 220 (1958). The second list of factors is published by the Internal Revenue Service in IRS Rev. Rul. 87-41.

parties, and the work for hire doctrine would still determine ownership. But as long as the agreement is in writing, it will be controlling on the issue of ownership.

h) Joint Authorship

People who work with others also need to be aware of the concept of joint authorship. For example, if an author hires someone to create an index for the author's book, is that person a joint author of that book for copyright ownership purposes? Perhaps. Joint authorship, like the work for hire doctrine, may create some unexpected and in many cases, undesirable results for those who do not plan in advance.

The Copyright law defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of the unitary whole."¹⁹ Congress expanded on its intentions in the legislative history to the Copyright Act, stating:

A work is "joint" if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole". The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit.²⁰

If one person writes the lyrics to a song, and then sends them to a composer who will write the music, they are both joint authors of the entire song because they intended to create an inseparable work. This is true even if the lyricist and the composer have never met, and the lyricist did not even select the composer until after the lyrics were written.²¹

How large must one person's contribution be in order for that person to qualify as a joint author? The courts generally hold that the contribution must be copyrightable on its own in order for the author to be considered a joint author.²² If a contribution is too minor to contain enough originality to qualify for copyright protection or does not meet the subject matter criteria for copyright protection, then the author will not rise to the level of a joint author. A typical example would be where one person creates an idea for a story, and another person writes the story. Ideas are generally not copyrightable, while artistically creative stories are copyrightable. Under the general rule, the person who created the idea would not be a joint author because that person's contribution was not independently copyrightable.

Courts will also look to the nature of the relationship between the parties and ask "Did they intend that their relationship would result in joint authorship". Using this reasoning, one court

¹⁹ 17 USC § 101.

²⁰ H.R.Rep. No. 1476, 94th Cong., 2d Sess. 120 (1976), S.Rep. No. 473, 94th Cong., 2d Sess. 103 (1975).

²¹ *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944).

²² See for example, *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991). Two of the federal Circuits have declined to adopt this reasoning so far, the District of Columbia and the Third Circuit. But neither Circuit has rejected this approach either.

pointed out that a writer frequently works with an editor who will make numerous revisions to early drafts, many of which will consist of additions of copyrightable expression, and research assistants will on occasion contribute some protectable expression to a book beyond mere factual findings. Yet neither the editor nor the research assistant will be considered a joint author because the parties did not intend that they be a joint author.²³ This test requires a subjective analysis of what the parties intended. It does not deal with the situation where the main author may not have intended to create a joint work, but the editor or research assistant did.

Whenever two or more people work together on the creation of a copyrightable work, the parties should agree in advance, preferable in writing, who will own the copyright in the finished work.

Joint author arrangements can be difficult to manage if more than one person controls the use of the work. Each joint author of a work may grant non-exclusive licenses in the work without first seeking the permission of the other joint authors. But an exclusive license can only be granted with the permission of all joint authors.

On the other hand, joint ownership of the proceeds from the licensing of the work is usually not a problem. Any license fees received by any of the joint authors must be shared with the other joint authors.

The joint authors are free to divide up ownership rights, so that one person controls what happens with the work, but all of the joint authors share in the proceeds from the licensing of the work. When this type of arrangement is feasible it is usually easier to manage and leads to less conflict among the joint authors.

i) Copyright Rights are Divisible

The package of rights that copyright gives to an author are infinitely divisible. You do not have to transfer all of the copyright rights to the same person. For example, you could give the rights to the hardcover (or magazine) reproduction in the U.S. to one publisher and the rights to publish in the rest of the world to another publisher. All of the following derivative works could be sold separately as distinct rights: paperback - trade or mass market; movie or video; pre-publication serialization; post-publication serialization (reader's digest, comic book, ...); reprints in other books; translations; TV or radio readings/dramatizations; commercial/merchandise rights (t-shirts, posters, dolls); foreign publication.

There is no limit to how many separate rights you can divide the copyright into. For example, a standard book publication contract is largely a description of how the pieces of the copyright will be divided up.

j) Copying Someone Else's Work

Authors are often more concerned about determining when they may legally use someone else's work than about protecting their own work. Generally, you need someone's permission to

²³ *Childress* at 507-508.

use their work. This is true even if you found the work on the Internet. When in doubt, get permission.

It can be very difficult to determine if a work is protected by copyright, and if so, who the copyright owner is. The rules are very complicated. There is also a separate set of rules for works first published outside of the United States. It is usually best to consult with an attorney regarding rights in older works.

It used to be fairly easy to determine when it was legal to use someone else's work. The term of the original copyright was 28 years, and one 28 year renewal was allowed. So, if the work contained a copyright notice and was less than 56 years old, it was probably protected by copyright and copying without permission was not permitted. If the work was older than 56 years, the copyright had expired.

The law was changed in 1976, with the new law taking effect in 1978. Prior to 1976 there were a series of amendments to the law that granted various interim extensions for existing works. There have been a few changes since 1976 as well. The interaction of these laws is very complex and beyond the scope of this brochure. But it is safe to say that all works first published in the United States prior to January 1, 1923 are in the public domain in the United States. The laws vary by country, and it is not safe to assume that works that are in the public domain in the United States are also in the public domain elsewhere. It is also not safe to assume that works first published outside of the United States are in the public domain in the United States just because their first publication in the United States was before 1923.

For works published on January 1, 1978 or later, the copyright normally lasts for the life of the author plus seventy years. This last category includes works created before January 1, 1978, but not published before January 1, 1978.

It also used to be easy to determine if the copyright in a work had been lost prior to the expiration of the copyright term, either by accident or intentionally. A work lost its copyright if it was distributed publicly without a copyright notice (although in some cases this omission could be cured and the copyright regained). Therefore one could generally assume that any work without a copyright notice was in the public domain. With the abolition of the requirement for a copyright notice as of March 1, 1989, a work no longer loses its copyright protection by not containing a copyright notice. For works first publicly distributed prior to March 1, 1989 the old rules still apply. It is usually safe to assume that such a work is in the public domain if it is published without a copyright notice.

But for new works, first published after March 1, 1989, there is no longer an easy way to determine when it is permissible to copy someone else's work. For new works, one has to assume that the works are protected by copyright unless specific information is available that indicates otherwise. It is therefore wise to obtain permission from the author before using or copying a work published after March 1, 1989.

Many people use rules-of-thumb that have become standard industry practice over the years for guidance as to when it is permissible to copy or use a work or a portion of the work. For example, it is widely believed that it is okay to copy up to seven bars of a musical composition or up to one chapter of a book. These rules-of-thumb were developed at a time when copyright enforcement was lax. Most of these rules have no basis in the law. As more and more individuals and businesses become aware of their copyright rights, they are challenging these rules.

Copyright and other intellectual property litigation is on the rise. I do not recommend relying on standard industry practices any more. If you wish to use a work that may be copyright protected, consult with a copyright attorney first.

Many people feel that if they make a reasonable attempt to obtain the permission of the author, and they do not receive a response, then they can proceed to use the work anyway. This is not true. The copyright right in a work includes the right not to have the work distributed, if the author so chooses. The author, or the author's publisher, as the case may be, is free to ignore requests for permission to use the work. It makes no difference whether the author can even be found in order to ask for permission. Unless you have specific permission to use a copyrighted work, you may not use that work. If you wish to use a work that may be copyright protected, you must obtain the permission of the author prior to using the work.²⁴

k) Exceptions to the Copyright Rights - Fair Use

There are exceptions to the exclusivity of copyright law. That is, under certain circumstances, someone who does not own an interest in the copyright to a work can still use the work.

The major exception is the fair use doctrine. Under this doctrine, people who do not own the copyright in a work can still use the copyrighted material in a reasonable manner without the copyright owner's consent. There is no fixed rule for when a use is fair. Instead, the fairness must be determined on a case by case basis. All of the circumstances of the use should be considered in determining fairness. The law specifies that there are four factors that should be considered in every case.

(1) the purpose and character of the use, including whether the 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.²⁵

The actual application of this test can be extremely complex. If you are unsure whether a particular use meets the fair use exception, this would be a good time to consult with a copyright attorney.

l) Remedies for Infringement

Anyone who uses a copyrighted work in violation of one or more of the five exclusive copyright rights without the permission of the copyright owner²⁶ is an infringer.²⁷ The copyright

²⁴ There are a few very limited exceptions to this rule. In addition, Google is trying to create a limited exception for out-of-print books.

²⁵ 17 USC § 107.

²⁶ In the case of certain visual works, the author may sue to protect some copyright-related rights even if the author is not the current copyright owner. See the section on moral rights below.

owner can sue infringers in federal court.²⁸ Federal courts are empowered with considerable authority to grant relief to copyright owners. The federal court may:

1. Order an injunction prohibiting the infringing action;
2. Order a federal marshal to impound and destroy all infringing copies of the work;
3. Order the infringer to pay the copyright owner the actual damages suffered by the copyright owner as a result of the infringement;
4. Order the infringer to pay the copyright owner the infringer's profits from the infringement, even if the infringer's profits are greater than the damages suffered by the copyright owner;²⁹
5. If the work was registered prior to the infringement³⁰, order the infringer to pay the copyright owner statutory damages of up to \$30,000, or up to \$150,000 if the infringement was committed willfully, for each instance of infringement, regardless of the actual damages involved.
6. If the work was registered prior to the infringement³¹, order the infringer to pay the copyright owner the attorneys fees and costs incurred in bringing the law suit.

Generally, in order to show infringement, the copyright owner must show that the infringer had access to the copyrighted work and the copy is substantially similar to the original work. Whether two works are substantially similar is a question of fact, and is often quite difficult to determine. One rule of thumb is that if the second work reminds an ordinary person of the first work, there is a strong possibility of substantial similarity.

Anyone who infringes a copyright willfully and for commercial advantage or private financial gain has committed a crime punishable by a fine of up to \$250,000 and imprisonment for up to 10 years.³² Criminal prosecutions are rare except in the case of counterfeiting - making and selling exact copies of popular phonograph records, tapes and CD's and movies.

Someone can be held liable for copyright infringement through contributory or vicarious liability. Contributory liability occurs where someone knows that copyright infringing activity is taking place and either induces it, causes it, or materially contributes to it. Napster was found guilty of contributory infringement because the company set up a web site that facilitated and encouraged the illegal sharing of copyrighted MP3 music files. Vicarious liability occurs when

²⁷ See 17 USC § 501-511.

²⁸ Federal courts have exclusive jurisdiction over copyright, 28 USC § 1338.

²⁹ An example of this would be if the copyright owner wrote a book that didn't sell very well and was no longer in print. Then the infringer comes along and essentially copies the book and the new book is a tremendous success. The copyright owner did not lose any money because of the infringement - the first book was no longer being sold. But the copyright owner may still be entitled to all of the profits made by the infringer.

³⁰ Or if the work was registered within three months of first publication.

³¹ Or if the work was registered within three months of first publication.

³² 17 USC § 506 and 18 USC § 2319.

someone has the right and ability to control the infringing action, does not stop it, and receives financial gain as a result. For example, a bar owner who allows musicians to play songs in the bar may be vicariously liable for copyright infringement if the musicians did not obtain the proper license to play the songs.

m) Moral Rights in Copyrighted Works

Moral rights are inalienable rights of the author which help to protect the author's reputation and the integrity of his or her creation. These rights are recognized in many other countries, but are not generally recognized in the United States.

There is a provision of the U.S. Copyright Law that provides a type of moral rights to authors.³³ This provision provides that the original author of a work has a one time right to terminate any copyright transfer. This termination right supersedes any contract or other agreement between the parties. In the case of transfers made on or after January 1, 1978, regardless of when the work was created, the termination must take place in the five year time period of thirty-five (35) to forty (40) years after the transfer of the copyright. In the case of transfers made before January 1, 1978, the termination must take place in the five year time period of fifty-six (56) to sixty-one (61) years from the date the copyright was secured (not from the date of transfer), or within five years of January 1, 1978, whichever is later. In either case, notice must be given at least two (2) and no more than ten (10) years in advance of the termination date. So if you intend to terminate - plan ahead.

The copyright law was amended in 1990 to give visual artists certain moral rights in their works of visual art (paintings, drawings, sculpture, and limited edition prints and photographs) which are separate from copyright rights.³⁴ It is not clear what affect this law has on other types of creative works. It may mean that the courts are free to extend these moral rights to other types of works. Or it may mean that the application of moral rights is specifically limited to the types of works listed in the new law. However, there has not been any movement to expand moral rights since the passage of this provision.

³³ 17 USC §§ 203 and 304(c).

³⁴ These rights include the right to:

- a) claim authorship of the work;
- b) prevent the use of the artist's name in conjunction with works the artist did not create;
- c) prevent any intentional mutilation, distortion, or other modification of the work without the artist's permission; and
- d) prevent the destruction of works of recognized stature.

These rights continue to exist even after the work has been sold by the artist to another party. These rights apply only to works created or sold by the original artists after May 1, 1991.

2. Contacting the U.S. Copyright Office

The best way to contact the U.S. Copyright Office is on-line at <http://www.copyright.gov/>. There is a new toll-free help line at 1-877-476-0778. The physical address is

Library of Congress
U.S. Copyright Office
101 Independence Avenue SE
Washington, DC 20559-6000
(202) 707-3000

A good place to start is with Copyright Office Circular #1 - Copyright Basics.