

Copyright Issues for Small Businesses

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Kevin A. Thompson
Davis McGrath LLC
125 S. Wacker, Suite 1700
Chicago, Illinois 60606

(312) 332-3033
kthompson@davismcgrath.com

Copyright Questions

- What is copyright?
- When does copyright exist?
- Do I need to register my copyrights?
- What benefits are there to registration?
- What is copyright infringement?
- What are the damages and other consequences for infringement?

What is Copyright?

- Copyright protects **original works of authorship** that are **fixed** in a **tangible medium of expression**
- Term is 70 years from the death of the author,
- If a work made for hire, term is 95 years from publication or 120 years from creation, whichever is shorter

What is not copyrightable?

- Ideas, methods, or systems
- Facts
- No titles, names, short phrases, slogans, forms, or common information
- Public domain works (expired copyright, or U.S. Government works)

Copyright protects the expression, not the ideas themselves

When does copyright exist?

- Under current law, Copyright exists from the moment of creation
- For older works, the answer may be different.

What are the rights of the copyright owner?

- The right to reproduce the work
- The right to prepare derivative works
- The right to distribute copies
- The right to perform the work publicly
- The right to display the work publicly
- The right to perform the work publicly by means of a digital audio transmission (only for sound recordings)

Who is the owner?

- Normally, it is the author of the work who is the owner, unless those rights are assigned to another.
- The owner of a physical copy does not normally own the copyright to the work itself.

Special situation – works made for hire

- Copyright in works prepared by employees in the scope of their employment are presumptively owned by their employers.
- If an independent contractor, the copyright is normally owned by the contractor, not the employer.
- If otherwise is intended, a contract needs to be signed to explicitly state who owns the copyright.

Do I need to register my copyrights to have protection?

- No, not under current law, but there are advantages to federal registration
- Under older law, registration was a prerequisite for protection

What benefits are there to registration?

- Registration is necessary before suit can be filed
- Statutory damages and attorneys fees may be available

Special situation - Compilation

- A work formed by the collection and assembling of pre-existing materials
 - Selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship
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- Protectable only to the degree of originality
 - The “sweat of the brow” in making the compilation is not enough

Special situation – Derivative works

- Based upon one or more already existing works
- Transforms or changes a pre-existing work
- Independently copyrightable if it is an original work of authorship, and if the underlying material was used with permission
- Copyright in a derivative work covers only what is added or changed
- Only the copyright owner can authorize a derivative work

Registering Copyrights in Digital Content

- Copyright Office website - www.copyright.gov
- Forms
- Circulars
- Fees
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- Websites
- Software
- Databases
- Photographs

Websites

- Generally, each update constitutes a new work
- Revisions can be registered, but protect only that material which has been added
- Use the form that corresponds to the predominant material
 - Text – use form TX
 - Pictures – use form VA
 - Audiovisual – use form PA
 - Sound recordings must use form SR

Websites that publish information

- Serials – weekly or less often updates – use form SE or SE/Group
- Newsletters – more often than weekly updates – Use form G/DN
- Deposit requirements vary depending on whether the information is also published on paper, or whether it is totally online.

Databases

- Use Form TX
- Protected as a compilation, requires originality in the selection or arrangement of the data in the database
- Can register either a single version, or a group registration of a database and its updates
- Deposit requirements vary depending on the database format, but special relief can be granted in the case of trade secrets

Photographs

- Can be registered individually (use form VA) or in a group if published (use form VA continuation sheet)

What is copyright infringement?

- It's someone who is not the owner who is usurping or interfering with one or more of the owner's exclusive rights

What are the remedies for infringement?

- Injunctive relief
- Impoundment / destruction of goods
- Compensatory damages and profits
- Costs and attorneys fees
- Statutory damages
 - \$750 to \$30,000
 - Not to exceed \$150,000 if willful infringement
 - Innocent infringement can lower to \$200

Defenses to infringement

- Innocent infringement is not a defense
- Fair use
- Parody
- Invalidity of copyright
- Estoppel
- Misuse or unclean hands
- Improper notice
- 3 year statute of limitations, but laches may also apply

Fair use – 4 factor test

- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality of the portion used
- Effect of the use on the market for the copyrighted work

- Important to note that it is a defense to infringement – if found not to be a fair use, still liable for the infringement

Avoiding Copyright Claims when using third party content

- Who is the owner? Request permission for use.
- Copyright database on website may help you track down who the owner is.
- Not all works require permission – For example, works published under a “creative commons” license may be available for use, provided that you comply with the license terms.

Stopping Infringement with DMCA Notices

- What is the DMCA?
- What is a notice?
- What is the proper notice format?
- Who should be notified?
- What are the steps involved?
- When will I get the result?
- What should I do if I don't like the result?

Digital Millennium Copyright Act

- Copyright Act, Section 512
- An online service provider (“OSP”) has a safe harbor from liability for hosting infringing content if it complies with takedown notices from owners.
- OSP is required to designate an agent for service of these notices
- To qualify, OSP must not have actual knowledge of the infringement, no direct financial benefit, and must act quickly to remove the infringement once there is notice.

What is the proper format for a DMCA notice?

- Physical or electronic signature of a person authorized to act on behalf of the owner
- Identification of the copyrighted work claimed to be infringed
- Identification of the material claimed to be infringing
- Contact information for the complaining party
- A statement that the complaining party has a good faith belief that the use is not authorized by the owner, and that the notice is accurate.

The DMCA takedown procedure

- Notice is given to the OSP
 - The OSP takes the material down, and notifies the user who uploaded the material
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- If taken down wrongly, the user can provide a counter-notice
 - It is similar to a regular notice, plus a statement consenting to jurisdiction in federal court
 - In 10-14 days, if no suit is filed, the material is put back up by the OSP

Why would someone submit a counter notice?

- Fair use
- Commentary
- Notifier is not the owner of or agent for the allegedly infringed work
- Misidentification of infringing work

Other Copyright issues on the Internet

- Section 230 of the Communications Decency Act – provided a safe harbor for providers and users of an “interactive computer service.”
- “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

When does Section 230 apply or not?

- Intended to protect forums from defamation claims, etc. for information uploaded by users.
- Only applies where the cause of action treats the publisher as a speaker, like defamation.

- Does not protect the publisher from copyright infringement claims, those are handled under the DMCA.

Any questions?

Thank you!