

AN OVERVIEW OF UNITED STATES COPYRIGHT LAW

Holme Roberts & Owen LLP
Attorneys and Counselors at Law

WHAT IS A COPYRIGHT?

A copyright is the legal right to control specific uses of art, books, music, motion pictures, videotapes, photographs, software programs, and many other kinds of creative material. Copyright is granted by law in most countries and in the United States by a federal statute called The Copyright Act of 1976 ("Copyright Act"). This statute governs who owns a copyright, what it consists of, how long it lasts, and how it is acquired, registered, transferred and enforced.

- **copyright owner** - a person who possesses this legal right
- **copyrightable or copyrighted material** - material that this right applies to
- **copyright protection** - the right to legally restrain unauthorized uses of copyrighted material
- **copyright registration** - a procedure for recording copyright ownership with the federal government
- **copyright infringement** - when particular uses of copyrighted material are made without the copyright owner's permission
- **Copyright Office** - the federal agency that registers copyright ownership claims

WHAT USES OF MATERIAL CAN A COPYRIGHT OWNER CONTROL?

A copyright consists of and gives a copyright owner the exclusive right to do the following things with copyrighted material:

- **Reproduce** it by photographing, photocopying, writing, drawing, audio and/or video recording, or by other means;
- **Prepare derivative material**, such as, translations, musical arrangements,

condensations, and abridgements and by varying, altering, adapting, or otherwise modifying copyrighted material;

- **Distribute it publicly** by selling, giving away, renting, loaning, or leasing;
- **Perform it publicly** by reading, performing, presenting, broadcasting, or by other means; and,
- **Display it publicly** by showing it either directly or by means of photographs, film or videotape images, or by other means.

The right to do these things exists and is enforceable throughout the United States, its territories, and possessions, subject to certain exceptions. This right gives the owner the power to control how, when, and where copyrighted material is used; who can do these things; and the number of times they can be done. It applies to all mediums so that a copyright owner can control whether copyrighted material is reproduced in paper, clay, or plastic, or on disks, videotape, or film, or in two or three dimensions.

WHAT KIND OF MATERIAL CAN BE COPYRIGHTED?

To be copyrightable, material must satisfy three requirements. It must be

- original;
- embodied in something tangible; and,
- fall within one or more copyrightable material categories.

Categories of copyrightable material:

- **Literary material** - consists of words, numbers, or other verbal or numerical symbols, such as books, advertising copy, catalogs, software programs, poetry, scripts, speeches, personal and business letters, and databases;

- **Music, including any accompanying words** - consists of varying melody, harmony, rhythm, and timbre with or without words, such as, vocal and instrumental songs, choral arrangements and orchestral music;
- **Dramatic material, including any accompanying music** - consists of literary compositions that tell a story through action with dialogue, performed on stage by actors with or without accompanying music, such as, plays, operas, and melodramas;
- **Pantomimes and choreography** - *pantomimes* consist of a drama presented by gestures and action without words; *choreography* consists of recorded or notated dance movements for performance before an audience;
- **Pictorial, graphic, and sculptural material** - consists of two-dimensional and three dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical and architectural drawings, diagrams, and models;
- **Motion pictures and other audiovisual material** - *audiovisual material* consists of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors; *motion pictures* consist of audiovisual material in the form of a series of related images which, when shown in succession, impart an impression of motion;
- **Sound recordings** - consist of recorded musical, spoken, or other sounds (but not sounds accompanying a motion picture or other audiovisual material), such as, recorded musical performances, lectures, and synthesized sounds as well as those found in nature; and,
- **Architectural material created on and after December 1, 1990** - consists of the overall form as well as the arrangements and composition of spaces and elements in the design of buildings, but not individual standard features.

A COPYRIGHT DOES NOT PROTECT IDEAS AND CERTAIN THINGS

A copyright does not include the legal right to control use of the underlying idea for copyrighted material. A copyright owner has the right to control only use of the particular way in which an idea is expressed in copyrighted material. For example, the idea of drawing a rose in a vase cannot be protected by a copyright, but a particular drawing containing these elements can be copyrighted. Other ways of representing the same idea do not infringe the copyright for that drawing.

In addition to ideas, copyright protection is not available for

- procedures, methods, systems, processes, concepts, principles, discoveries, or devices
- facts, basic plots, themes, and scenes that necessarily follow from certain plots
- public domain material
- material that lacks sufficient originality, such as book, motion picture, and song titles
- product and business names
- short phrases, catchwords, slogans and mottoes
- typographic ornamentation or lettering
- content and ingredient listings
- blank forms designed for recording information
- familiar symbols or designs
- measuring and computing devices, like tape measures, rulers, and wheel dials
- material consisting entirely of information that is common property, like standard calendars, sporting event schedules, height charts, and lists or tables taken from public documents or other common sources

HOW TO OBTAIN A COPYRIGHT

A copyright is obtained simply by creating copyrightable material. Nothing more needs to be done. It comes into existence automatically on the date eligible material is created. Filing documents, paying fees, or obtaining a certificate of registration from the Copyright Office is not required.

The copyright owner of copyrightable material is the person who creates it. However, there are two exceptions to this rule. **Work made for hire** refers to material subject to these exceptions.

One exception applies to material an employee creates within the scope of employment. The other applies to material an independent contractor creates on commission, but only with respect to specific kinds of commissioned material.

- **Employer/employee relationship** - the employer obtains and is automatically the first owner of copyright for material that an employee creates.
- **Commissioned work** - a person who commissions another to create copyrightable material obtains and is the first owner for the material, but only if the creator signs a written agreement to create it before the material is created.

Persons who collaborate to create copyrightable material jointly own the copyright for it, even though they have not expressly agreed to this result. They automatically become copyright co-owners unless they agree otherwise and each has a right to use the copyrighted material without the need to obtain permission from the other owner(s).

Paying someone to create copyrightable material does not itself result in a copyright ownership transfer for the material to the person who makes the payment.

A copyright is not transferred unless the creator signs a written agreement to that effect.

Similarly, purchasing copyrighted material from another person does not include a transfer of copyright ownership for it if there is no written agreement saying the copyright is transferred for

the material. The person who creates it keeps the copyright.

HOW LONG DOES COPYRIGHT LAST?

There are three different time periods copyright can last.

- **Life plus 70 years** - for material a individual creates other than as an employee; protection lasts for the life of the creator plus 70 years after that person's death. If two or more persons create copyrightable material, the term of protection ends 70 years after the death of the creator who dies last.
- **95 years from publication or 120 years from creation** An exception to the life plus 70 year term applies to material created within the scope of employment. For such material, copyright lasts 95 years from the date it is first publicly available, or 120 years from its creation, whichever period is shorter.

WHAT IS A REGISTERED COPYRIGHT?

Copyright registration is a procedure used to record a copyright with the federal government, namely the United States Copyright Office. This procedure involves filing an application for registration on a preprinted government-provided form, submitting copies of copyrighted material, and paying a filing fee.

Registration can occur any time during the life of copyright. However, there are advantages to registering a copyright soon after material is created. Although registration is not required to obtain a copyright, it is necessary for United States nationals as prerequisite to filing an infringement lawsuit.

WHAT ARE THE BENEFITS OF REGISTERING A COPYRIGHT?

If a copyright is registered before it is infringed, the copyright owner is entitled to be awarded attorney fees and can elect to receive statutory damages in cases where the infringer has made little or no profit from the infringement. These remedies are in addition to the right to an injunction. If registration is made after the infringement, the owner is not entitled to either of these remedies but can be granted injunctive relief.

WHAT IS A COPYRIGHT NOTICE?

A copyright notice consists of three elements for visual perceptible material:

- (1) © or the word "Copyright" or the abbreviation "Copr.";
- (2) the year in which a copy of the material is first publicly available by sale, gift, lease, rental, lending or offer to sell or distribute; and
- (3) the copyright owner's name.

A different version of this notice is used for sound recordings. It consists of the last two elements mentioned with an encircled letter "P" as the first element rather than ©.

To obtain or to avoid the loss of a copyright it is unnecessary to use a copyright notice. However, it is a good idea to use a notice so that all the remedies available for an infringement can be obtained. If a notice is not used, it is possible an infringer may not have to pay the copyright owner's attorney fees or statutory damages.

CAN COPYRIGHTABLE MATERIAL BE PROTECTED IN FOREIGN COUNTRIES?

Under certain conditions, many countries will give legal protection to copyrighted material owned by United States citizens. The United States has signed various copyright treaties with those countries including the Berne Convention for the Protection of Literary and Artistic Works (signed by more than 75 countries) and the Universal Copyright Convention (signed by more than 50 countries).

IS THERE A WAY TO BAR IMPORTATION OF INFRINGING MATERIAL?

By registering a copyright and recording the registration with United States Customs, a copyright owner may be able to bar importation of infringing material. United States Customs will withhold delivery of any item it has reason to believe may infringe a registered and recorded copyright.

WHAT CONSTITUTES COPYRIGHT INFRINGEMENT?

Subject to certain exceptions, unless permission is obtained from the copyright owner, everyone who produces copyrighted material or does anything with it that a copyright owner has the exclusive right to do, may be liable for infringement. The need to obtain permission applies to persons who own or have possession of copyrighted material. The absence of an intent to infringe and ignorance of the law are not necessarily defenses to infringement.

Under the "fair use" doctrine and in certain precisely defined circumstances, the Copyright Act permits persons other than the copyright owner to use copyrighted material in a variety of ways without requiring them to obtain the owner's permission.

The Intellectual Property Practice Group of the law firm of Holme Roberts & Owen LLP has published this overview as a brief introduction. This overview is intended only as a generalized introduction to a very complex and rapidly evolving area of the law. A qualified attorney should always be consulted for advice in specific factual situations.

For more information about intellectual property, including trade secrets, trademarks, copyrights and patents, contact any attorney in the HRO Intellectual Property Practice Group.

HRO maintains the following offices:

Boulder, Colorado
1801 13th Street, Suite 300
Boulder, Colorado 80302-5314
Telephone: 303-444-5955

Colorado Springs
90 S. Cascade Ave., Suite 1300
Colorado Springs, Colorado 80903-1615
Telephone: 719-473-3800

Denver, Colorado
1700 Lincoln St., Suite 4100
Denver, Colorado 80203-4541
Telephone: 303-861-7000

Los Angeles, California
777 South Figueroa Street, Suite 3650
Los Angeles, California 90017
Telephone: 213-892-4925

Salt Lake City

299 S. Main Street, Suite 1800
Salt Lake City, Utah 84111-2263
Telephone: 801-521-5800

San Francisco

One Maritime Plaza, Suite 2400A
San Francisco, California 94111-3514
Telephone: 415-362-7135

London

Five Chancery Lane
Clifford's Inn
London, England EC4A 1BU
Telephone: 011-44-207-320-6464

Munich

Leomax
Rosental 4
D-80331 Munich, Germany
Telephone: 011-4989-383980-0