GENERAL PRINCIPLES OF COPYRIGHT LAW
INTRODUCTION TO COPYRIGHT LAW

Copyright laws have been promulgated to protect the author's artistic expression of their works. During the last 20 years, Copyright Laws have undergone substantial change. The general trend of these changes have been to provide authors with more comprehensive protection. Notably, those changes made in 1978[1] and 1989.[2] However, when assessing the status of any work, it is important to consider certain dates, such as the date that the work was completed, and the date of publication of the work. For purposes of this paper, the current law is reviewed and occasionally references may be made "pre 1978" or "pre 1989". These include works in the year indicated.

The purpose of this article is to provide an overview of the copyright laws. In order to analyze any individual situation, additional laws must be reviewed. To provide the reader with a general understanding of the Copyright Laws, this outline breaks down the Copyright Laws into three areas:

- GENERAL PRINCIPALS OF COPYRIGHT LAW
- THE COPYRIGHT REGISTRATION PROCESS
- COPYRIGHT ENFORCEMENT

GENERAL PRINCIPLES OF COPYRIGHT LAW
SUBJECT MATTER OF A COPYRIGHT

For a work to be copyrightable, it must be "original" to the author. To determine originality, two issues should be considered, (1) individuality of expression, and (2) independent expression. For example, two authors could be in adjacent rooms and if they both produced identical works without copying, they could both receive valid copyrights.

For a work to be copyrightable, it also must be "fixed" under the authority of the author. A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit

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it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[3]

Copyrightable subject matter is the artistic expression of the author. For example, if the pattern on a planter is copyrighted, the same pattern when applied to a mug would also be protected. If the object is utilitarian in nature, the artistic expression must be "separable" and capable of existing separately from the utilitarian object.

Copyrightable works include the following categories and must be fixed in a tangible form:

- Literary works, including computer programs and most "compilations";
- Musical works, including any accompanying words;
- Dramatic works, including any accompanying music;
- Pantomimes and choreographic works;
- Pictorial, graphic, and sculptural works, including maps and architectural plans;
- Motion pictures and other audiovisual works;
- Sound recordings;
- Architectural works; and
- Vessel Hull Designs.

Copyright protection is not available for such things as titles, names, short phrases, slogans, familiar symbols and designs, ideas, procedures, methods, systems, processes, concepts, principles, discoveries, and devices. In some of the above instances, other protection, such as patent, trademark or trade secret, may be obtained.

Derivative works may be the subject matter of a copyright, but the owner of the underlying work has rights with regard to the creation of a derivative work.

OWNERSHIP OF COPYRIGHTED WORKS

If a work is "made for hire", the author of the work is the employer. In determining whether a copyrightable work is a work for hire, it must first be ascertained whether the work was prepared be (1) an employee, or (2) an independent contractor.[4] To determine whether a person is an employee, each situation must be evaluated on the facts. Some of the factors considered are the control by the employer over the work, control of the employer over the employee, and the status of the employer. If the work is made by an independent contractor, there may only be a work for hire if there is a written contract and the work falls in one of nine categories.

Some written agreements provide that if the employer-employee relationship is found not to exist, the copyrighted work is assigned to the "employer" or commissioning party.

TERM OF COPYRIGHT

On October 27, 1998, the terms of copyrights were significantly extended by the Sonny Bono Copyright Term Extension Act (CTEA). The term of a copyright is now the life of the author plus 70 years or if the work is joint, the life of the last surviving author plus 70 years. In the case of a work made for hire or anonymous or pseudonymous works, the term is 95 years from the date of publication or 120 years from the date of creation, whichever expires first. Works that were created but not published or registered before January 1, 1978 have a term of

the life of the author plus 70 years but will not expire earlier than December 31, 2002 and if that work is published before December 31, 2002, the term will not expire before December 31, 2047. For pre-1978 works still in their original or renewal term of copyright, the total term is 95 years from the date the copyright was originally secured.

It is important to review each specific copyright to determine its term. Prior to October 27, 1998 the terms were 20 years shorter and a number of complex transition rules applied to the term of copyrights for works that were not originally created on or after January 1, 1978, but generally the term of early copyrights were 28 years plus an additional 28 years if renewed unless one of the transition rules apply. A few of these prior transitional rules (before October 27, 1998) follow but each situation should be reviewed since other rules may apply. For works copyrighted before January 1, 1978: the term of the copyright was 28 years plus 47 years if renewal was properly made. For copyrights secured between January 1, 1964 and January 1, 1977, the additional term of 47 years is automatically vested.[5] For pre January 1, 1964 works, if the copyright was not properly renewed, copyright protection expires permanently.

While the Copyright Term Extension Act of 1998 (CTEA) is now the law, it is under Constitutional attack in the case of Eldred vs. Ashcroft, heard by the U.S. Supreme Court on October 9, 2002. The lower courts have ruled against the plaintiffs. The plaintiffs argue that CTEA violates the rights provided by the First Amendment. Plaintiffs point out that the U.S. Constitution provides that a copyright should last for a "limited time" but leaves the specific time to be determined by Congress. The plaintiffs also argue that the copyright laws provide not only a reward to creators but also make the works available for the public to exchange and develop new works. By extending the term of a copyright, the public is denied its First Amendment rights to the work. This is particularly true when the copyright extension is retroactive. It is interesting to note that in 1790 a copyright lasted for 14 years. In the last century the term of a copyright has been extended 11 times. Under CTEA the period is 70 years after the death of the creator.

The defendant argues that CTEA is not a violation of free speech because "Fair Use" has always been allowed. As noted below, the Digital Millennium Copyright Act of 1998 puts severe restrictions on Fair Use with respect to digital works and there is much legislative activity with respect to these restrictions. The defendant also takes the position that the court should defer to Congress to "determine that demographic, economic and technological changes warrant a longer term." The defendants amicus curiae argue that CTEA provides parity with the European Union copyright term and gives content owners to preserve and restore old works. Other amicus curiae take the position that by allowing the First Amendment position in Eldred vs. Ashcroft, every copyright related law could be drawn into constitutional litigation.

Stay tuned for this important development. [Authors Note: After writing this paper, the U.S. Supreme Court decided that the Congress had the right to change the term of a copyright (Eldred v Ashcroft, 123 S. Ct. 769 (US 01/15/2003)).]

COPYRIGHT NOTICE

Copyright notice <u>was</u> an absolute requirement for published works to have copyright protection. Unpublished works have never been required to have a copyright notice. The 1976 Copyright Act[6] attempted to provide remedial measures if a copyright notice was not provided. Under this law, the copyright applicant had 5 years after publication to remedy omissions or errors of notice. The Berne Convention Implementation Act dramatically changed copyright notice requirements. Notice is now optional for works published on or after March 1, 1989.

The form of the notice should have three elements:

! The symbol 8, or "Copyright", or "Copr." (in the case of sound recordings a P in a circle);

! The year of first publication; and

! The name of the owner of the copyright.

An example of one notice would be:

8 2002 Robert Hussey II All rights reserved

Placement of the notice is important because each type of published work has differing preferred locations. It is a crime to place a false copyright notice with fraudulent intent.

PUBLICATION

Publication is the distribution of copies to the public by sale or other transfer of ownership, or by rental lease. or lending. This date of publication is important since it is preferable to register copyrights within three months of publication.[7]

RIGHTS CONFERRED BY COPYRIGHT

A "bundle" of rights are conferred by a copyright and each of these rights are separable in their sale or licensing. These rights are the rights to:

! Reproduce the work,

! Prepare derivative works based on the copyrighted work,

! Distribute copies to the public,

! Perform the work publicly, and

! Display the copyrighted work publicly.

TRANSFER OF COPYRIGHT

A copyright, or any one of the rights conferred by the copyright, may be sold and assigned or otherwise transferred, or impressed with a security interest. The document describing this event may be recorded in the Copyright Office using the "Document Cover Sheet" with a fee of $20 plus $10 for each group of 10 (or fewer) additional titles.

THE COPYRIGHT REGISTRATION PROCESS

While registration of a copyright work is not required now, there are substantial advantages when doing so.

Copyright registration requires (1) filing the proper copyright registration form, (2)

paying the proper fee, and (3) making the required deposits. If the work is published, two copies must be deposited and only one copy must be deposited if the work is not published (with exceptions).

The registration documents and fee are filed with the Copyright Office. After reviewing the documents, the Copyright Office responds with a registration or rejection. Action may be taken to overcome the rejection. In order to prove a filing date, it is recommended that the copyright registration be sent by Certified Mail.

DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

With the approach of the new millennium, a new breed of copyright laws have been born. On Oct. 28, 1998, Congress signed into law the Digital Millennium Copyright Act (DMCA), a complex piece of legislation that both expands the protection of copyright works on the Internet and limits the liability of Online Service Providers for infringement of copyrighted works. Under the act, even if the work is not copied there is liability for attempting to do so, or giving others the tools or methods to do so. Its provisions are important to any person owning a copyright, doing business on the Internet, providing employees with access to the Internet, or providing products in digital form.

Under the Act, a Service Provider (SP) is given a Asafe harbor@ from monetary relief and some limited injunctive relief from claims of copyright infringement. A SP is defined as Aa provider of online services or network access, or the operator of facilities therefor.@ SP=s can obtain registration information at http://www.loc.gov/copyright/onlinesp/

Under the DMCA, hacking is also a violation of the law. The DMCA makes circumventing protective technologies, such as encryption and passwords, a violation of the law. The sale and use of circumventing devices or methods or the manufacture, distribution and offering to the public the tools or services to perform circumvention is also a violation of the law. It is also a violation of the DMCA to change or alter copyright management information such as the author, copyright owner, performer, terms of use of the work or any identifying numbers or symbols of the work. As an interesting aside, the Act surprisingly provides for copyright protection of certain original boat hull designs!!

The DMCA puts severe restrictions on fair use rights to copy with respect to digital works. The "fair use" doctrine allows consumers to make copies of copyrighted content for personal and other "non-infringing" uses. DMCA does not allow this Afair use@ for digital works.

The in July, 2002 Representative Howard Berman (D.-California) introduced a bill further extending the rights of copyright owners to by allowing them to disrupt unauthorized uses of their copyrighted works on peer-to-peer networks.

Under DMCA the fair use doctrine with respect to material in digital format is virtually eliminated. To preserve fair use rights to copy digital works and provide rights to bypass copy

protections for non-infringing uses, Rep. Boucher (D.-Virginia) and Doolittle (D-Calif.) introduced The Digital Media Consumers Rights Act in October 2002. Silicon Valley Congresswoman Rep. Zoe Lofgren (D.-Calif.) introduced another digital rights bill entitled "Digital Choice and Freedom Act of 2002" in October, 2002. This bill allows the owner of a digital work to make backup copies and display that digital work on preferred the devices, prohibit shrink-wrapped licenses that limit the lawful consumers rights and expectations, clarifies that lawful consumers can sell or give away their copies of digital works, and allows them to bypass technical measures.

Is not expected that these recently introduced bills will be passed this year. Probably the next session of Congress will be revisiting the issue of fair use of copyrighted material with respect to digital works.

COPYRIGHT ENFORCEMENT

While copyright enforcement is an important part of the copyright law, the limited scope of this article does not allow a description of all alternatives since each situation must be evaluated on its particular facts. The following is a birds eye view of a few copyright enforcement procedures.

FEDERAL COPYRIGHT INFRINGEMENT LAWSUIT

To prove a lawsuit for copyright infringement, two elements must be proven: (1) ownership, and (2) copying. Each of these elements have subelements, each of which must be proven.

To prove ownership, the copyright owner must prove:

- Originality in the author,
- The subject matter is copyrightable,
- Citizenship status which allows for the copyright claim
- Compliance with Statutory formalities,
- The basis for the claimants right if he is not the author.

Copying may be proven by direct evidence, such as witnesses who observed the copying, but this is generally not the case. Copying will exist even if the copying is done from memory. Copying is usually proven by (1) access, and (2) substantial similarity. However, even if these elements are proven, the court can find no infringement if the court believes the work is the authors creation, based on other defense elements. Other defenses are license, assignment, limitations, latches, estoppel, innocent intent (damages only), misuse of the copyright (anti trust violation or unclean hands), abandonment of the copyright, and most importantly, fair use.

The "fair use" doctrine allows consumers to make copies of copyrighted content for personal and other "non-infringing" uses. The fair use doctrine also applies to other areas some of which are pointed out below. It should be noted though that the Digital Millennium Copyright Act effective eliminates the fair use defense with respect to digital works but this area is under scrutiny in Congress (see Digital Millennium Copyright Act section of this paper).

Other areas of fair use are as follows:

- ! Criticism,
- ! Comment,
- ! News reporting,
- ! Teaching (including multiple copies for classroom use with size limit),
- ! Scholarship or research, and
- ! Parody.

While there is no brightline test for the fair use defense, the following factors are considered in making a determination of fair use.

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

An interesting case where the Afair use A defense was applied is in Sony Corp. v. Universal City Studios, Inc., 464 US 417 (1984) in which the U. S. Supreme Court held that making home copies of a broadcast for viewing at another time (Atime shifting@) was a non-infringing Afair use@ of the copyrighted material.

If a copyright owner prevails in a lawsuit for infringement, he "is entitled to recover the actual damages suffered by him or her as a result of the infringement, **and** any profits of the infringer that are attributable to the infringement...".[8] If the copyright owner has registered the work prior to infringement, Statutory damages and attorneys fees may be elected. One exception to this statement occurs if the copyright registration is filed within 3 months of the date of publication. Statutory damages vary at the discretion of the court between $750 and $30,000 per infringement. The exception is that the minimum may be reduced to $200 in the case of an innocent infringer or increased to $150,000 where the infringement is "willful". Even though each copy is a technical "infringement", the number of copies are not multiplied by the statutory damage amount, but if there are multiple publications separated by more than a number of days, the statutory damages may be multiplied by that number at the discretion of the court. Multiple statutory damage awards have been made for infringements of multiple copyrighted works.

Injunctive relief is also available to stop further infringing acts. The court may also impound infringing articles and in the final decree order the infringing articles destroyed. Reasonable attorneys fees may also be awarded by the court if registration was made before the infringement and there is some "moral blame" against the losing party. The Statute of Limitations for a Civil Copyright Infringement action is 3 years after the claim accrued.[9]

CRIMINAL INFRINGEMENT

Some infringements of copyright are criminal infringements when "any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain"[10] The U. S. Government may only bring such actions for willful infringements and such actions are rarely brought. The penalty is a fine or imprisonment up to 5 years (up to 10 years for the second or subsequent offense), or both. In the case of sound recordings or motion pictures, a fine or imprisonment up to 3 years (up to 6 years for the second or subsequent offense), or both. The Statute of Limitations for Criminal Copyright proceedings is 5 years after the cause of action arose.[11]

IMPORTED INFRINGING ARTICLES

Armed with a copyright registration, the owner of a copyright can file the registration with U. S. Customs. The infringing goods may be prevented from entering the United States.

Footnotes

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1. **Copyright Act of 1976 (Title 17 of the United States Code)**

2. **Berne Convention Implementation Act of 1988**

3. **See Copyright Office Practices Compendium II ' 202.02**

4. **Community for Creative Non-Violence v. Reid, 490 U. S. 730 (1989)**

5. **Public Law 102-207, enacted June 26, 1992**

6. **This Act took effect on January 1, 1978.**

7. **See COPYRIGHT ENFORCEMENT section.**

8. **17 U.S.C. ' 504(b) (Emphasis added)**

9. **17 U.S.C ' 507 (b)**

10. **Copyright Act ' 506(a)**

11. **17 U.S.C. ' 507 (a)**