## Copyright, the Law and the Creative Professional: A Basic Primer

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In my experience as an attorney specializing in working with creative professionals, there are major reasons why it is important to be familiar with the basic principles of copyright law. Regardless of the media, or your role in it – artist, musician, writer, web designer, film/video marker – a basic understanding of copyright is vital.

1. You want to know how to protect your work, and to control how others request permission to use (license) your work. How to prevent others from using it without your permission. How to retain ownership or control over any work you do for others.

2. You want to know how to use someone’s material with permission -- or know how to use it *without* asking permission (and how much trouble you can get in if you don’t ask!).

**What can you *own* and how can you protect it? The basic premises of copyright law are: As the author of an original work, you have the right to control the work and make of copies of it.**

\* Original works are protected by copyright. The Copyright Act’s exclusive rights provision gives the creator the right, as the owner of a work, to control unauthorized exploitation of their creation This applies to individual components of a larger work (Ex: chapters, characters, the author’s alternate universes), too: If you draw a large complex pen and ink drawing, which includes numerous figures, ornate borders and trees, all those drawings are part of your copyright.

\* Copyright law is a US federal law, and the law does not vary from state to state. Artists should avoid infringing copyrights owned by others to avoid lawsuits, but should also avoid it keep their attention on the production of good work, not on legal problems and infringement lawsuits.

**What kind of work is protected by copyright law?**

Copyright protection is available for “original works of authorship.” The Copyright Act states that works of authorship include the many types of works that are all of interest to the artist:

*Literary: Novels, nonfiction prose, poetry, newspaper articles, magazine articles and magazines, blogs, emails, lyrics, content of your web site, love letters, etc.*

*Musical: Songs, compositions, instrumentals, recordings of music sounds and beats.*

*Dramatic: Plays and skits. This would include how-to demonstrations as well as pantomimes and choreographic works such as ballets, modern and jazz dance.*

*Pictorial, graphic, and sculptural. Photographs, posters, maps, paintings, prints, drawings, graphic art, display ads, cartoon strips and cartoon characters, statues, sculptures, and paintings.*

*Motion pictures and other audio-visual works: Movies, documentaries, training films, animations of all types, videos, television shows, and interactive multimedia works.*

**#1 Copyright *Protection* is not the same as a Copyright *Registration***

Copyright protection springs into existence automatically when an “original” work of authorship is “fixed” in a tangible medium of expression. Registration with the copyright office is not required, but it is very helpful -- especially when trying to enforce your copyright against infringers.

Among the most important benefits of registration is the **legal presumption that the work belongs to you**.In addition, a work is registered and infringement is shown, the copyright owner is entitled to “statutory damages” -- which do not require proof of the monetary losses and if the infringement is willful, the statutory damages awarded can be as high as $150,000. Also, if a work is registered before the infringement starts, a copyright owner may be able to get their attorney’s fees paid by the infringer. Finally,only a registered copyright holder can access the courts. Most work can be registered electronically with the eCO on the website at www.[copyright.gov](http://www.copyright.gov)/eCO

**What is “fixed:”** A work is “fixed” when it is made “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” One example: An artist can produce “images” with a pen, pencil, or computer software.

(The requirement used to be that the work had to be observable by the human eye – now digital files are protectable even though they would be unintelligible without the aid of a computer Copying a file into the computer memory, including storing it in the “cloud” is sufficient for a work to be “fixed”.)

Example: You create a track you call “Sick Beats 520” using the virtual instruments in Cubase (a digital beat mixing software) and save that track to your computer. Your track is sufficiently “fixed” for copyright purposes.

**Why bother to register the copyright? Isn’t litigation (going to court) very expensive?** Litigation *is* expensive, but having a registration is not only for litigation. A registration makes the *threat* of litigation more significant for any infringer. Because a registration allows for the possibility of statutory damages (the judge decides the amount) and attorney’s fee, an infringer is more likely to take the threat seriously and try to find a settlement for any legitimate claim of infringement.

**#2 Copyright Protection Requires Only Minimal Creativity, and Protects only the Expression the Author/Artist Creates**

Only minimal creativity is required to meet the originality requirement. No artistic merit is required. In a case concerning the copyrightability of circus posters (Bleistein). Justice Holmes warned that “it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.” It is very easy to satisfy the creativity required to meet the originality requirement.

The law separates the “idea” from the “expression of the idea”. Copyright protects against “copying” the “expression” of a work but not the “idea” of the work. The difference between “idea” and “expression” is one of the more difficult concepts in copyright law. The most important point to understand is that the protection of the “expression” is not limited to exact copying -- whether it is the literal words of a novel, or the shape of particular stuffed bear. No one owns the exclusive right to make stuffed bears in general, though. Copyright infringement also extends to new works which are “substantially similar.” Not though, that in order to infringe, the author of the alleged infringing work has to, at least, have had access to the copyrighted work. Coincidental similarity, when the creator of the new work has never seen or heard the other copyrighted work, is not infringement.

In addition, a work can incorporate pre-existing material and still be original -- so long as there is some original authorship added by the creation of the new work. When pre-existing material is incorporated into a new work, the copyright on the new work covers *only* the original material contributed by the new author. The new work is considered a “derivative” of the original work.

Example: A publication is created by an Artist, incorporating a number of photographs that were made by a Photographer (who had given the Artist permission to use the photographs in the work). The publication as a whole owes its origin to the Artist, but the photographs do not. The copyright on the final project does not include the rights to the photographs beyond the Photographer’s permission (license) to be included in the publication. Only the material created by the Artist is covered by the Artist’s copyright. If a Buyer came along and wanted to use the work of the Artist, for example on the Buyer’s website, Buyer would have to get permission from both the Artist and the Photographer. If she wanted only to use the photographs, she would only have to ask the Photographer.

(Situations like this can get complicated – fast. Keep good records of licenses and consider making sure those licenses are broad enough to cover what you need.)

**#3 The Rights of a Copyright Owner**

A copyright owner has many exclusive rights in the copyrighted work:

Reproduction Right. The right to copy (in any format), duplicate, transcribe, or imitate the work in fixed form.

Modification Right (AKA Derivative Work Right). The right to modify the work to create a new work. A new work that is based on a preexisting work is known as a “derivative work.”

Distribution Right. The right to distribute copies of the work to the public by sale, rental, lease, license or lending.

Public Performance Right. The right to perform the work at public place or to transmit a performance of the work to the public. In the case of a motion picture, video on a web site, or other audiovisual work, showing the work's images in sequence is considered “performance.”

Public Display Right. The right to show a copy of the work directly or by means of a film, slide, or electronic image at a public place, or to transmit it to the public. In the case of a motion picture or other audiovisual work, showing the work's images out of sequence is considered “display.” Use on a web site is also a display.

In addition, certain types of works of “visual art” also have “moral rights” which limit the modification of a particular copy of the work, and the also limit the use of an artist’s name on a work the artist did not create. For the most part this covers fine art paintings, limited edition prints (200 or less) and sculptures.

**#4 Ownership: Until Transferred, Copyrights are Owned by the Author – BUT Employers and Hiring Parties can be the “Author”**

Generally, the person who creates the work is legally considered the work’s “author” and so owns the copyright. But, if the work is created by an employee **within the scope of his or her employment**, it is a “work made for hire” -- and the employer is considered the “author” and thus owns the copyright.

Other types of works can also be a “work made for hire” even if outside of an employment context -- but a written agreement saying the work is a work made for hire is required. Only certain types of works can be works made for hire through a contract like this. Those types of works are:

1. Contributions to a collective work (for example an article for a magazine),
2. A contribution to a motion picture or other audiovisual work (for example, writing a scene or composing music for a video advertisement),
3. A translation,
4. As a supplementary work (Ex: forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes),
5. A compilation (Ex: a short story to be included in a collection of short stories),
6. An instructional text,
7. A test and the answer material for a test, and
8. An atlas.

**Is there a way for me to regain a copyright I transferred?** To transfer a copyright, it must be in writing – some written acknowledgement by the copyright owner of the transfer.

If you transferred your copyright after January 1, 1978 you may be able to terminate the transfer 35 years later.

You cannot terminate a transfer for a work that was created as a “work made for hire.”

Terminating a transfer can allow you to resell the copyright to someone else, or to re-negotiate the royalty rate you may be receiving from the current owner of the copyright. It can be real money -- think about the song “Funky Town” or the comic *Superman*. Both are over 35 years old and still valuable. Regaining control of your copyright would also allow you to release the work with an “open” license, for example through Creative Commons, or even dedicate the work to the public domain, removing copyright protection from the work.

**How long does copyright last?** The term of copyright protection depends on three factors: who created the work, when the work was created, and when it was first distributed commercially. For copyrightable works created on and after January 1, 1978, the copyright term for work created by individuals is the life of the author plus 70 years. The copyright term for “works made for hire” is 95 years from the date of first “publication” (distribution of copies to the general public) or 100 years from the date of creation, whichever expires first.

**#5: Infringement and Obtaining Permission**

Interference with any of the exclusive rights of a copyright owner is called **copyright infringement.**

Example: An Artist scanned a Photographer's copyrighted photograph, cropped the image by using digital editing software (Photoshop), and included the cropped version of the photograph in a book that the Artist sold to consumers. If the Artist didn’t get the Photographer’s permission to use their original photo, then the Artist infringed the Photographer's copyright by violating the Photographer’s (1) reproduction right and (2) distribution right (selling the altered photograph in the Artist’s own work).

In the case of a willful infringement, a copyright owner can recover actual damages or, in some cases, attorney fees and statutory damages (again as high as $150,000 for willful infringement as low as $250 if infringement is innocent) from the infringer **if the work was registered before it was infringed** (there is a three month grace period for newly published works). In addition, courts have the power to issue injunctions (court-enforced orders) to prevent or restrain copyright infringement, and to order the impoundment and destruction of infringing copies. This injunction action is not automatic, but it is available to prevent damages, especially damages that cannot be remedied by cash.

Copyright infringement occurs when someone uses work, which is under copyright protection, without permission -- and also without a recognized defense for using the work without permission. Infringement is a legal claim under federal law, because copyright is a federal statute. A federal law is a law of the country, which is applied in same way in all the states -- which is different from a state law, which may be unique to an individual state.

To succeed on a copyright infringement claim, plaintiff must show:

1. Ownership of a valid copyright, and
2. The unauthorized copying of constituent elements of the work that are original.

Unauthorized copying can be established when the plaintiff can show both that the defendant had access to the copyrighted work, and that the accused work is substantially similar to the copyrighted work. To determine whether there is substantial similarity between two works, courts will use the ordinary observer test: That is, whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value.

One way to think about using copyrightable works belonging to other people is that authorization is *always* required to use copyrighted works, and authorization can come from the copyright owner -- *or* it can come from the doctrine of fair use (see section 6, below).

**It’s easy to make the mistake of inadvertent copying! How to avoid problems**. Current technology makes it very easy to combine material created by others ‑- film and television clips, music, graphics, photographs, and text -‑ into a video product or web design.  **The technical ease of copying these works does not give you the legal right to do so.** If you use copyrighted material owned by others without getting permission, you can incur liability for hundreds of thousands or even *millions* of dollars in damages.

Most of the third‑party material you will want to use in your work is likely protected by copyright and likely belongs to someone else. Using copyrighted material without getting permission ‑- either by obtaining an “assignment” or a “license” or making sure the use is “fair use” -‑ can have disastrous consequences. The owner of the copyright can prevent the distribution of your product and obtain damages from you for infringement, even if you did not intentionally include his or her material. In addition, you might be held liable to pay for copyright owner’s legal fees if they successfully sue you.

Permission to use copyrighted material is called a **license**. A license typically describes how a work can be used by stating the scope, amount of use or duration of use. An **assignment of rights** in a copyright is generally understood to transfer all of the intellectual property rights in a particular work, although an assignment can be made more limited in scope by the written agreement it’s part of.

**An Example:** Productions, Inc. created an interactive video called You Can Do It. A freelance writer wrote the script. You Can Do It includes an excerpt from a recording of [Kelly Clarkson’s “Stronger (What Doesn't Kill You](http://www.google.com/url?sa=t&rct=j&q=what%20doesn't%20kill%20you%20makes%20you%20stronger&source=web&cd=4&sqi=2&ved=0CEQQtwIwAw&url=http%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3DavYxiIRG4xQ&ei=NVdaT-GgGaKPigKXrPGoCw&usg=AFQjCNHiPj1XPQV8pEwkxMM_bpgHHYxwJQ)).” It ends with a photograph of Kelly Clarkson shown above the words, “You Can Do It.” In this example, if the Production staff did not obtain permission to use the recording of “Stronger (What Doesn't Kill You)” and the photograph of Kelly Clarkson, “You Can Do It” infringes three copyrights: the copyright on the written song, the copyright on the Kelly Clarkson’s recording of the song, and the copyright on the photograph. (Productions is also infringing Kelly Clarkson’s right of publicity (which is separate from copyright) by the commercial use of her image.) Furthermore, if Productions did not acquire ownership of the script from the freelance writer (Productions could have a “work for hire” agreement with the writer, thereby shifting ownership of the script to them), Productions does not have clear title to You Can Do It -- and distribution of You Can Do It infringes the writer's copyright in the script. Any of the copyright owners whose copyrights are infringed may be able to get a court order preventing further distribution of this video product.

**There are a number of** myths **out there concerning the necessity of getting a license. Here are just five. Do not make the mistake of believing them:**

*Misconception #1: “The work I want to use doesn't have a copyright notice on it, so it's not copyrighted. I'm free to use it.”*

Most published works contain a copyright notice. However, for works published after 1989, use of a copyright notice is optional. The fact that a work does not have a copyright notice does not mean that the work is not protected by copyright.

*Misconception #2: “I'm using a small amount of the copyrighted work so I don't need a license.”*

It may be true that *de minimis* copying (copying a small amount) is not copyright infringement. Unfortunately, it is rarely possible to tell where *de minimis* copying ends and copyright infringement begins. There are no simple this is and that is not “bright line” rules.

Copying a small amount of a copyrighted work is infringement if what is copied is a qualitatively substantial portion of the copied work. In one case, a musician took only 2 seconds out of a four minutes recording and used it in another song. The new song was found to infringe the copyright on the original. Even though the copied material was only a small part of the original, the copied portion was an immediately recognizable part of the original.

Copying any part of a copyrighted work is risky. If what you copy is truly a tiny and non-memorable part of the work, you may get away with it (the work's owner may not be able to tell that your work incorporates an excerpt from the owner's work). However, you run the risk of having to defend your use in expensive litigation. Your use may be a fair use (see below), but sometimes, it may be better to get a license and avoid the uncertainty of the fair use doctrine. You cannot escape liability for infringement by showing how much of the protected work you did not take.

*Misconception #3: “Since I'm planning to give credit to all authors whose works I copy, I don't need to get licenses.”*

If you give credit to a work's author, you are not a plagiarist (you are not pretending that you authored the copied work). However, attribution is not a defense to copyright infringement.

*Misconception #4: “My project will be a wonderful showcase for the copyright owner's work, so I'm sure the owner will not object to my use of the work.”*

Do not assume that a copyright owner will be happy to have you use his or her work. Even if the owner is willing to let you use the work, the owner may want to charge you a license fee. Content owners view the various forms of expression as new markets for licensing their material. There are clearance agencies and stock houses to obtain rights and permissions to use work -- explore those avenues before using someone's work without permission.

*Misconception #5: “I don't need a license because I'm going to alter the work I copy.”*

Generally, you cannot escape liability for copyright infringement just by altering or modifying the work you copy. If you copy and modify protected elements of a copyrighted work, you may be infringing the copyright owner's derivative work right as well as the reproduction right, unless your use is a fair use.

**#6: Sometimes Permission is Not Necessary**

You do not need a license to use a work in three circumstances: (1) the work you use is in the public domain; (2) you only copy the facts or the ideas the work; or (3) your use is “fair use.”

**(1) Public Domain**

You do not need a license to use a **public domain** work. Public domain works are works that were never or are no longer protected by copyright, and therefore no one can claim the exclusive rights of copyright for such works. Today (2020), works first published before 1925 are no longer eligible for copyright protection. The plays of Shakespeare are in the public domain. Gershwin’s “Rhapsody in Blue” is too. Works enter the public domain in several ways: the term of the copyright may have expired, the copyright owner may have failed to “renew” his copyright which was required under the Copyright Act of 1909 after 28 years, or the copyright owner may have failed to properly use copyright notice (which was of required for publications prior to March 1, 1989, but is no longer required). The rules regarding what works are in the public domain are too complex for this primer, and they vary from country to country.

One type of work is prohibited from ever obtaining copyright, according to copyright law: Works of the federal government. However, works of state and local governments, can be copyrighted (and often are). Also, be careful to make sure that works that appear to be works of the federal government really are the works of the government, and not merely licensed by the government. Consider that the Forest Service wants a video about some protected area. In a cost cutting effort they hire a production team to make the video and also only license (pay for) the rights to put that video on the web site and show in an interpretive center, and allow the producer to sell the work elsewhere. In this case, you would not be able to take what you want of that video. Read the license information on any reference material or clip art and you can often will learn how it can be used.

**(2) Facts and Ideas**

You do not need a license to copy facts from a protected work. The copyright on a work does not extend to the work's facts. This is because copyright protection is limited to original works of authorship, and no one can claim originality or authorship for facts.

Why is that? “There is nothing new under the sun.” If we let one person own or control an idea, we would stifle all the creative interpretations of that theme. There have been famous photographs of lilies but the idea of photographing a lily is free for anyone to use. You do not need a license to take the ideas from a protected work. The copyright on a work does not extend to the work's facts -- and the idea in a story are considered a fact. However, you need to be careful in distinguishing the facts -- ideas -- from what is protectable. No one can own the idea of an apple, but you can own your artistic expression of the apple.

**(3) Fair Use**

You do not need a license to use a copyrighted work if your use is a “**fair use**.” Fair Use is a concept that came from case law and became part of the Copyright Law in the revision in 1978. The term has come to mean an unauthorized use of copyrighted material from which no infringement action would survive, considering what work was used, how it was used, how much it was used and the final effect of the use on the market for the original. Also, fair use factors in First Amendment free speech considerations, allowing people to respond to the words and images that surround them. The exclusive rights are outlined in section 106; fair use is in section 107.

Unfortunately, it is difficult to tell whether a particular use of a work is fair or unfair. Scholarly work, commentary, news reporting are all common typical fair uses. Commercial use to promote your business typically is *not* fair use. Determinations are made by courts (and it can be an expensive determination) on a case‑by‑case basis, by considering four factors:

\* Factor #1: Purpose and character of your use. The courts are most likely to find fair use where the use is for *noncommercial* purposes. Also, certain types of uses are more likely to be fair uses, such as commentary, news reporting, scholarly work, and use in classrooms. Also, courts look at the use and whether there is a transformative use or purpose to the use of the material from the copyrighted work. The more transformative the use, the more likely the use is a fair use. But all fair use factors need to be considered.

\* Factor #2: Nature of the copyrighted work. The courts are more likely to find fair use where the copied work is a factual work rather than a creative one. But this can be tricky; a book about a migrating bird, while factually describing the activities of birds, is nonetheless protected by copyright But the facts contained in the book can be freely copied because facts are not protectable. And, because the bird book is factual in nature, it may be fair use to copy some portion of the book, for example a map showing the migratory pattern of a particular species.

\* Factor #3: Amount and substantiality of the portion used. Courts are more likely to find fair use where what is used is a tiny amount of the protected work. If what is used is small in amount but substantial in terms of importance ‑- the heart of the copied work -- that weighs against fair use.

\* Factor #4: Effect on the potential market for, or value of, the protected work. The courts are most likely to find in favor of fair use where the new work is not a substitute for the copyrighted work. If it can be shown that the public is not only confusing your work with the original, but also buying yours instead of the original because it is less expensive, you have a real problem. For example, a review that includes the entire work is rarely a fair use, especially if the critique can substitute for the purchase of the original work.

General rule: Never take more of an image, writing, song or artwork than you absolutely need and be very careful the rest of the fair use factors weigh heavily in your favor if you are taking it all.

Think about your response to an accusation of copyright infringement before you use something. If you are thoughtful and solid in your answer you are more likely to succeed.

Be transformative in your use of material you are using and use the work in a transformative way. Fair use is a feature of the law, not only a defense.

**SOME ONLINE RESOURCES**

[www.Copyright.gov](http://www.Copyright.gov) Copyright Office website: online copyright registration here.

<https://rightsback.org/> - Helpful information concerning **Termination of Transfers**

<http://fairuse.stanford.edu/overview/> **-** general information site for fair use information

<http://cmsimpact.org/codes-of-best-practices/> **- several “best practices” guides for specific types of works including documentary film, journalism, poetry, sound recording, and online videos**

[www.gag.org](http://www.gag.org) - graphic artists guild - good information resource especially their pricing guideline.

**INTERESTING FAIR USE VIDS** See YouTube Disney Mashup “**Fair(y) Use Tale”** and “**Gimme the Mermaid”**

also **“YouTube Copyright School” and “Response to YouTube Copyright School”**

**My friends at NegativLand also made this video:**

<https://www.youtube.com/watch?v=t8veXrYh1cc>