



Copyright: *A Primer*

"Only one thing is impossible for God: To find any sense in any copyright law on the planet."

- Mark Twain

BRYAN CAVE



Copyright: A Primer

What Is a Copyright?

Copyright is a form of protection provided by the laws of the United States and other countries to the authors of “original works of authorship.” Copyright grants the owner a bundle of exclusive rights to do (and to authorize others to do) certain things with protected works. Copyright protection is available for both published and unpublished works.

What Types of Works Are Protected by Copyright?

Copyright protects “original works of authorship” that are fixed in a tangible medium of expression. The fixation does not need to be directly perceptible as long as the work may be viewed with the aid of a machine or device.

Works protected by copyright include the following:

- Literary works such as novels, news articles, poetry, and computer software;
- Musical works, including any accompanying words;
- Dramatic works, including any accompanying music, such as theatrical plays;
- Pantomimes and choreographic works;
- Pictorial, graphic, and sculptural works, such as paintings, illustrations, photographs, and maps;
- Motion pictures and other audiovisual works;
- Sound recordings; and
- Architectural works.



We’re not a Hollywood Studio. How is Copyright Relevant to Us?

Every organization has a portfolio of intellectual property, and some of the most valuable properties in that portfolio are protected by copyrights. Just a few of these include:

- Company websites;
- Company proprietary software;
- Marketing and advertising materials;
- Manuals, brochures, catalogues; and
- Training manuals and materials.

What Is not Protected by Copyright?

The following works are generally not protected by copyright:

- Works that have not been fixed in a tangible form of expression, such as speeches or dances that have not been written or recorded;



- Ideas, facts, procedures, methods, systems, processes, concepts, principles, discoveries, or devices;
- Titles, names, short phrases and slogans;
- Familiar and common symbols or designs;
- Mere variations of typographic ornamentation, lettering, or coloring, and mere listings of contents or ingredients; and

- Works consisting entirely of information that is common property and containing no original authorship, such as standard



calendars, height and weight charts, tape measures and rulers, and lists or tables from public documents.

artists are correctly identified with the works of art they create;

- The right of integrity, which allows artists to protect their works against modifications and destructions that are prejudicial to the artists' honor or reputation.

The sale or transfer of the work of visual art itself or of the copyright does not affect the moral rights owned by the author.

Who Is an Author? And Who Owns the Copyright?

When Is my Work Protected?

A work is automatically protected by copyright from the moment it is fixed in a tangible form. For example, "phonorecords" are material objects embodying fixations of sounds, such as cassette tapes or CDs. Therefore, a song (the "work") is protected as soon as it is "fixed" in sheet music ("copies") or a CD ("phonorecords"), or both.

What Protection Does Copyright Provide to Me?

The owner of a copyright generally has the exclusive right to do and to authorize others to do the following:

- Reproduce the copyrighted work;
- Prepare derivative works based on the original copyrighted work;
- Perform the copyrighted work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works; and
- Display the copyrighted work publicly, 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.

What Are "Moral Rights" in Visual Art?

In addition to copyright, authors of certain works of visual art—including paintings, sculptures, and numbered limited editions of 200 or fewer—have the following two types of moral rights in their work:

- The right of attribution, which ensures that



"Author" is a special term in the Copyright Act that includes what we ordinarily think of as writers, composers, painters, sculptors, photographers, and other creators. The creator of the work is its author. In cases of "works made for hire," the employer or commissioning party may be the author for certain types of works (see "What Is A Work Made For Hire?" below). Copyright law automatically makes the author of a work the owner of the copyright in the work unless there is a written agreement by which the author assigns the copyright to another person or entity, such as a publisher. This is true, for example, for creative works included in advertisements.

If two or more persons create a work, they are joint authors—and thus co-owners—of the copyright in the work, unless there is an agreement to the contrary.

Copyright in each separate contribution to a magazine or other collective work is distinct from the copyright in the collective work as a whole and vests initially with the author of the contribution.

What Is a “Work Made for Hire”?

A work prepared by an employee within the scope of employment is a “work made for hire.” So, too, is a work that is (a) specially commissioned, (b) falls within certain specific categories, and (c) covered by an appropriate written agreement between the parties.

When a work qualifies as a work made for hire, the employer or commissioning party is considered to be the author—and thus the owner of the copyright. This is an exception to the general rule that the person who creates the work is its author.

Accordingly, it is important to know (a) what types of works qualify as “works made for hire,” and (b) whether a written agreement concerning the work is required.

Are Copyrights Transferable?

Yes. Copyrights provide the owner with a number of rights, all or some of which may be transferred by the owner to another. Transfers of copyright are normally made by contract. The U.S. Copyright Office can record the transfer of a copyright and this provides certain legal advantages. Moreover, recordation may be required to validate the transfer against others.

The transfer of an exclusive right is not valid unless it is in writing and signed by the copyright owner or the owner’s authorized agent. Transfer of a nonexclusive right does not have to be in writing to be valid.

A copyright may also be conveyed by operation of law and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.



How Do We Ensure our Company Owns the Copyright in Works Created by Our Employees?

If an employee within the scope of employment creates a photograph, advertising layout, musical composition, or other original work, the employer will own the copyright. A freelancer or outside agency, however, will likely own the copyright to their creative work, unless there is a written contract explicitly assigning the copyright in such work to the employer.

If a particular design, composition, or work is important to the company, it may be advisable to file a copyright registration application.

How Do We Ensure that our Company Has the Right to Reproduce Copyrighted Works Created by Freelancers or Independent Contractors?

The best way to do this is by contract. That contract should provide either (1) that the entire copyright in the work is assigned from the freelancer/independent contractor (author) to your company, or (2) that the author grants your company the necessary rights to use the work.

If the author refuses to transfer the entire copyright in the work to your company, but is willing to grant your company rights to use the work, the contractual definition of your company’s “use” of the work will be of the utmost importance. For example, you may want to ensure your company has the right to reproduce and make derivative works of the author’s work in all intended and future forms of media, including electronic communications such as on the Internet.



What Could Happen if Our Company Does not Obtain Rights to Reproduce Copyrighted Works Created by Freelancers or Independent Contractors?

Your company could get sued for infringement.

For example, a group of freelance authors sued a number of publishers, including The New York Times, for violating their copyrights in articles they wrote. The publishers had published, with permission, the articles in a collective work (the newspaper or magazine that included works by different authors). But then publishers granted electronic publishers (such as Lexis) the right to reproduce and distribute the individual articles over the Internet.

The authors sued for copyright infringement, claiming that their agreements with the publishers did not grant the publishers the right to republish and distribute the individual articles by electronic means. The U.S. Supreme Court agreed with the authors.

How Do I Indicate that my Work Is Protected by Copyright?

No particular notice or registration is required to create or preserve a copyright. You do not have to register your copyright with the U.S. Copyright Office to put a copyright notice on your work. Nevertheless, proper notice informs the world of copyright ownership and will defeat a claim of innocent infringement.

Thus, on all original works that you or your company wish to protect from copying by others, a copyright notice should be placed one time in a noticeable place in the work, such as the first page of a book or manual or the bottom of a web site page. Proper notice includes the word "Copyright" or the copyright symbol ©, the year of first publication, and the copyright owner's name. For example:

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Are There Reasons to Register the Copyright In My Work?

Here are some reasons:

- If you wish to have the facts of your copyrights on the public record and have a certificate of registration.

- If you wish to bring a lawsuit for infringement of your copyright, since you will have to register the work before you commence the lawsuit.
- If infringed after registration, registered copyrights may be eligible for statutory damages and attorney's fees in successful litigation.
- If registration occurs within five years of publication, it is considered prima facie evidence of the copyright in the work in a court of law.

If you decide to register your copyright, it is best to file for registration within three months of first publication. That way, if you have to file a lawsuit for infringement some day, you will have a statutory right to seek your attorney's fees and what are known as "statutory damages."

How Do I Register My Copyright?

You can now register your copyright online at the U.S. Copyright Office's website, www.copyright.gov. You can also register by mail at United States Copyright Office, 101 Independence Avenue, S.E., Washington, D.C. 20559-6000. Either way, you will need to submit a completed application form, a non-refundable filing fee, and one or two non-returnable copies of the work to be registered.

You may get application forms from the U.S. Copyright Office in person, by mailing in a request, by calling the Office's hotline: (202) 207-3000, or by downloading the forms from the Office's web site.

How Long Does A Copyright Last?

It depends on when the work was created, published, or registered. Generally, for works created after January 1, 1978, copyright protection will endure for the life of the author plus seventy (70) years. For works made for hire (where the company or the commissioning party owns the copyright), the duration is the shorter of 95 years from publication or 120 years from creation.

Do I Have to Renew My Copyright?

No. Copyrights in works created on or after January 1, 1978 do not need to be renewed. For works published or registered prior to January 1, 1978, renewal registration is optional after 28 years but it does provide certain legal advantages.

Does Someone's Work Have to Be Published to Be Protected?

No, publication is no longer necessary for copyright protection. However, publication remains important to copyright owners and has a specific definition under U.S. copyright law.

Registered works that are published in the United States are subject to mandatory deposit with the Library of Congress. Publication of a work can affect the limitations on the exclusive rights of the copyright owner. When a work is published, it may bear a notice of copyright to identify the year of publication and the name of the copyright owner and to inform the public that the work is protected by copyright. Copies of works published before March 1, 1989 must bear the notice or risk loss of copyright protection.



What Constitutes Publication In The United States?

Under the 1976 Copyright Act, publication is defined as: "the distribution of copies or phonorecords of a work to the public for sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies of phonorecords to a group of persons for the purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not constitute publication."

Therefore, the sale of a music CD constitutes publication of the underlying work embodied in the CD. In addition, when copies or phonorecords are offered for sale or leased to a group of wholesalers, broadcasters, or motion picture theaters, publication takes place if the purpose is further distribution, public performance, or public display.



Can I Copyright a Name, Title, Slogan or Design Logo?

Generally, you can't. Copyright does not protect names, titles, slogans or short phrases. However, a design logo may be protected by copyright provided it contains sufficient originality. Good examples are the Walt Disney Company fair castle logo and the Energizer Bunny logo.

Protection under the trademark laws may be available for names, titles, slogans, short phrases, and design logos.

How Do I Protect My Idea?

Copyright does not protect ideas, systems, or methods of doing something. The writings or drawings **expressing** your ideas may be protected by copyright, but not the idea itself.

Protection under the patent laws may be available for certain ideas, concepts, systems, or methods of doing something.

How Much Do I Have to Change in My Own Work to Make a New Claim of Copyright?

You may make a new claim in your work if the changes are substantial and creative. This new work would qualify as a derivative work. Mere editorial changes, minor changes, and spelling corrections will not create a new work subject to copyright protection.



Does My Copyright Cover Other Countries?

There is no such thing as an “international copyright” that automatically protects an author’s work throughout the entire world. Protection against unauthorized use in a particular country depends on the national laws of that country.

The United States has copyright relations with over 100 countries throughout the world, and as a result of these agreements, each country honors the copyrights of citizens of these other countries.

What Other Ways Can Copyright Protect My Work?

You can record your copyright registration with the United States Customs Service. You must have a certificate of copyright registration from the Copyright Office to record your copyright with the Customs Service.

By recording your copyright registration with the Customs Service, infringing works being imported or exported may be seized and forfeited as prescribed by Customs regulations.

Someone Infringed My Copyright. What Can I Do?

The copyright owner can file a civil lawsuit for infringement in federal district court. In cases of willful infringement for profit, the U.S. Attorney may initiate a criminal investigation.



What Is Direct Copyright Infringement?

Direct infringement is when someone copies a protected work without authorization. The copyright owner can prove infringement either by direct evidence or by showing that:

- The infringer had access to the copyright owner’s work; and
- The infringer’s work is substantially similar to the copyright owner’s work.

The copyright owner must prove that what was copied was a protectable expression, i.e., that the parts of the work copied are sufficiently original to merit protection. Thus, elements of a work that are not subject to copyright protection—e.g., facts, ideas—cannot be the basis for copyright infringement.

What Are Contributory and Vicarious Copyright Infringement?

A person commits contributory infringement if that person, with knowledge of the infringing activity, causes, or materially contributes to the direct infringing conduct of another person.

A person may be liable for vicarious copyright infringement when that person has the right and ability to control the primary infringer’s conduct and receives a direct financial benefit from the infringement.

What Types Of Remedies Do I Have Against an Infringer?

You may obtain an injunction against the infringer to stop the infringing activities. You may also be able to recover actual monetary damages, including lost profits and profits gained by the infringer to the extent not counted in your lost profits.

If the copyright in the work is timely registered, you may be able to recover statutory damages of up to \$30,000, or up to \$150,000 if the infringement is willful. In addition, attorney’s fees may be recovered.



The Infringer Is Claiming Fair Use as a Defense. What Is Fair Use?

The rights granted to a copyright owner are subject to certain limitations. One of the more important limitations is the doctrine of “fair use.” Federal copyright law contains a list of various purposes for which the reproduction of a particular work may be considered fair use, such as criticism, comment, news reporting, teaching, scholarship, and research. Federal law also identifies four factors to be considered in determining whether or not a particular use is fair:

- The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

The distinction between fair use and infringement may be unclear and is not easily defined. There is no specific number of words, lines, or musical notes that may safely be taken without permission.

What About a Parody? Is that a Fair Use?

A parody of a copyrighted work may constitute a fair use, and therefore, not be an infringement of the original copyrighted work. However, a number of factors must be considered to determine:

- Whether the new work actually fits the law’s definition of a parody of the original work; and
- Whether the parody is a fair use of the original work.

This is a complex area of the law, and the court decisions generally turn on the specific facts of the case.

When Can I Copy Someone Else’s Work?

Generally, a copyrighted work should not be published without the copyright owner’s permission unless the copyright in the work has expired or entered the public domain.

When it is impracticable to obtain permission, use of copyright material should be avoided unless the doctrine of fair use would clearly apply to the situation.

NOTE: Acknowledging the source of the copyrighted material does not substitute for obtaining permission. The safest course is to always get written permission from the copyright owner before using copyrighted material.

Could I be Sued for Using Someone Else’s Work? How About Quotes or Samples?

If you use a copyrighted work without authorization, the copyright owner may be entitled to bring an infringement action against you. There are circumstances under the fair use doctrine where a quote or a sample may be used without permission, but even there it all depends upon the specific facts. In cases of doubt, get permission from the copyright owner.

How Much Of Someone Else’s Work Can I Use Without Getting Permission?

It all depends upon the work in question and the use involved. You may use limited portions of a work including quotes for purposes such as commentary, criticism, news reporting, and scholarly reports under the fair use doctrine of U.S. copyright law. There are no set rules defining the use of a percentage of a work or a specific number of words. The myth that you are safe if you use less than 10% of the original is just that: a myth.



How Do I Get Permission To Use Somebody Else's Work?

You can ask for it. If you know who the copyright owner is, you may contact the owner directly. If you are not certain about the ownership or have other related questions, you may wish to conduct a search of the Copyright Office records.

If the material is part of a web site, contact the web site owner identified on the web site. If the web site owner is not identified, you may be able to obtain the owner information from the domain name registrar.

If the material is music, there are several industry clearinghouses that grant licenses to use musical works or, if they cannot grant the type of license you are seeking, will direct you to the proper party. The two most recognized of these organizations are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI).



How Much Do I Have To Change In Order To Claim Copyright In Someone Else's Work?

You cannot claim copyright to another's work protected by copyright, no matter how much you change it, unless you have the copyright owner's consent. Only the copyright owner has the right to authorize someone else to create a derivative or new version of a work protected by copyright.



Does The U.S. Copyright Office Have A List Of Works In The Public Domain?

No. However, a search of the Office's records may reveal whether a particular work has fallen into the public domain. A search may be conducted by the title of the work, the author's name, or the copyright owner's name. Copyright Office's records may be searched in person or online.

I Own Computer Software that I Use on My Computer. May I Make Another Copy of the Software and Give It to a Friend?

No, unless you own the copyright in the software. If you created the software and the copyright was not transferred to someone else, you are the owner of the copyright and you may give away copies.

It is important to distinguish ownership of a copy of a work from ownership of the copyright in the work.



The purchase of computer software, a book, painting, jewelry, videotapes, photographs, or any other copy or phonorecord does not give the owner or possessor the copyright. The law provides that the transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright. For example, if you buy the DVD of the latest Harry Potter movie, you own that DVD but you don't own the copyright in the movie or other works of authorship on the DVD.

Are Internet Web Sites Protected By Copyright?

Generally, yes. Copyright protection covers works of original authorship. Therefore, works that are transmitted and made available over a communications network such as the Internet, i.e., online, may be protected by copyright. Copyright protection also applies to works accessed via Internet networks and files and documents downloaded electronically.

For works transmitted online, the materials protected by copyright can include text, artwork, music, audiovisual material (including any sounds), sound recordings, animation, or motion pictures.

Do not presume that the content of a web site is not protected by copyright just because the web site does not contain a copyright notice. Remember, display of a copyright notice is not a requirement for copyright protection of the work.

How Do I Protect My Home Page Or Web Site Material?



You should have, as part of your home page or web site, a proper copyright notice and a stated prohibition on the downloading and reuse or retransmission of your material. Normally, permission to do any of those acts is by way of a license between the owner of the copyright in the material and the end users who access the home page or web site, commonly called a “clickwrap” or “webwrap” license.

The most sophisticated of these agreements require the web site visitor to register by name before receiving full access to the site and to click on a button that records the visitor’s agreement to the various restrictions governing use of the material on the site. Appropriate language for home pages or web sites should be drafted by legal counsel.

Important Points To Remember:

- Copyright protects original works of authorship that are fixed in a tangible medium of expression. Generally, the person who creates a work is the author.
- Copyright grants the copyright owner exclusive rights to do and authorize others to do certain things with protected works.
- Literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works may be protected by copyright.
- Ideas, methods, concepts, titles, names, and facts are some of the things not protected by copyright.
- You do not have to register your copyright with the U.S. Copyright Office to be protected. However, certain advantages exist if the copyright is registered, especially early on.
- Generally, copyright protection endures for the life of the author plus 70 years. Exceptions exist.
- New copyright registrations do not have to be renewed.
- Copyrights may be registered with the U.S. Customs Service.
- Copyrights are transferable.
- A work made for hire is (a) a work prepared by an employee within the scope of employment, or (b) one of certain categories of work specially commissioned in certain specified circumstances. The employer or the commissioning party will be the deemed the author of the work and the owner of the copyright.
- If you do not own the copyright in a work, you must obtain permission to use a work protected by copyright unless you use qualifies as a “fair use” under the law.
- A copyright owner may obtain the following redress for copyright infringement: an injunction to stop the infringing activities; monetary damages (including the infringer’s profits); and, in certain cases, attorneys’ fees.

DATE WORK CREATED, PUBLISHED, OR REGISTERED	PROTECTION BEGINS	PROTECTION ENDS
Created on or after January 1, 1978.	As soon as the work is fixed in a tangible medium of expression.	70 years after the death of the author. If a joint work, 70 years after the last surviving author's death. For anonymous and pseudonymous works and works for hire, protection ends the shorter of 95 years after first publication or 120 years from creation.
Created before January 1, 1978, but not published or registered before January 1, 1978.	As soon as the work is fixed in a tangible medium of expression.	70 years after the death of the author, but no earlier than December 31, 2002, whichever is longest.
Created before January 1, 1978, but published between that date and December 31, 2002.	As soon as the work is fixed in a tangible medium of expression.	70 years after the death of the author, or on December 31, 2047, whichever is longest.
Created and published with copyright notice or registered between January 1, 1964 and December 31, 1977.	When published with copyright notice or registered.	95 years after publication with copyright notice or registration.
Created and published with copyright notice or registered between January 1, 1950 and December 31, 1963.	When published with copyright notice or registered.	If properly renewed in the 28th year, 95 years after publication with copyright notice or registration. If not properly renewed in the 28th year, the work entered the public domain on December 31st of the 28th year and protection was lost permanently.
Created and published before 1950 and renewed before 1978.	When published with copyright notice or registered.	95 years after publication with copyright notice or registration. If not renewed before 1978, the work entered the public domain on December 31st of the 28th year and protection was lost permanently.

The foregoing are general guidelines and are not intended as legal advice. Each individual situation has its own issues, which may vary from the general guidelines set forth above.

If you have questions, please contact one of our copyright, trademark, or advertising attorneys who can be found on our web site at:

www.bryancave.com

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