

COPYRIGHT AND TRADEMARK

Intellectual Property Basics that Every Author Needs to Know

Copyright

What is it?

Copyright is a legal device that gives the creator of a creative work the exclusive rights to use that work and the ability to prevent others from using the work. These rights include: The right to distribute, copy, create adaptations (derivative works), and to perform or display the work. To qualify for copyright protection the work must meet the following criteria:

- It must have some **creative** elements created by human intellect. (i.e. Poem v. Telephone book listing);
 - It must be **original**;
 - It must be in a **fixed tangible** medium of expression. It doesn't protect ideas or facts;
 - The work **was not** created by the Federal Government.

When does its protection start?

Immediately. Copyright protection starts as soon as the work is created. But, if the author or owner of the work wants added protection, they will have to register the work with the U.S. Copyright Office.

Why register the work with the U.S. Copyright Office?

A timely registration with the U.S. Copyright Office gives the author or owner of the work greater protection in enforcing infringement claims. Registration gives a copyright owner the ability to recover up to \$150,000 without proving monetary damages, and the opportunity to recover attorney's fees from the infringer. A timely registration means that the author registers work with the U.S. Copyright Office within three months of publication, or before an infringement occurs. Without registration, it is harder for the author or owner to prove the validity of their copyright.

Can the rights be transferred or loaned?

Copyright and other forms of intellectual property protection protect the rights of the owner to use or display the works. However, a copyright owner can assign away or license those rights to another. If the owner wants to retain some rights in the work, and wants to give another the right to use the work for a duration of time, the owner can license those rights to the other. If the owner wants to relinquish all rights altogether, then they can assign or transfer those rights (assignment). All copyright transfers must be recorded with the U.S. Copyright Office to put others on notice of whom to contact regarding obtaining permission.

NOTES

COPYRIGHT AND TRADEMARK

Intellectual Property Basics that Every Author Needs to Know

Copyright

How long does copyright protection last?

When the work was first created or published affects the duration of the protection. The general rules are as follows:

- **Published before 1923:** The work is in the public domain
 - **Published 1923-1963 and never renewed:** The work is in the Public domain
 - **Published 1923-1963 and timely renewed:** 95 years from date of first publication
 - **Published between 1964-1977:** 95 years from the date of publication (renewal term automatic)
 - **Published after 1978:** The life of the author, plus 70 years after death. If the work is made for hire, anonymous, or pseudonymous, then it's 95 years from the date of first publication or 120 years from date of creation (whichever ends first)
 - **Created, but not published or registered, before 1978:** Single term of 120 years from date of creation
 - **Created before 1978 and published 1978-2002:** Copyright will expire January 1, 2048

What is the Public Domain?

Works that fall into the Public Domain are no longer protected by copyright, which means anyone may use them without obtaining permission from the author or the author's heirs. The caveat to a work in the public domain is where another author has added a new, unique creative form of expression to the work. In that event, the new, unique form of expression is the only portion that's protected (i.e. variations of Pachelbel's Canon in D).

Are there certain situations where a copyrightable work may be used without the permission of the owner?

In 1992 the Copyright Act of 1976 was amended to allow others to use copyrighted works under certain circumstances. This allowance is known as Fair Use. Fair Use can be used in the following contexts:

- In the course of news reporting
 - For educational or teaching purposes
 - As a part of research or scholarship
 - Criticism, parody and satire

NOTES

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Copyright

Fair Use is a defense to the claim of infringement. When evaluating whether or not the use falls under Fair Use, the courts look at the following factors:

- The amount of the work used
 - Any negative impact the use may have on the value of the work
 - The nature of the copyrighted work
 - The purpose and character of the use (commercial v. nonprofit or educational uses)

NOTES

What are the copyrightable features in a book?

1. **Title?** No, titles to books or movies are not copyrightable (although, they can be covered under a Trademark theory if they qualify).
 2. **Characters:** Copyrightable only so long as the character is unique and distinctive. (E.T. v. stick-figure alien).
 3. **Content:** The words as they are exactly written is copyrightable so long as it doesn't qualify as a list of facts, news, or another form of non-copyrightable content. Copyright protects the expression in the work.
 4. **Storyline:** The idea behind the storyline isn't copyrightable (i.e. Romeo & Juliet v. Westside Story). But, the expression is protected. The expression is the unique creativity in which the story is told.
 5. **Cover Design:** The design of the cover of the book is copyrightable.
 6. **Photos:** The photos and illustrations in a book are copyrightable and should be registered independently of the written content if they are the owner's original work (i.e. not being used with permission from another owner).

What if there are two authors to the work?

It is possible to copyright a work that has been created by two or more owners (coauthors). The coauthors share in copyright equally unless stated differently in a written agreement. They also share in any profits created by the work. Where there are multiple authors, it is best to have a collaboration agreement that is registered with the U.S. Copyright Office.

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Copyright

What if someone uses my work without my permission?

The use of a copyrighted work without permission or a legal basis is called an infringement. The copyright owner will send a cease and desist letter to the infringer. The letter outlines the validity of the ownership of the work, the nature of the infringement, and the remedies available to the owner. If the infringement continues, the owner can file an infringement action in Federal court.

What if I don't want to register my work with the U.S. Copyright Office but I want others to know that my work is copyrighted?

Copyright notice is extremely crucial because it alerts others that the work is copyrighted, it notifies others who the copyright owner is and the date of publication (for time calculations), and it allows the owner to get substantial damages for willful infringement. A valid copyright notice has three elements:

- A copyright symbol
 - The year(s) in which the work was published
 - The name of the copyright owner(s)

Symbol

The copyright symbol is the well-known “c” inside of a complete circle. However, in the United States the word “copyright” or “copr.” are also acceptable. However, if you want to distribute the work outside of the U.S., the © is required.

Year of publication

Note that the key word here is publication and not creation. If you have an older work that is being republished, the copyright date becomes the date of publication of the newer version if the newer version has enough substantial changes to qualify it as a new version. If the publication of the old work is just that, a republication without significant changes, then the copyright date will contain both the first publication date and new date (i.e. Copyright © 2010, 2012). However, most publishers prefer to put all dates of publication. The dates must be in Arabic numerals, and not Roman numerals.

Name of the copyright owner

The name of the person or entity who owns the copyright should be included in the copyright. If there are multiple owners, all names should be listed to put the public on notice of whom to contact regarding use of the work.

NOTES

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Intellectual Property Basics that Every Author Needs to Know

Trademark

NOTES

What is a Trademark?

A trademark is a slogan, logo, symbol, distinctive word, or device used to identify a product or service. The key to a trademark is that it must be used in commerce. Just like a copyright, it doesn't need to be registered, but can be registered to gain the additional benefits in infringement litigation.

How long do Trademarks last?

A Trademark lasts as long as it is used in commerce. If the owner of a Trademark fails to use the mark for a continuous period of three years, the mark will be considered abandoned and can be used by others.

What do Trademarks have to do with authors?

Authors and Trademarks intersect in the following ways:

- The mention of a Trademarked name in a book (i.e. Mary grabbed a Kleenex to wipe the tears from her eyes).
 - Inadvertent use of a Trademarked logo or design on the cover of a book or as an illustration.
 - The authors own personal Trademark to market a line of book sequels (Think Harry Potter).

The mention of a Trademark or the use of a mark of another in a published work without permission from the Trademark owner can lead to legal problems, even if not used to compete with the owner in commerce. Most businesses and corporations do not like their Trademark names to be used so commonly because it causes dilution of their trademark (Think Kleenex, Xerox, Band Aid). Many Trademark owners will also register for copyright protection to cover instances where authors may try to use the mark in non-commercial literary works (this only applies to logos and designs, as names and short slogans aren't copyrightable).