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What Everyone Should Know About Copyright

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What Everyone Should Know About Copyright

By Leonard D. DuBoff © 2007
We wrote the book on small business law.

About

It is well known that copyright was so fundamental to the founders of this nation that the Constitution contains a provision enabling Congress to enact a copyright law. The First Congress did so, and copyright has been a part of this country’s laws since then. From time to time, the laws have been revised and updated to reflect new technology.

Most people believe they have some knowledge about the copyright laws. Unfortunately, the law is not stagnant, and the information that is passed from person to person is often inaccurate.

Under the current law, a copyright is created whenever any “original work…of authorship [is] fixed in any tangible medium of expression…” This means that all one needs for a copyright is an original work, involving some minimal degree of creativity, embodied in some tangible means of expression. The requirements appear quite simple; yet, they can be misunderstood.

Since the law requires the work to be in a tangible form for it to be protected by copyright, mere ideas that have not been implemented are not protectable. Words, symbols and logos used to identify products or services are protectable under the trademark laws—not under the copyright statute. Generally speaking, copyright protection extends to creative work such as art, music, literature and software. This includes photography, which the courts have defined as an art form.

The protected work need not be unique. For instance, if two artists by coincidence create artworks that are virtually identical to each other without copying, each will be entitled to copyright protection if the other requirements of the statute are present. This is true even though the works may be substantially similar to one another.
The law does not require a copyright owner to use a copyright notice, though it is a good idea to do so, since the statute provides that anyone who copies another’s protected work, believing in good faith that the work is not protected by copyright, is an innocent infringer. Innocent infringers may not be held liable for damages and may even be permitted to continue copying, despite the fact that the original work is technically protected by copyright.

The statute says that to defeat the defense of innocent infringement, the appropriate copyright notice should be placed on the protected work. The notice is quite simple. It is either the word “copyright” or the international symbol “©”, plus the copyright owner’s name and the year in which the work was first published or exhibited.

The statute provides the copyright owner with a number of exclusive rights, which means that nobody else can legally exercise or use those rights without permission, although there are some public policy exceptions to this rule. Regrettably, the balancing of rights as between the copyright owner and others generates a great deal of confusion.

The copyright statute prevents others from making a substantial copy of a protected work, but there is no precise definition of substantial copy. Cases have held that creating a three-dimensional work from a two-dimensional drawing is an infringement so long as the unauthorized three-dimensional copy is substantially similar to the two-dimensional drawing.

The unauthorized work need not be a substantial copy of the entire protected original in order for there to be an infringement. In one case, the court held that an infringement was proven when a portion of a repetitive pattern was copied without permission. Even taking a piece of a protected work and using it as part of a collage has been held to be an infringement.

While the law is clear—that is, no one can make a substantial copy of another’s protected work—the application of this simple rule is quite difficult. Persons who desire to use the creative works of others for mere inspiration certainly may do so, but the use can go no further than that. There are statements to the effect that changing a work by 10 percent, 20 percent or some other specified percentage will avoid violation of the copyright statute. This is inaccurate since there are no cases or statutes providing any percentage that can be considered safe. Rather, as noted above, the law uses the substantial similarity test. This is a very subjective test and presents those who copy the works of others with a great risk that the finder of fact may conclude that the line between inspiration and copying has been crossed.

Care should, therefore, be taken when using the works of others for ideas. When in doubt, you should consult with an experienced copyright lawyer.

The copyright laws provide that Congress shall grant a creative person copyright protection for a limited period, and at the end of that time, the work shall become part of the public domain and be freely copyable. It is, therefore, important when copying works of others to determine if those works are still protected. The period of protection for copyrighted works created on or after
January 1, 1978, is the life of the creative person plus 70 years if the work was created by an identified human being. Works created anonymously, under a pseudonym or for a business entity, are protected for 120 years from creation or 95 years from first publication, whichever period expires first.

Copyrights that predate January 1, 1978, generally have a period of protection of 75 years, though you should see an art attorney if you need to calculate the precise expiration date of such a work. If a work is no longer protected, then it is in the public domain, and there is no prohibition on copying it.

As you can see, the copyright laws of the United States provide creative people with the ability to control the reproduction of their work, though it also has a chilling effect for individuals who obtain more than inspiration from the works of others. It is important to recognize the fact that even subliminal or unintentional copying has been held actionable. It is, therefore, essential for you to understand the copyright laws and avoid violating them. When in doubt, you should consult with an expert who may be able to assist you in avoiding liability.

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