



SHEDucation

IP Law for Writers

Class 1 of 3:

Overview and

Copyright

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The Clause

“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”

It’s important to remember that copyright and patents are in the Constitution.

- The Founders supported innovations and knew that inventions required investment of time, effort, money so offered inventors “protected time” to recoup investment and profit (so they’d invent more).**
- The English wrote copyright laws to block the King from exclusive power to grant printing rights. Our Founders agreed so included copyright in the clause.**

Neither a Lender Nor a Borrower Be

You don't want to infringe.

Your publisher does not want you to infringe.

You do not want others to infringe your work.

Your publisher does not want others to infringe
your work.

Quick review of IP categories

We'll cover each in detail, later, so this intro. isn't "deep."

Stop me if you have a question

Remember: The descriptions apply to US law only. While the categories and some of the principles may overlap with practices in other countries, "it ain't necessarily so."

Copyright

- **Applies to literal expression (not to the underlying concept/idea).**
- **Life of the author plus 70**
- **120 years in works made for hire.**
- **Original Works of Authorship:**
 - **Literary, Dramatic, Musical, Artistic**
 - **The system used for music varies from the norm. It uses the underlying system (one gets a copyright the same way), then varies it with license and royalty aspects (others can make use of the material differently than for non-musical stuff).**
 - **The system for graphic art varies from the norm. It enables artists to claim rights while displaying less formal symbolism (though registration is still preferred).**

Copyright

- **A copyright is established when the author fixes the work in a tangible medium of expression**
 - **Pen to paper; musical notes to sheet; material to digital file**
 - **Performance only qualifies SOME of the issues (mere performance itself isn't “set to form”)**

Copyright

- **Additional rights (ability to sue for damages & fees) follow with display of the symbols and registration.**
- **(Submit Form, \$35.00-if online-, submit copy to US Copyright Office).**
 - **Really important. Timely registration enables recovery of compensatory damages AND fees for infringements.**

Copyright

- **Gives exclusive rights to:**
 - **Reproduce**
 - **Distribute**
 - **Make derivatives**
 - **Publicly perform/display works**

Liabilities for infringement

– Penalties could include:

- Fines not less than \$750 or more than \$30,000**
- Fines up to \$150,000 for willful infringement**
- Actual damages and any profits made by infringement**
- Without timely registration, only actual damages (loses) can be recovered (and the cases usually cost way more than that). Plus most courts won't even take cases involving non-registered works.**

Safe Harbor from Copyright Infringement

- **The DMCA specifies procedures protecting ISPs and web operators from liability for content posted by 3rd parties.**

Trademarks

- **Trademark: Protecting the marks/symbols of identity for representational clarity.**
 - **Identifying word or logo (can also be a color, sound, package shape, or smell)**
 - **Public Use In Commerce**
 - **State or National registrations available**
 - **Term: 10 years, renewable**
 - **E.g. Clorox, Kodak, Ivory**
 - **URLs, domain names, search terms and meta-tags are trademark issues**
 - **Trade dress (associated with trademark law)**

Content Torts

- **Rights of Publicity**
- **Invasion of Privacy**
 - **privacy, in general is not an IP issue; privacy surrounding personal identity can be**
- **Defamation (libel/slander)**

Rights of Publicity

- **Right to control one's image, especially in commercial environments.**
- **Based on state statutes**
- **California and New York lead the way; Illinois also has a statute as do some other states.**
- **Generally involve celebrities (due to the relative value of their image/celebrity).**
- **However, the law applies to everyone and in this Internet age, non-celebrities are implicated and protected in more instances than earlier.**

Invasion of Privacy

- **Most privacy issues dealing with surveillance are not IP issues.**
- **IP privacy applies to certain issues of personal identity**
 - **Portraying someone in false light**
 - **Intrusion into the seclusion of another**
 - **This part might/can be related to surveillance issues--but focuses on the person controlling their personae (rather than purely about “privacy”).**

Defamation

- **False Statement of Fact**
- **Causing damage to reputation**
- **It's somewhat difficult to defame a celebrity (though it IS possible)**
- **It's MUCH more difficult to defame a public official or the organization they run.**

1st amendment law “controls” many defamation cases

Tort Safe Harbor

- **The Communications Decency Act (section 230) provides ISPs and web providers safe harbor from violations (usually defamation) in content posted by 3rd parties.**
- **The CDA procedures are NOT the same as the DMCA copyright procedures, though the protections for ISPs/web providers are similar.**
 - **For example there are no take-down procedures under the CDA/230.**
- **Protection DOES NOT apply to the defamer.**

Trade Secrets and Patents

- **Two important IP categories we will not cover in these sessions.**

Introduction to Copyright Basics

- **In order to be copyrighted**
 - **The work must be “original”**
 - **“originality” is complex.**
 - **For the purpose of legal proceedings, originality means that the work has not been previously copyright protected.**
 - **In earlier historic stages, originality might have had more direct reference to “first to think of it and put it down.”**

Introduction to Copyright Basics

–In order to be copyrighted

- The work must “fixed”**
- The expression of the idea that is copyrighted, not the idea itself, so the work has to “come out.”**
- “publication” is not limited to “professional distribution.”**

Equivocation over web posting and publication

- Lack of clarity
- Lack of case law
- Much of what we have is based on whether making media files available “counts” as distribution (so violates the distribution right)
 - [Nimmer Changes His Tune: “Making Available” is Distribution](#)
(at least if/when the distribution is giving something to a peer-to-peer network that then infringes a lot)

Equivocation over web posting and publication

- **In general, one can say that fixing in form (even on the Internet) establishes the basic right**
 - **Online terms of use/service limit & determine rights.**
 - **REGISTRATION IS CRUCIAL FOR RIGHTS PROTECTION!**

Protecting Your Copyright: Three Levels of Protection

- **Level One: You put the work to form.**
- **Level Two: You use proper symbolization.**
- **Level Three: You register the work (and display the proper symbolization).**

Protecting Your Copyright

Level One: You put the work to form

Once “fixed”: “THIS IS MINE AND YOU ARE INFRINGING!”

You (generally) cannot get into court (for anything) with merely this.

But you can notify, beg, bluster, & threaten.

Protecting Your Copyright

Level Two: You use proper symbolization/notification.

“IP Law for Writers: Overview and Copyright.”

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Maybe you can get an injunction ... maybe not.

But now the accused is willfully informed.

Protecting Your Copyright
Level Three: You register the work
(and have displayed the symbolization)

<http://copyright.gov/>

If online, \$35.00 per item.

**After registration takes effect, you can
SUE infringers for an injunction, damages
AND court/legal fees.**

**But only for infringements that happen
AFTER your registration.**

Who owns/controls the copyright?

- **The author (you).**
- **Multiple authors of “the whole” or of “parts”**
 - **Get a contract!**
- **Others: Authors may assign rights.**

Who owns/controls the copyright?

Employers (usually)

- **Work output belongs to the employer.**
 - **Work for hire. For example, a special project and pay, by contract.**
 - **Rights to employer, unless specified in the contract.**
- **Grant-supported/externally funded work.**
 - **Rights to the funding agency, unless specified in the contract.**

A wide range of rights are protected

- 1. Reproduction Right: all copying**
- 2. Modification Right: the derivative works right to modify the work to create a new work.**
 - a. The derivative right is HOTLY contested**
 - b. Courts have often recognized transformative fair use that compromises derivative rights.**
- 4. Distribution Right: sale, rental, lease, or lend.**
- 5. Public Performance Right.**
- 6. Public Display Right.**

Duration

- **Life of the author plus 70 years.**
- **Corporate or “works for hire”: 95 years from “publication” or 120 years from creation, whichever expires first.**
- **No registration renewal in the US now**
 - **There used to be**
- **Is it in the public domain? (copyright expiration)**

<https://guides.library.cornell.edu/copyright/publicdomain>

Exceptions

You want to use something OR someone wants to use something of yours but no permission has been given

- **Ideas can't be copyright protected.**
- **Federal (and some state) materials can't be copyright protected.**
 - **Subcontractors might retain rights over portions of their work.**
- **Facts cannot be can't be copyright protected--unique ways they are arrayed can be (e.g., phone books).**
- **Independent/Same-time creation.**
- **Timely registration is key and might sort out “independent/same time” creation.**

More Exceptions

- **First Sale Doctrine (before digital and mostly about non-digital material):**
 - **Once I buy it, I can rent it, display it, resell it. (could NOT copy it for distribution)**
 - **First sale is largely overturned in digital by the *DMCA*, TOS, and EULAs.**
- **Copying for licensed broadcast/transmission.**
- **Fair Use**

Fair Use

... the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.**

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

(17 U.S.C. § 107)

Copyright Office offers examples:

- **quotation of excerpts in a review or criticism for purposes of illustration or comment;**
- **quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations;**
- **use in a parody of some of the content of the work parodied;**
- **summary of an address or article, with brief quotations, in a news report;**
- **reproduction by a library of a portion of a work to replace part of a damaged copy;**
- **reproduction by a teacher or student of a small part of a work to illustrate a lesson;**
- **reproduction of a work in legislative or judicial proceedings or reports;**
- **incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.”**

IMPORTANT FAIR USE ISSUES

- **Mere publication on the Internet DOES NOT mean re-use is Fair.**
- **Inconsistent application of the 4 factor test by the courts. (Which factor(s) “wins”?)**
- **Attenuations of the factors including De minimis Use and Private Use.**
- **Increased licensing ease helps many but undermines the basic fair use right.**
- **Open Source ([GPL/GNU](#)): specifies/requires open sharing without rights.**

IMPORTANT FAIR USE ISSUES cont.

- **Leval's "transformative" uses**
 - **Introduced into the "law" by implication AND later added as case law.**
 - **Very much a "shifting" standard.**
 - **Even more confusing than the basic idea of fair use, as it edges on derivative rights.**
- **Guidelines**
 - **Can be helpful and are used all the time.**
 - **Are awfully profuse, have no standing under the law, and can chill.**

More Exceptions

Want to “share”? Believe in open publishing? Want to participate in the “cut and paste” culture?

Creative Commons enables the rights owner to indicate which uses are allowed and with what (if any) required remunerations/considerations/notifications.

Copyrights (and laws) stay in place: You just make a contractual indication of exceptions.

There are a wide variety of CC licenses, found here:

<https://creativecommons.org/licenses/>

Infringement and Punishment

- **After (claimed) infringement:**
 - **Only courts can issue valid Cease and Desist orders (injunctions).**
 - **Copyright holders with claims can issue C&D threats**
 - **These joined to proper symbolization make the infringement “willful” and raise the penalties.**
 - **Courts can issue C&D orders (injunctions), levy fines, recover damages, impound illegal copies, imprison violators.**

DMCA Take Downs and Safe Harbor

- **Procedures, external to courts (initially) for infringements on WWW.**
- **Rights owner files proper paperwork with ISP/host.**
- **Site operator MUST take the material down (for up to 10 days) while the matter is adjudicated.**
- **The poster can complain; the ISP decides. Then litigation might occur.**
- **If one hosts 3rd party content: FOLLOWING THE DMCA PROCEDURES PROVIDES SAFE HARBOR.**
 - **Don't follow the procedures--the protections don't apply.**

***DMCA* Take Downs and Safe Harbor**

- **If one accepts 3rd party content, one has to designate and train a *DMCA* agent and follow the take down protocols or there's no *DMCA* “safe harbor.”**
- **Under the safe harbor, if the protocols are followed, ISPs/web services providers are not liable for infringements by 3rd parties (those posters might still be liable).**

Liabilities for Infringement

– Penalties could include:

- Fines not less than \$750 or more than \$30,000 for each infringement (checked your iPad/iPhone lately?).**
- Fines up to \$150,000 for willful infringement (checked your iPad/iPhone lately?).**
- Actual damages and any profits made by infringement.**

You can see what I last taught in the IP in New Media class at BU:

- <http://interactivemedia.bradley.edu/ell/im450/IP450/fall22/im450-01fall2022.html>
- Each class day's lecture is a .pdf, so you can get additional details if wanted.

Q&A