Myths of Copyright Law

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The growth of the Internet over the past decade has provided unprecedented access to information and entertainment. Unfortunately, it also has provided an unprecedented number of opportunities to run afoul of copyright law. The education of the public appears not to have kept up with the explosion of the technology. This article discusses some of the most common misconceptions regarding the law governing copyright, especially as it applies to materials found on the Internet.

Myth #1: If it is on the Internet, it is in the Public Domain.

There are millions of copyrighted works on the Internet that are fully protected under the law. No one other than the owner of the copyright has the right to copy, distribute, or perform the works. Copyright law protects "original works of authorship" that are fixed in a tangible form of expression, including: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion picture and other audiovisual works, sound recordings, and architectural works. So, articles, photographs, videos, music, and graphic designs on the Internet are subject to the copyright laws.

There are items located on the Internet, of course, that are not entitled to protection. The federal Copyright Act specifically states that the following types of works are not protected: 1) unrecorded performances, titles, names, short phrases, slogans, and lists of ingredients or contents; 2) mere variations of typographic ornamentation, lettering, or coloring; 3) ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration, which may be protected; and 4) works consisting entirely of factual information that is common property and containing no original authorship.

Myth #2: If it Does Not Have a Copyright Notice, I am Free to Copy it.

Particularly for works created after 1989, there is no requirement that a copyright notice be used to ensure protection. Some old works may have fallen into the public domain because they did not meet the notice requirements in force under prior law, but do not count on that being the case. Assume that a work is protected by copyright unless proven otherwise.

The primary benefit of putting the © notice on works is that it prevents infringers from claiming innocent infringement and avoiding certain damage awards. Unlike patents and trademarks, there is no requirement that a copyright be registered before the copyright notice is used. We recommend that clients use the copyright notice on all the works they create, whether or not they register the copyright with the Library of Congress.

Myth #3: If the Copyright in the Work is Not Registered, it is Not Protected.

As discussed above, ownership of copyright is not predicated on registration. A work is protected as soon as it is fixed in a tangible medium.

However, registration confers many benefits, including the following:

- If a work is registered within three months of the date of publication OR before an infringement occurs, the owner is entitled to statutory damages and attorneys' fees. Otherwise, only actual damages are available.
- Registration establishes a public record of the owner's claim to the work.
- If made before or within five years of publication, registration establishes *prima facie* evidence in court of the validity of the copyright and the facts stated in the Certificate of Registration.
- Registration allows the owner of the copyright to record the registration with the U.S. Customs Service for protection against the importation of infringing copies.

Registration of a copyright is required in order to bring suit in federal court, but the registration can be obtained after the infringement has occurred.

Myth #4: The Work is Really Old, So it is No Longer Protected.

This may be true, but be careful. For published works, unless the work was created prior to 1923, the copyright may still be in force. For unpublished works, the critical date is 1891. Various amendments to the Copyright Act have extended rights in some cases and restored rights in others. In addition, even if the original work is very old, what you are copying may be a more recent recording or adaptation of the earlier work that is protected. Investigate thoroughly before assuming that anything has fallen into the public domain. There are Web sites that publish information that can assist in determining the status of a work, including the Copyright Office Web site at copyright.gov.

Myth #5: What I am Doing is Not for Profit, So it is Fair Use.

The Copyright Act provides for certain exceptions to the exclusive rights conferred to owners. The Act specifically lists the following categories of fair use: criticism, comment, news reporting, teaching, scholarship, or research.

Section 107 of the Copyright Act also lists the following factors to be considered in determining whether a use is "fair use" under the Section:

1. The purpose and character of the use, including whether such use is of 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;

4. The effect of the use upon the potential market for, or value of, the copyrighted work.

It is important to remember that whether or not the use is "commercial use" is only one factor that is considered in determining whether unauthorized use of a work is "fair use."

Myth #6: It is Legal to Use the Work if You Give the Author Credit.

The owner of the copyright has the exclusive right to reproduce, distribute, perform, or display the work publicly, to prepare derivative works, and, in the case of sound recordings, to perform the work publicly by means of a digital audio transmission.

The Copyright Act was intended not only to allow authors to reap the commercial benefit of their creations, but also to give them the right to control the way their work is used. Therefore, simply attributing the work to the owner does not take the place of obtaining permission from the owner to use the work.

Myth #7: I Only Used a Small Portion of the Work. That Cannot be an Infringement.

There is no bright line rule that allows use of any certain amount or percentage of a work. The court will look at many factors in determining whether or not use of the portion of the work constitutes "fair use." Sometimes even a very small portion of a work can represent significant commercial value.

A famous case in this area is *Harper & Row v. Nation Enterprises*, which concerned the release of information surrounding President Ford's pardon of former President Nixon. In this case, the court found that an unauthorized quote consisting of only a few hundred words from an unpublished book that was more than 500 pages in length constituted copyright infringement because the quoted section contained the heart of the story. In finding infringement, the court held the amount and substance of the portion used in relation to the copyrighted work as a whole was great, as it constituted a substantial portion of the infringer's work. The court noted that the infringer could not defend plagiarism by pointing to how much else it could have plagiarized, but did not. The court also found that the effect of the use on the potential market for the value of the copyrighted work was great, even though the percentage of the total work was small.

Myth #8: If I Bought the Book, Movie, or CD, I Own the Copyright.

Consumers only purchase the right to use the book, movie, or CD for their own personal use. The first sale doctrine gives the purchaser the right to give away or sell the work, but not the right to make or distribute copies or to create a derivative work from the original or exercise any of the rights that are exclusive to the owner of the copyright.

Myth #9: I Hired Someone to Create a Copyrighted Work for Me, So I Own the Copyright.

Generally, the author of the work is the owner of the copyright. An exception to this rule is if the work is a "work made for hire." The Copyright Act defines a work made for hire as:

1. a work … created by an employee within the scope of his or her employment; or

2. a work specially commissioned in certain specified circumstances.

The Act lists categories of works that can be considered a "work made for hire" pursuant to a written agreement.

If a work is created for you by someone other than an employee, you need to have the author sign a "work made for hire" agreement. The document also should include an assignment of all copyrights in the work.

Unfortunately, if a work was authored for you by an independent contractor without a "work made for hire" agreement, you may only own an implied license to use the work for the purpose for which it was created. This can be a big trap for business owners.

Myth #10: If I am Caught Infringing, I Will Just Stop. What Can They Do to Me?

The penalties for copyright infringement can be severe, and the technology for catching offenders gets better all the time.

The penalties for copyright infringement include:

Criminal Penalties: The No Electronic Theft Act imposes criminal penalties for certain acts of infringement, including infringements involving works with a total value of more than $2,500. Penalties include significant fines and prison terms of up to ten years for acts of willful infringement.

Civil Penalties: The copyright owner's actual damages plus any profits made from the infringement may be awarded as civil damages. Alternatively, the copyright owner may avoid proving actual damages by electing a statutory damage recovery of up to $30,000 or, where the court determines that the infringement occurred willfully, up to $150,000 per infringement.

The music industry has been particularly aggressive in going after offenders. Over the past several years, the industry has brought numerous lawsuits against individuals rather than just focusing on the companies who provide the file-sharing software with the idea that large judgments against individual users would create a significant deterrent to other individual infringers. A Minnesota case that has received a lot of publicity was brought against a woman for illegally downloading and sharing music files. The district court found that this individual had willfully infringed 24 copyrights and awarded statutory damages of $9,250 for each willful infringement, for a total damages award of $222,000. The defendant was granted a new trial, resulting in another finding of 24 counts of willful infringement and a damages award of $80,000 per infringement, for a total award of $1,920,000. The case was tried for a third time resulting in a jury award of $62,500 for each song, for a total verdict of $1,500,000. Upon appeal, the judge reduced the verdict to $54,000. That decision is now under appeal to a higher court.

This Minnesota case is just one of thousands of similar cases filed by the Recording Industry Association of America against individuals. The movie industry is also becoming more assertive in policing its copyrights, utilizing "copyright trolls" to discover unauthorized downloads of movies.

Finding ways to stop and punish infringement of copyrighted works remains a priority for government and copyright owners alike. On October 25, 2011, the Copyright Office announced policy priorities for the next two years, which include providing analysis and support to Congress in finding ways to deal with "rogue Web sites" that provide illegal file-sharing services.

Before using materials found on the Internet, it is important to contact an attorney to discuss the copyright ramifications.

Practice Areas

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