What You and Your Business Need to Know About Copyright Law and Infringement

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Copyright law affects one's rights and ability to use another's work, including writings, drawings, photographs, paintings, software codes, or even business plans. The purpose of copyright law is to promote the creation of works by giving authors exclusive property rights; copyright law is intended to encourage the dissemination of these works, bolstering a competitive marketplace.

Is Your Work Copyrightable?

For a work to be eligible for copyright protection, it must be an “original work of authorship” that is (1) “fixed in a tangible medium of expression,” (2) original, and (3) possessing a modicum of creativity. “Fixed in a tangible medium of expression” means the work exists in some physical form, for some period of time, no matter how brief. The originality requirement allows for works that are similar to pre-existing works, but may be lacking in quality, ingenuity, or aesthetic merit, so as long as the new work is independently created. The modicum of creativity requirement necessitates some creative effort on the part of the author.

Copyright protection can be granted for literary works, musical works and their accompanying words, dramatic works and their accompanying music, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works. Works that are ineligible for copyright protection include ideas, procedures, systems, methods of operation, principles, or discoveries. The ineligible works fall short of the originality and modicum of creativity requirements necessary for copyright protection. Other examples of noncopyrightable works include short titles and phrases, mere listings of ingredients or contents, works that are part of common property with no original ownership such as a calendar, speeches that have not been written or recorded, and basic plots or character types.

Businesses should be aware that copyright protection is date and fact sensitive. The date of publication determines the duration of copyright protection, as well as the necessity for observing certain formalities related to the copyright protection. For works published after 1977, copyright protection lasts for the life of the author plus seventy years. If the work is for hire, meaning it is done in the course of employment or specifically commissioned, or if it is published anonymously, by a corporation, or under a pseudonym, the copyright lasts between 95 and 120 years, depending on the publication date. At the end of the copyright protection time period, the work becomes part of the
public domain. This means the work is available for anyone to use without permission or restriction, but no person or entity can ever own it. All works published in the United States before 1923 are in the public domain.

How Can You Protect Your Work?

Notably, a copyright symbol (©) is no longer required to receive copyright protection. It is nevertheless wise for authors and businesses to include the symbol so that an infringer cannot claim to be unaware of the copyright. Publication or registration in the Copyright Office is not required to secure copyright protection for works created after January 1, 1978: works are copyrighted at the moment they are fixed in a tangible form.

Nonetheless, registering the copyright with the Copyright Office does have certain important benefits and advantages. The most significant advantage is that registration is a prerequisite to filing an infringement suit in court. Meaning, in order to be able to file a lawsuit against an infringer for copyright infringement and stand a chance at recovering any type of damages, you must have a copyright registration for the work or works at issue. Completing registration creates a public record of the author’s copyright claim, which renders an alleged infringer incapable of asserting an innocent infringer defense. If the work is registered within five years of publication, the registration is presumptively true evidence of the validity of the copyright. If registered within three months of publication, or prior to infringement of the work, statutory damages and attorney’s fees are available to the copyright owner in court actions; otherwise, owners can only recover actual damages and the infringer’s profits. Additionally, the owner of a registered copyright may record the registration with the United States Customs and Border Protection to protect against the importation of infringing copies.

What Rights Does Copyright Protection Provide?

Certain exclusive property rights vest in the owner when copyright protection is secured. The right of reproduction encompasses copying some or all of the copyrighted work. The right to prepare derivative works refers to the right to transform, adapt, or recast a work, such as turning a book series into a television series. The right to distribute includes the right to sell, rent, lease, or lend copies of the work. The right to perform is limited to literary works, musical works, dramatic works, choreographic works, pantomimes, motion pictures, and audiovisual works. Finally, the right to display the copyrighted work includes display of pictorial works, graphical works, and sculptural works, in addition to display of works that may be performed.

Any or all of these exclusive rights may be transferred, but for a transfer to be valid, businesses must execute a transfer agreement in writing, signed by the owner of the rights, or the owner’s duly authorized agent. Transfer of a right on a nonexclusive basis does not require a written agreement.

What If Your Works Are Infringed?

If you’re copyrighted and registered work has been infringed, you can file a claim for copyright infringement, but you must do so within three years after discovering the infringing act took place because that is the legal deadline for a copyright infringement claim. Each time a copyrighted work is infringed upon, the owner has three years to file suit; which means each time the infringer uses your work or commits an act of infringement, a new three-year limitations period commences. In some instances, you can file suit more than three years after the infringement occurs or the discovery of the
infringement, but you would only be entitled to damages for the three years preceding the date you file suit and not for any infringing activity that occurred prior to then.

A recent copyright infringement case filed against the songwriters of Frozen illustrates the effect of the statute of limitations, Ciero v. Walt Disney Co., Case No. 2:17-cv-08544 GW-MRW (C.D. Cal., filed 2017). Copyright owner Jaime Ciero alleged that the Frozen songwriters copied the hit song “Let It Go” from his Chilean song “Volar” because the two songs had many striking similarities. The alleged infringing conduct—recording the song and incorporating it into the Frozen film—occurred before the movie’s release in November 2013; Ciero did not file his complaint until after the three-year period had ended in 2017. The Central District of California found the complaint was insufficient because it was generic and conclusory; additionally, the alleged infringing conduct occurred more than three years prior to filing the complaint. The court permitted Ciero to amend his complaint because each time an infringer violates a copyright, the three-year period to file suit re-opens. Therefore, every time “Let It Go” is played on the radio or sung at a Broadway show, there is an alleged violation of the copyright. The court limited Ciero’s potential recovery, however, to only the infringing events that occurred within the three-year time period. Ciero’s amended complaint included more specific musical examples of alleged infringement and references to alleged infringement that occurred within three years prior to filing the lawsuit. The parties agreed to dismiss the case in May 2019.

What Damages Can You Recover?

If a copyright owner is successful in proving infringement, there are three types of damages that may be recovered: actual damages in the form of lost revenue or sales, additional profits of the infringer, and statutory damages. An infringer’s additional profits can only be recovered when those profits exceed the copyright owner’s actual damages. Statutory damages range from $750 to $30,000 per work for non-willful infringement and up to $150,000 for willful infringement; the actual amount awarded is based upon the surrounding circumstances, the seriousness of the infringing act, and the financial worth of the infringer. Copyright owners may recover actual damages plus profits or statutory damages, but not both. As stated above, works must be registered prior to infringement, or within three months of first publication, for an owner to recover statutory damages. Therefore, it is wise for an author to file for copyright protection as soon as possible to preserve the right to sue for statutory damages.

What Defenses Can the Infringer Raise?

Businesses must be aware of possible defenses that may be asserted in a lawsuit for copyright infringement and must be prepared to address them. One such defense is fair use—the idea that a copyrighted work can be used by someone other than the author without permission for public use purposes such as journalism, commentary, criticism, news reporting, teaching, scholarship, and research. A parody or satire may be considered fair use as social commentary or criticism and may even diminish or destroy the market value of the original work, so long as it does not merely appropriate the original. To determine if an alleged infringement is fair use, courts consider (1) the purpose and character of use; (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.

The author of Who’s Holiday, a one-actress comedic play that makes use of the characters, plot, and setting of the Dr. Seuss children’s book How the Grinch Stole Christmas!, recently requested a declaration from the court stating that the play made fair use of the Dr. Seuss book and did not
constitute copyright infringement, Lombardo v. Dr. Seuss Enters., 279 F. Supp. 3d 497 (S.D.N.Y. Sept. 15, 2017), aff’d, 729 F. App’x 131 (2d Cir. July 6, 2018). Seuss alleged that the play infringed on the book’s copyright by using the same rhyming style, setting, and characters as the original. Giving most weight to the first fair use factor, the court discussed whether and to what extent the play was “transformative.” The court found the play was a transformative parody that took the original character’s archetypes, turned them upside down, and made their saccharin qualities objects of ridicule. The play also re-contextualized and subverted Dr. Seuss’s rhyming style while highlighting the ridiculousness of the utopian society depicted in the children’s book. This parody was sufficiently transformative to be a fair use because it added something new and altered the original book with new expression, meaning, and message. The court found the play did not incorporate substantial elements of the book’s characters, setting, and plot; rather, it merely engaged in a distorted imitation, mocking the original. Considering the effect on the potential market, there was virtually no possibility that consumers would go see the play in lieu of reading the book because the book is a children’s book intended for all ages, while the play is a “bawdy, off-color parody . . . clearly intended for adult audiences.” The court found this was “fair use” that precluded the copyright infringement claim.

As another example, Michael Jackson’s estate filed a copyright infringement suit against Walt Disney and ABC in May 2018, MJJ Prods., Inc. v. Walt Disney Co., 2:18-cv-04761-PSG-SK (C.D. Cal., filed 2018). The complaint alleged that “The Last Days of Michael Jackson” prime-time special documentary used a “truly astounding” amount of Jackson’s music, videos, and concert footage from “Thriller,” “Billie Jean,” and many other songs without a license. When the estate contacted Disney regarding the contents of the program, Disney responded that all uses of the music, videos, and footage were fair use because “The Last Days” is a documentary. Disney maintained that the documentary used and incorporated only short excerpts of songs, music videos, and other materials with the purpose of providing historical context and explanation of Jackson’s life and career. The court did not make any findings in this case regarding fair use, and the parties agreed to dismiss the case in December 2019.

In conclusion, copyright protection is available for many types of works, so long as the works meet the statutory requirements of (1) being fixed in a tangible medium of expression, (2) originality, and (3) possessing a modicum of creativity. Copyright protection can last for a very long time, and obtaining copyright registration for photographs, drawings, software codes, business plans, etc. allows businesses to enforce the exclusive property rights that come along with owning a copyrightable work. Copyright registration further allows business to recover damages from infringers in either the form of actual damages and infringer’s profits, or statutory damages. Businesses need to be conscious of the statute of limitations when filing a claim of copyright infringement, and they should also be aware of any potential defenses that may be raised, such as fair use.