A CALIFORNIA LAWYERS FOR THE ARTS WHITE PAPER

COPYRIGHT BASICS

by B. Douglas Robbins[†]

I. INTRODUCTION

In this paper we discuss the basics of copyright law for non-lawyers: what sort of works are protected by copyright, what sort of works are not protected, how copyright protection operates, and what the consequences are for copyright infringement.

This paper is the first in a multipart-series written for California Lawyers for the Arts about copyright law. Forthcoming papers will discuss the prominent exceptions to copyright, such as the fair use doctrine, and the public domain.

II. COPYRIGHT BASICS

A. *Elements of Copyright*

Copyright exists in any (1) "original works of authorship" (2) "fixed in any tangible medium" (3) which "can be perceived, reproduced, or otherwise communicated."[1] Copyright protects "literary works" like novels, poetry, or short stories, "musical works," like record albums of rock music, tapes of classical music, CDs of movie soundtracks, or mp3s of hip hop recordings, "dramatic works," like plays and musicals, "pictorial, graphic, and sculptural works" like fine oil paintings, bronze cast sculptures, comic books, printed posters, or photographs, "motion pictures" like those on film, digital video, or DVD, and "architectural works" such as the blueprints to San Francisco's Transamerica Pyramid.[2]

In addition, to be "copyrightable" (an item that can be protected by under copyright law) the work must be original—that is, independently created by the author. An author's creation can be somewhat similar to existing works, or even lacking in quality, ingenuity, or aesthetic merit, as long as the author toils, without copying from someone else, to create something different or new.

Finally, to receive copyright protection, a work must be the result of at least some

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[1] 17 U.S.C. § 102(a).

[2] *Id*. § 102(a)(1)-(8).

creative effort on the part of its author.[3] The work need not exhibit much creativity: "To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice."[4] For example, the Supreme Court found that the alphabetical listing of names telephone numbers and addresses as located in a telephone book's white pages did not exhibit sufficient creativity to be copyrightable.[5] And since the white pages are not copyrightable, you or anyone else can copy them, without penalty, under the Copyright Act.

B. Copyright Rights

The Copyright Act gives to the copyright holder certain special rights over her work that no one else in the world has. Conversely, anyone other than the copyright holder who tries to use these rights without permission is *infringing* the copyright. Those rights are: (1) the right to make a copy, (2) the right to make a derivative work, (3) the right to distribute the work to the public, and (4) the right to put on a public performance of the work.[6]

Make a Copy. The right to make a copy is as mundane as taking the work to a photocopy shop and running off a copy to give to your cousin (running off a copy for your own personal use, however, is generally held to not be a violation of copyright prohibitions). Copying a song from iTunes to give to your girlfriend, *even if you charge no money*,[7] breaks the law too. As a practical matter it is difficult, if not impossible, for the copyright holder to keep track of every person who gives a mix-CD to their girlfriend, and the damages at stake may be minimal, but this is, technically, a violation of copyright law.

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[3] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); *see* also Dennis S. Karjala, *Copyright and Creativity*, 15 UCLA ENT. L. REV. 169 (2008) (discussing the creative element and arguing it is problematic as a requirement of copyright because it can result in "market failure").

[4] Feist Publ'ns, Inc. 499 U.S. at 345.

[5] *Id*. at 362 ("In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.").

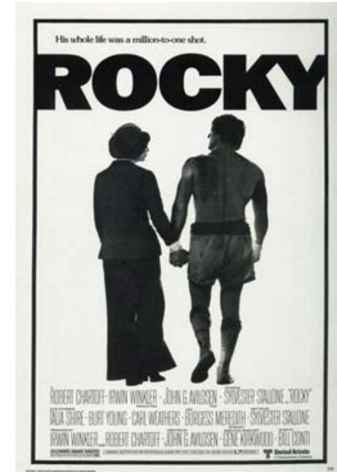
[6] The full text of the statute sets out the following rights:

> (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106. Note that the last two rights "don't really apply to filmmakers" and in the opinion of at least one scholar "don't amount to much." MICHAEL C. DONALDSON, CLEARANCE & COPYRIGHT, 8-9 (3d ed. 2008).

[7] There are a number of myths surrounding copyright law. One of them is that all sorts of copying is allowed as long as the copier makes no profit. This is untrue. One popular site discussing the top ten copyright myths, puts this particular myth at number two. Brad Tempelton, *10 Big Myths About Copyright Explained*, http://www.templetons.com/brad/copymyths.html (last visited July 11, 2010).

Derivative Work. A derivative work is a work based on a previous work. Sequels are a good example. The James Bond franchise is a jealous guardian of its rights. No one may make a 007 movie without the rights-holder's permission. Even making a commercial with similar James Bond-like elements—similar characters, similar themes, similar plots, similar mood, etc.—may be considered derivative.[8] George Lucas controls the exclusive right to make or license Star Wars sequels, Star Wars novels, Star Wars lunchboxes, and *Star Wars* books on tape. And if you write a movie treatment for the next *Rocky* movie without Sylvester Stallone's permission, that treatment can be freely copied by the Rocky franchise. Why? Because the treatment is a derivative work and, as such, is not only uncopyrightable, but is actually copyright infringement.[9]



Poster, *Rocky*, Copyright © 1976 by United Artists Corp.

Distribution. Only the copyright holder can distribute the work to the public. This means the right to sell, disseminate, give away, or otherwise make the work available to others.

Public Performance. Only the copyright holder has the right to publically perform the work. Public performances not only include, say performances of plays, but also the public playing of music (either live or from a music CD), public viewing of a DVD movie, or the public reading of a book. Playing these works at private parties to which the public is not invited and for which admission is not charged is permitted. But if your fraternity holds a party, open to the public, and plays dance music from CDs without a license, this is a technical violation of the copyright act. Again, as a practical matter, it is difficult to enforce this sort of prohibition, and few rights-holders have any interest in doing so—but there are always rare exceptions.

C. Length of the Copyright

Copyright rights run for the life of the author plus 70 more years. If a corporation is the author then the copyright lasts for 95 years from the day the work was published or 120 years from the day it was created, whichever time period lapses first.[10] This is really an extraordinary length of time. It means that any work created in your lifetime, will, in all likelihood, will be protected by copyright, and unavailable to you or anyone else, except the author, for use or copying, until *after you are dead and gone*. This regime seems to conflict with the ultimate goal of copyright which is to encourage, not discourage, creativity, but there you have it.[11]

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[8] Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc., 900 F. Supp. 1287, (C.D. Cal. 1995).

[9] Anderson v. Stallone, 11 U.S.P.Q.2d 1161, 1167 (C.D. Cal. 1989) ("This Court has determined that Anderson's treatment is an unauthorized derivative work. Thus, Anderson has infringed upon Stallone's copyright.").

[10] 17 U.S.C. § 302.

[11] It is eminently unlikely that the quantity or quality of copyrighted work has increased by any measurable magnitude due to the fact that copyright has been lengthened from 28 years to life-plus-70-years. Ask any serious artist if, hypothetically, knowing the copyright term only lasts 28 years instead of life-plus-70, would be inclined to thereafter make fewer works or works of lower quality. Most artists are unaware of the length of the copyright term in the first place. And many artists worked under much weaker or nonexistent copyright regimes. Think of J.D.

When a work becomes available for use without permission from a copyright owner, it is said to be "in the public domain."[12] Most works enter the public domain because their copyrights have expired.

D. Remedies for Infringement

If an infringer violates the rights of a copyright owner, the owner's remedies include: (1) injunctions to prevent further violations or destruction of any and all media containing the infringing work,[13] (2) actual damages compensating the rights holder for the loss,[14] (3) an award of statutory damages, "in a sum of not less than $750 or more than $30,000 as the court considers just,"[15] (4) up to $150,000 in statutory damages in a case in which results from a rights holder having to prove and a court having concluded that the infringement was willful,[16] (5) "full costs,"[17] (6) and, at the court's discretion, an award of "reasonable attorney fees to the prevailing party."[18]

An infringer is also subject to criminal prosecution by the United States Attorney for willful infringement.[19]

E. What Copyright Does Not Protect

There are all kinds of works in certain subject or use categories that copyright will not protect. These "uncopyrightable" works can be freely copied and exploited by others.

1. Ideas

Salinger, Walt Disney, William Shakespeare, or Aristotle. Do we really believe that Shakespeare held back the sequel to *Macbeth* because he thought the copyright regime was too stingy? How about Aristotle?

Moreover, patents, by contrast, only run for 20 years. If the term of protection is supposed to incentivize creation then we would expect longer, not shorter, patent terms. After all is the discovery of the polio vaccine, or a similar medicine, really less important than persuading movie-makers to produce the next *Avatar in 3D*? It is difficult to imagine any creator or inventor deciding to not pursue her next project because the copyright term (or the patent term for that matter) only ran for the next 28, 38, or 48 years. But when a term runs *longer than the life of the author*, it begins to look more like a regime designed to foster wealth inheritance, not creativity. There are significant penalties the society pays for locking up culture in this way. Wealth inheritance for the few seems like a petty and squalid trade-off.

[12] *See* B. Douglas Robbins, Public Domain Basics (Cal. L. for the Arts, forthcoming 2010).

[13] 17 U.S.C. §§ 502, 503.

[14] The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504(a)(1).

[15] *Id*. § 504(c)(1).

[16] *Id*. § 504(c)(2).

[17] *Id*. § 505.

[18] *Id*. § 505.

[19] *Id*. § 506.

Copyright does not protect ideas. Copyright shelters only fixed, original and creative expression, not the ideas upon which the expression is based. For example, copyright may protect *Star Wars* the movie, but it cannot protect the more general idea of a farm boy from outer space who goes on a hero's quest to rescue a princess and save a planet from annihilation.

2. Facts and Events

Similarly, copyright does not protect facts and events: news facts, historical facts, even new discoveries in the sciences are not protected by copyright.[20]

3. De Minimis Use

The less you take, the more likely that your copying will be excused as a fair use.[21] In some cases, the amount of material copied is so small, "de minimis," that the court permits it without even conducting a fair use analysis. For example, in the motion picture *Seven*, several copyrighted photographs appeared in the film, prompting the copyright owner of the photographs to sue the producer of the movie. The court held that the photos "appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable."[22] The court excused the use of the photographs as "de minimis" and a fair use analysis was not required.[23]

Film, *Seven*, Copyright © 1995 by New Line Cinema.

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[20] *See* Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344 (1991) ("[F]acts are not copyrightable . . . [while] compilations of facts generally are.").

[21] *But see* Universal City Studios v. Sony Corp., 464 U.S. 417 (1984) (holding, remarkably, that when consumers of Sony's Betamax video recorders copied a complete work, for purposes of time-shifting, it was still protected as fair use).

[22] Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218 (2d Cir. 1998). The court further explained,

> Sandoval's photographs as used in the movie are not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs, much less the style used in creating them. . . . The photographs are displayed in poor lighting and at great distance. Moreover, they are out of focus and displayed only briefly in eleven different shots. [T]he eleven shots here have no cumulative effect because the images contained in the photographs are not distinguishable.

Id. at 218.

[23] *Id*.

As with fair use, there is no bright line test for determining a de minimis use. For example, in another case, a court determined that the use of a copyrighted poster for a total of 27 seconds in the background of the TV show, "Roc" was not de minimis. What distinguished the use of the poster from the use of the photographs in the *Seven* case? The court stated that the poster was clearly visible and recognizable with sufficient observable detail for the "average lay observer " to view the artist's imagery and colorful style.[24]

The de minimis doctrine appears to have a lower threshold for music sampling. The practice of using small segments of music without authorization to build or supplement a new composition (sampling) was dealt a blow when the Sixth Circuit Court of Appeals ruled that the use of a two-second sample was an infringement of the sound recording copyright. The court went further stating that when it came to sound recording there was no permissible minimum sanctioned under copyright law.[25]

4. Words and Short Phrases

Individual words and short phrases such as names, titles, and slogans are not copyrightable.[26] That means, generally speaking copyright does not attach to names of products or services, business names, names of organizations or groups, the names of musical bands, names of individuals, titles of works, catchphrases, slogans, and short advertising expressions.

These words or short phrases, may, however be *trademarked*. Generally speaking, trademarked words and phrases may be used in other copyrighted works but may not be used to sell, or endorse merchandise or products without the trademark holder's permission.

Second, words and phrases may be copyrightable if they are intrinsically linked to a copyrighted character. In one case, a Texas court found that the phrases "I Love E.T." and "E.T. Phone Home!!" written on the side of porcelain mugs and pencil holders infringed Universal Pictures' copyright because "'E.T.' is more than a mere vehicle for telling the story . . . 'E.T.' actually constitutes the story being told. The name 'E.T.' itself is highly distinctive and is inseparable from the identity of the character."[27]

Third, short phrases may be copyrightable if they are unusually inventive.[28]

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[24] Ringgold v. Black Entertainment Television, Inc. 126 F.3d 70 (2d Cir. 1997).

[25] Bridgeport Music v. Dimension Films 410 F.3d 792 (6th Cir. 2004).

[26] *See* Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W.D. Pa. 1986) ("This class is illustrated by case authority denying copyright protection to "fragmentary words and phrases" and to "forms of expression dictated solely by functional considerations."); *see also* 37 C.F.R. § 202.1(a) (1985) (explaining that the following categories are not subject to copyright: "Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents").

[27] Universal City Studios, Inc. v. Kamar Industries, Inc., 217 U.S.P.Q. 1162, 1165 (S.D. Tex. 1982).

[28] Brilliant v. W.B. Productions, Inc., Case No. 79-1893-WMB (S.D. Cal. Oct. 22, 1979) (holding that Ashleigh Brilliant's 17-word epigrams are creative and clever enough to be copyrightable).

5. Blank Forms

Many blank forms and similar works designed to record rather than convey information cannot be protected by copyright. Examples include time cards, graph paper, account books, bank checks, scorecards, address books, report forms, order forms, and diaries. To be protected by copyright, a work must contain at least a certain minimum amount of original expression. Forms are more an expression of facts than an expression of creativity.

6. Ingredients, Formulas, Computations

Listing ingredients or contents in recipes or formulas is not copyrightable because they are not an original work of authorship. Thus mere computation based on a concept or formula, or be the mere extrapolation or application of an idea or system, which would always produce substantially the same result whenever done correctly by anyone are not sufficiently creative. Computation of interest or transposing music from one key to another are not copyrightable.

7. Symbols and Typeface

Familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring are not copyrightable. Typeface nor book design is copyrightable. This is a quirk in the law codified by the Copyright Office which says that "the arrangement, spacing, or juxtaposition of text matter which is involved in book design falls within the realm of uncopyrightable ideas or concepts."[29]

As for symbols and designs, standard ornamentation such as chevron stripes, a fleur-de-lys, or a cross are not copyrightable. Nor are common geometric figures or shapes such as hexagons, ellipses, circles, triangles, or standard symbols such as an arrow or five-pointed star. Color schemes, in the abstract are not copyrightable either. But all elements, symbols, colors, even a few musical notes (think of the Microsoft startup ring, or the NBC chime) may, however, be trademarked.

8. Common Property

Works consisting entirely of information that is common property and containing no original authorship are not eligible for copyright. Examples include standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents, diatonic and chromatic scales, and standard chord charts. But material that's been added to "common property" type information, such as instructional text, could be copyrighted.

9. Spontaneous Events

Creativity expressed in a spontaneous event, such as a spontaneous jazz solo, a spontaneous rap song, or a dance made up on the spot, absent having been fixed in a tangible medium prior to the event, such as recorded on paper, on film, on audio tape, are not copyrighted.

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[29] *See* 46 C.F.R. § 30651 (1981).

10. Useful Articles

A "useful article" is an item whose inherent function is utilitarian. Examples of useful articles include automobiles, boats household appliances, furniture, work tools, clothing, dinnerware, and lighting fixtures. Copyright does not protect the mechanical or utilitarian aspects of useful articles. Copyright *may*, however, protect pictorial, graphic, or sculptural features that can be identified separately from the utilitarian aspects of the useful article if the pictorial, graphic, or sculptural features can be physically or conceptually separable from the useful article.

For example the BMW Art Cars were painted by notable artists such as Alexander Calder, Andy Warhol, and our friend, Jeff Koons. Since the art covering these cars is "conceptually" separable from the car itself, it is copyrightable.[30]

Painting, *BMW 3.0 CSL*, Copyright © 1975 by Alexander Calder.

III. CONCLUSION

In this paper we discussed the basics of copyright law for non-lawyers: what sort of works are protected by copyright, what sort of works are not so protected, how copyright protection operates, and what the consequences are for copyright infringement.

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[30] The BMW Art Car was conceived in 1975, the year that French auctioneer and racecar driver Herve Poulain first entered 24 Hours of Le Mans. Searching for a link between art and motorsport, Poulain asked his friend, noted artist Alexander Calder, to commission a rolling canvas on the BMW 3.0 CSL that he would race. In the years that followed, this unique combination of motorsport and BMW design fascinated the famous artists of our time. Frank Stella, Roy Lichtenstein and Andy Warhol have all turned BMW racing cars into Art Cars.

Segura Inc., *BMW Art Cars*, http://www.cartype.com/pages/345/bmw_art_cars (last visited July 10, 2010).