

COPYRIGHT LAW BASICS

for Entertainment
Professionals

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A key legal issue regularly encountered by entertainment professionals is how to effectively protect and exploit one's intellectual property. A good place to start in addressing this issue is to conduct a basic analysis of one's rights under copyright law.

Criteria for Copyright

In order for a work to receive copyright protection under the U.S. Copyright Act, it must be both (1) "an original work of authorship" and (2) "fixed in any tangible medium of expression" that "can be perceived, reproduced or otherwise communicated." In other words, the work must have been created by its author (1) without having been copied, and (2) expressed in a tangible form. For instance, if one authors an original screenplay in manuscript form, the author has fulfilled both elements required for copyright protection (originality and fixation in a tangible medium). Even if the main topic of the screenplay has been written about extensively by others, so long as the characters, setting, and other components of the narrative contain sufficient original elements, the work will be copyrightable. The same is true for a song, book, documentary, photograph, or any other tangible medium by means of which an artist communicates original expression.

Exclusive Rights

A copyright holder obtains certain exclusive rights in a work she/he authors: the rights to reproduce, modify, distribute, perform and/or display the work publicly (depending on the type of work). Use of a copyrightable work for any of these purposes by a third party who has not first obtained adequate rights from the copyright holder likely will be deemed to be an infringement of the holder's copyright in the work. Note: there are several exceptions to a copyright holder's exclusive rights in a work, such as fair use by others (for example, for educational purposes, news reporting or for use as a parody).

Notice; Registration

Once an original work is fixed in a tangible medium of expression, no further steps need to be taken to secure the author's copyright in the work. Notice of copyright (© or "Copyright" with the name of

the copyright holder and the year of first publication) in or on the work is no longer necessary, though providing such a notice may be beneficial to a copyright holder bringing an infringement action and therefore it is a good idea to include such notice. Registration of a copyright is also not required; however, there can be significant benefits to registering a copyright with the U.S. Copyright Office, and the costs to do so are relatively inexpensive (\$35-\$45 per application). One important benefit is that a copyright holder cannot sue a third party for copyright infringement unless the copyright that is the subject of the alleged infringement has been registered. However, a copyright holder can fulfill this registration requirement retroactively (i.e., after learning about an alleged infringement but before commencing a lawsuit), though doing so may result in delays. Furthermore, if a copyright holder wishes to receive statutory damages (rather than actual damages) and attorneys' fees, the holder must have registered its copyright prior to the date on which the infringement occurred.

Uncopyrightable Works

While copyright law protects original works fixed in a tangible medium of expression, such protection does not extend to the ideas or facts underlying such works. For instance, the information in a phone book is not copyrightable (since names, addresses and telephone numbers are largely factual), unless the ideas or facts are expressed in an original manner (for example, by means of original format or design). In such a case, only those original components will be eligible for copyright protection, and not the entire work (i.e., the manner in which entries are composed, if original, may be copyrightable, but not the entire phone book).

Infringement; Remedies

The test for infringement of a copyrighted work is (1) access to the infringed work by the alleged infringer, and (2) substantial similarity

of the allegedly infringing work to the infringed work. Determining whether two works are substantially similar requires a fact-specific analysis, which essentially asks whether the average person would determine that the allegedly infringing work is substantially similar to the infringed work. If such an analysis results in a finding that the two works are substantially similar, and access has been shown, a copyright holder's rights in a work likely will be deemed to have been infringed. If infringement occurs, the copyright holder has the right to bring a lawsuit seeking to prevent further infringement, to seize all copies of the infringing work and to recover damages (actual or statutory, as applicable) and, where appropriate, the infringer's profits as well as costs and reasonable attorneys' fees.

Common Issues

Works Made for Hire: Under U.S. copyright law, any work created by an employee in the scope of her/his employment is the property of the employer, and all copyrights in such work automatically vest in the employer. However, work created by an independent contractor is treated differently – the presumption under U.S. copyright law is that a contractor is the author of works she/he creates, even if the person engaging the contractor has paid for the work. Therefore, in order to ensure that the person engaging a contractor gets the full benefit of what is being paid for (i.e., that the person engaging the contractor obtains the copyright in works created by the contractor), this presumption must be reversed by a written contract containing a "work made for hire" clause. By providing contractually, before the work commences, that the person engaging the contractor will be deemed to be the author of

any works created by the contractor (as a "work made for hire"), the ensuing copyrights in the work will be owned by that person and not by contractor.

Public Performances: The right to perform a work publicly is one of the exclusive rights granted to a copyright holder. This issue often surfaces in the area of publishing and distributing online video content that contains musical compositions (whether used as part of a soundtrack or as background music). If a website operator has licensed the right to perform video content but has not also licensed musical compositions accompanying such video, the public performance rights of the persons who composed such music likely would be infringed. Note: even if one does properly obtain the right to publicly perform musical compositions embedded in video content, doing so may trigger an obligation to account for and pay royalty fees to an applicable performance rights organization (e.g., ASCAP, BMI, SESAC).

Conclusion

U.S. copyright law provides various rights for the creators of original works that are fixed in a tangible medium of expression, merely by virtue of the creation of such works. However, there are often subtle legal issues which affect the viability of a copyright holder's use of a copyrighted work or her/his ability to protect and/or commercialize such work. It is wise to discuss the applicable copyright issues with an attorney experienced in this area before investing effort and money in creating a work that might not qualify for copyright protection.

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