U.S. COPYRIGHT LAW AND PROTECTION Michigan and Nationwide Intellectual Property

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Disclaimer

- This presentation is for informational purposes only.
- This presentation is not to be construed as providing legal advice.
- The author does not guarantee the accuracy of this presentation.
- It is impossible to cover the entire subject of US copyright law and protection, therefore only a number of topics or issues will be discussed, for further information contact Hackett & Hackett to discuss your copyright needs.

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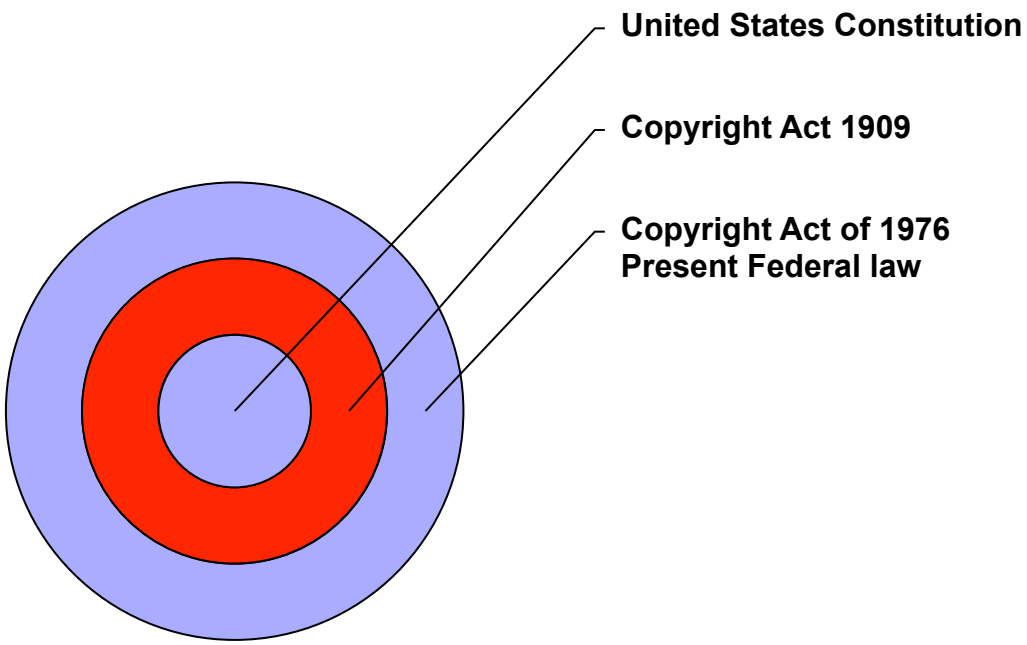
U.S. Copyright Law's Origin



U.S. Copyright Law

This presentation will introduce to the reader to some of the very basic fundamentals of U.S. copyright law. The foundation of U.S. copyright law has its roots embedded within the United States Constitution. Article I, Sec. 8 of the Constitution provides that "***The Congress shall have power…to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries***."

Congress sought to incentivize and reward those who through the fruits of their labor advanced knowledge–one who progressed science and useful arts– thereby granting such author's privileges and rights for a period of time or until the work reaches into the public domain. The Constitution not only promotes the basis for U.S. copyright law, but also the U.S. patent system within the same Article.

U.S. Copyright Law

Today much of the law relating to copyright is contained within the Copyright Act of 1976 (the “1976 Act” enacted October 19, 1976 as Pub. L. No. 94-553, 90 Stat. 2541), which took effect on January 1, 1978, thereby replacing many of the provisions under the previous Copyright Act of 1909 (the “1909 Act”). In order to understand copyright law today, a person should have a familiarity with both the 1976 Act and the 1909 Act, since the 1976 Act introduced significant changes to the 1909 Act.

The United States copyright law is contained in chapters 1 through 8 and 10 through 12 of title 17 of the United States Code (“U.S.C.”). To understand copyright law, a familiarity as explained with the copyright act(s) will play a crucial and fundamental role in applying the relevant law to a given situation. A brief example may serve to provide a conceptual understanding of this point, though a bit lengthy it needless to say explains the issue in a thoughtful manner as it relates to the 1976 Act on the following slide.

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Pursuant to 17 U.S.C. § 301(a) of the Copyright Act, a provision is provided in which federal claims preempt state law claims that are either or could be seen as a re-characterization of state law claims i.e. a claim for negligence in a complaint for copyright infringement in which negligence could be said is adequately dealt with by recourse to contributory infringement. All too often, such issues fall afoul to 17 U.S.C. § 301(a). Section 17 U.S.C. § 301(a) in part states that:

"…all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."

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This provision has been held ripe for the purposes of dismissing a claim for negligence, where the court has caught onto the notion that such a legal assertion or allegation is really a re-characterization of a cause of action housed within the confines of the Copyright Act of 1976. You should note that a state law claim is pre-empted when (a) the work is the type of work protected by copyright law; and (b) the right asserted is equivalent to a right protected by the copyright law. *Mayer v. Josiah Wedgwood & Sons, Ltd*., 601 F. Supp, 1523 (S.D.N.Y. 1985).

Where a copyright infringement action merely alleges negligence and does not add an additional legally cognizable element, it is generally ripe for dismissal. Attempting to clothe the allegation in a fabric designed by the copyright act will not fit the additional element test adopted by the courts. This was the position of the United States District Court, C.D. California in the case of *Dielsi v. Falk, 916 F.Supp*. 985 (C.D. Cal. 1996).

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The *Dielsi* the court pointed out that “But this claim merely recharacterizes a copyright infringement claim as one for negligence. Because the essential allegation is still that Defendants unlawfully copied Plaintiff's ideas, it is still a copyright infringement claim. Moreover, recharacterization of the claim as one of “negligence” does not add a legally cognizable additional element because a general claim for copyright infringement is fundamentally one founded on strict liability…Therefore, Plaintiff's negligence claim is preempted by federal copyright law” at **992-994.

You should note that the extra element sufficient to survive pre-emption must be one which changes the nature of the action so that it is qualitatively different from a copyright claim. It is the nature and not so much the awareness or intent of the cause of action, which will suffice for the purposes of qualitative difference. See also *Stromback v. New Line Cinema*, 384 F.3d 283 (6th Cir. 2004) at *307 in which the 6th Circuit held that tortuous-inference claims is not qualitatively different from a copyright infringement claim, thus a knowledge of the law goes a long way.

Copyright Eligible Subject-Matter

- The subject-matter that is eligible for copyright protection is contained in *§ 102(a)* and *§ 102(b)* of the 1976 Act, which states that *"(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:*
- *literary works;*
- *musical works, including any accompanying words;*
- *dramatic works, including any accompanying music;*
- *pantomimes and choreographic works;*
- *pictorial, graphic, and sculptural works;*
- *motion pictures and other audiovisual works;*
- *sound recordings; and*
- *architectural works.*
- *(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work*."

Copyright Eligible Subject-Matter

- As you have read, copyright protection is granted in 'original works of authorship fixed in any tangible medium of expression.' So from this we learn that *expression* is the driving force of copyright law and that it must be an original work of authorship that is fixed. A work is fixed in a tangible medium of expression when it is embodied in a copy or phonorecord, *§ 101* of the 1976 Act and a work is created when it is fixed in a copy or phonorecord for the first time, *§ 101* of the 1976 Act.

- Similarly a work must be original in order to be copyrightable. Original therefore means that is it not copied and that it must at least have some minimal degree of creativity that is independently created. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). Originality then, to reiterate, only requires that the work be not copied with a minimal degree of creativity, therefore rewarding the author for the fruits of their intellectual labor. The U.S. Supreme Court in *Feist Publications v. Rural Telephone Service*, 499 U.S. 340 (1991), speaks only of some creative spark or modicum of creativity for originality to exist to pronounce a blessing on copyright protection.

Works Made For Hire

- A work made for hire is defined under *§ 101* of the 1976 Act as a work prepared by an employee within the scope of his or her employment or a work specially ordered or commissioned for use as a contribution to a collective work. Similarly *§ 201(b)* notes that "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author… unless the parties have expressly agreed otherwise in a written instrument signed by them…."

- This portion of the Copyright Act of 1976 presents some interesting concepts. First, this provision is the only provision in which the author of the work can be a non-natural person i.e. such as a corporation. Secondly, the ownership of the said work in contrast to the ownership of the copyright potentially could be determined by a written contract. And thirdly, no creative contribution of originality by the author is noted, since it is a work for hire.

- Yet problems may arise if the individual employed to do the work is an independent contractor as oppose to an employee. This was the position in the case of *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) in which the Supreme Court concluded that Reid was an independent contract and therefore copyright ownership resided with him. You should note that the Court adopted a number of factors in determining whether Reid was an employee or independent contractor and today special attention should be paid when work is made for hire. However, special rules apply to derivative works under *§ 103(a)* and *(b)* and collective works under *§ 103 (a)* and *(b)*. Make sure that you comply with the law to be eligible as the author, though you have hired someone to do the work.

Copyright Protection of Music

- Copyright protection in music can be a complex matter, especially when dealing with the lyrics and sound recording of the music. Ensuring that one is the complete author of the entire music requires an understanding of copyright protection of music.
- Problems can arise when a claim to authorship is made by several people who contributed to such work.
- Consider alternative options to ensure that problems do not arise later when a claim is made to copyright in music.

Idea/Expression Dichotomy

- Before discussing what amounts to copyright infringement, it is essential to understanding what is meant by the idea/expression dichotomy as it relates to copyright law. As you have already read, copyright protection does not extend to *any idea*, *§ 102(b)* of the 1976 Act, but to the '*medium of expression*' *§ 102(a).* But where does one draw the fine line when the expression is so closely related to the idea or the idea is so closely intertwined to the expression that they seem inseparable? The answer to this particular question is not an easy one.

- In fact, one Federal Judge in a recent case pointed out with respect to the idea/ expression dichotomy that "*The doctrine is simple to state…but difficult to apply*." See, *Tetris Holding, LLC and The Tetris Company, LLC v. XIO Interactive, Inc*., Civil Action No. 09-6115 (United States District Court, D. New Jersey May 30, 2012). The task faced by the court is to decipher between the protectable expression and the idea that is not protectable, yet as Judge Wolfson has pointed out, it is simple to state, but difficult to apply.

- Again these issues become relevant when dealing with the subject of copyrightable expression and are important to understand if you feel that you want to pursue copyright protection, because the idea/expression dichotomy becomes a relevant factor in copyright infringement discussed below. See also *Steinberg v. Columbia Pictures Industries, Inc*., 663 F.Supp. 706 (S.D.N.Y. 1987) that speaks on the subject of idea/expression dichotomy.

Requirements for Copyright Infringement

- Another important feature of copyright law is what amounts to copyright infringement. To establish a claim for copyright infringement, a plaintiff must establish both (1) ownership of a valid copyright and (2) unauthorized copying by the defendant. *Dun & Bradstreet Software Services, Inc. v. Grace Consulting*, 307 F.3d 197, 206 (3rd Cir. 2002). Therefore the focus shifts on access to the copyrighted work and substantial similarity of the two works.

- In order to determine whether there is substantial similarity between two works, it is paramount to distinguish between an *'idea'* which is not afforded copyright protection *§ 102(b)* and the *'expression*' which is provided protection under the 1976 Act, as stated previously. It should be stated that when an idea is inseparably tied to a particular expression so that they merge practically into one (sometimes called Merger doctrine) it can be looked upon in a negative light by a court.

- Since to confer protection in this scenario or situation would indirectly confer a monopoly on the idea of the expression to which it is inseparably tied, which in all actuality is what Congress prohibited in *§ 102(b)*. It has been said that '*the difficult task in an infringement action is to distill the non-protected idea from expression*.' *Reyher v. Childrens Television Workshop*, 533 F.2d 87 (2nd Cir. 1976).

Requirements for Copyright Infringement

- Ordinarily, it has been said that the test for substantial similarity asks the question from the prospective of an ordinary observer, whether the defendant has captured '*the total concept and feel'* of the plaintiff's work. It seems now that the total concept and feel analysis is a contributing test for substantial similarity as it relates to copyright infringement and likelihood of success in such a case.
- Copying also requires access to the copyrighted work. But you should note that If there is no similarity between the two works, it does not matter how much access you gain as pointed out by the Second Circuit which stated that '*of course, if there are no similarities, no amount of evidence of access will suffice to prove copying*.' *Arnstein v. Porter*, 154 F.2d 468 (2d Cir. 1946).
- Proof of access requires an opportunity to view or to copy plaintiff's work, *Sid and Mary Kroft Television Productions, Inc. v. McDonald's Corp*., 562 F.2d 1157, 1172 (9th Cir. 1977) or put another way, a reasonable possibility or opportunity of viewing plaintiff's work that leads to the copying. Such considerations play an important role in copyright infringement cases and should be discussed if an individual believes there work has been copied and infringed.
- Importantly, pursuant to *17 U.S.C. § 507* a civil action for copyright infringement must be commenced within three years from the date on which the claim accrues. Also under *17 U.S.C. § 411* an action for infringement of a copyright may not be instituted until the copyright has been registered or preregistered under *§ 411*. However some exceptions apply to the general rule of registration for civil infringement, namely, under *§ 106A(a)*, foreign works and live broadcast under *§ 411(b)*.

Faulty Advice from US Copyright Office – Consult an Attorney

- If you feel that the US Copyright Office has all the answers to your questions on copyright protection and law, think again.
- In one case, an individual relied on the advice of the U.S. Copyright Office only to find out in later case that it was as the court said "*faulty advice*" or "*poor advice*."

U.S. Copyright Registration

The benefits associated with US copyright registration are to facilitate rights in a lawsuit, ownership and international enforcement and protection. These are just some of the benefits associated with registration of US copyright. Therefore it is important to register your copyright with the US Copyright Office

International Copyright

- In the digital age, it is must easier and simpler to copy work that is protected by U.S. copy law. However, under international law, remedies may exist to protect work that is infringed in foreign countries.
- United States has a number of provisions to enable a U.S. copyrighted work seek international enforcement and protection, sometimes even within the boarders of the United States.

Next Steps

Protecting your intellectual property rights under the Copyright Act of 1976 or reinforcing your rights under the Copyright Act of 1909 are important aspects that you must consider. Whether you hold the rights directly or have assigned such rights or whether your work is a work for hire, derivative work or joint work. Of course, you must consider whether such work does in fact qualify for protection under US copyright law before considering other issues.

CONTACT

- To discuss your copyright needs, whether seeking protection, enforcement or facing a potential lawsuit for copyright infringement requires the input from an experienced attorney.
- Our legal professional can provide you with the best possible legal advice and assistance.