The Copyright Act is a Federal statute and is codified under title 17 of the United States Code. The Copyright Act is divided into thirteen chapters. Copyrights are also protected by state law and common law, so long as the remedies are not preempted by federal law.
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CONTROLLING LAW: COMMON LAW, STATE STATUTES, AND THE FEDERAL COPYRIGHT ACT

Common Law and State Statutes

Although the common law and some state statutes provide some protection to copyrights, the federal Copyright Act ("the Copyright Act") preempts and abolishes any causes of action that fall within the subject matter of federal copyright law and are equivalent to the exclusive rights federal copyright law protects. See 17 U.S.C. § 301.¹

Because the vast majority of copyright proceed under the Copyright Act, this Core Knowledge publication will focus on the application of the Copyright Act.

The Federal Copyright Act

The Copyright Act is codified under title 17 of the United States Code, and is divided into the following thirteen chapters:

Chapter 1—Subject Matter and Copy of Copyright (§§ 101–122)
Chapter 2—Copyright Ownership and Transfer (§§ 201–205)
Chapter 3—Duration of Copyright (§§ 301–305)
Chapter 4—Copyright Notice, Deposition, and Registration (§§ 401–412)
Chapter 5—Copyright Infringement and Defenses (§§ 501–513)
Chapter 6—Importation and Exportation (§§ 601–603)
Chapter 7—Copyright Office (§§ 701–710)
Chapter 8—Proceedings by Copyright Royalty Judges (§§ 801–805)
Chapter 9—Protection of Semiconductor Chip Products (§§ 901–914)
Chapter 10—Digital Audio Recording Devices and Media (§§ 1001–1010)
Chapter 11—Sound Recording and Music Videos (§ 1101)
Chapter 12—Copyright Protection and Management Systems (§§ 1201–1205)
Chapter 13—Protection of Original Design (§§ 1301–1332)

Standing Under the Federal Copyright Act

Section 411(a) of the Copyright Act requires a plaintiff to possess a valid registration of the copyright that is to be the subject of the action before a lawsuit for copyright infringement is instituted. The second and third sentences of § 411(a) permit a rejected claimant, who has properly applied for registration, to maintain an infringement action if notice of the action is served of the Register of Copyrights.

Statute of Limitations

Section 507(b) requires a civil action under the Copyright Act be filed within three years after the claim accrued.

¹ Section 301(b) lists three general areas of state law and common law unaffected by the Copyright Act: (1) subject-matter not within the scope of copyright; (2) causes of action arising under state law before January 1, 1978; and (3) violations of rights that are equivalent to the exclusive rights under copyright.
SUBJECT MATTER AND SCOPE OF COPYRIGHT

How to Register a Copyright

Under § 408(a), registration of a claim to copyright is permissive. Registration of a claim to copyright can be made in any work, whether published or unpublished, by “the owner of copyright or of any exclusive right in the work” any time during the copyright term. A claim to copyright is registered with the Copyright Office by depositing copies or phonorecords of the work in accordance with § 408(b) and (c), along with a short application and a small fee. Pursuant to § 408(c)(1), the Register of Copyrights is to specify “the administrative classes into which works are to be placed for purposes of deposit and registration” and makes clear that the classification “has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.”

The application for copyright registration is covered by § 409. Section 409 provides that the application shall include the name and address of the copyright claimant, the case of work, if the work is anonymous or pseudonymous, the title of the work, along with other alternative identifying titles, and the year in which creation of the work was complete. The section also requires that (1) if the work was made for hire, a statement to that effect, and (2) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright.

Upon proper registration, § 410 provides the basic duties of the Register of Copyrights with respect to copyright registration. First, the Register of Copyrights must register the claim and issue a certificate if the Register determined that “the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met,” and (2) to refuse registration and notify the applicant if the Register determined that “the material deposited does not constitute copyrightable subject matter or that the claim is invalid for another reason.”

Rights Protected by a Copyright

The Copyright Act provides copyright protection for “original works” of authorship “fixed in any tangible medium of expression.” See 17 U.S.C. § 102(a). Section 102(a) provides seven broad categories that are included in “works of authorship”: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motions pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. Four (literary works, pictorial, graphic, and sculptural works, motions pictures and audiovisual works, and sound recordings) of the seven categories are defined in § 101. This list sets out the general subject-matter of copyrightable material and does not exhaust the scope of “works of authorship” that can be copyrighted.

The Copyright Act does not protect “any idea, procedure, process, system, method of operation, concept, principle, or discovery regardless of the form in which it is described, explained, illustrated, or embodied in such work.” See 17 U.S.C. §102(b).

The Copyright Act does not protect the mechanical or utilitarian aspects of “useful articles.” A “useful article” is an object that has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. Examples are clothing;
automobile bodies; furniture; machinery, including household appliances; dinnerware; and lighting fixtures. An article that is part of a useful article, such as an ornamental wheel cover on a vehicle, can itself be a useful article. Copyright may, however, protect any pictorial, graphic, or sculptural authorship that can be identified separately from the utilitarian aspects of an object.

The owner of a copyright under the Copyright Act has the exclusive rights of reproduction, publication, adaptation, performance, and display. See U.S.C. § 106(1)-(6). All rights are subject to limitations set forth in § 107-§ 122. With regard to the owner’s exclusive rights of performance and display, this extends only to “public” performances and displays.

OWNERSHIP AND TRANSFER OF A COPYRIGHT

Copyright in a work protected under the Act vests with the author or authors of the work. See 17 U.S.C. § 201(a). In the case of joint work, the coauthors of the work are also co-owners of the copyright. Id. Section 101 provides that a work is “joint work” if the authors of the work prepare the work “with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”

With regard to collective works, § 201(c) provides that each separate contribution to a collective work is distinct from copyright in that collective work as a whole and will vest with the author of the contribution. “Collective work” is defined in § 101 to include a “periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves are assembled into a collective whole.”

Under § 201(d), the ownership of a copyright may be transferred by any means of conveyance or by operation of law, and should be treated as personal property upon the death of the owner. Section 101 defines “transfer of copyright ownership” to include “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.” With the exception of “work for hire,” § 203 provides for termination of a copyright grant or transfer.

DURATION OF COPYRIGHT

Copyrights for works created on or after January 1, 1978, continue for the life of the author and 70 years after the author’s death. See 17 U.S.C. § 302(a). The term “created” is defined in § 101 as the first time that a work is fixed in a copy or phonorecord. In the case of “joint works,” the copyright terms consists of the life of the last surviving author and 70 years after the last surviving author’s death. See 17 U.S.C. § 302(b).

There are different copyright terms in cases where the work is anonymous, pseudonymous, or made for hire. In those cases, the copyright term is 95 years from the year of the work’s first publication, or a term of 120 years from the year of the work’s creation, whichever expires first. See 17 U.S.C. § 302(c).
COPYRIGHT INFRINGEMENT

A copyright infringer is anyone who “violates any of the exclusive rights of the copyright owners” as provided in the Copyright Act. See 17 U.S.C. § 501. Section 501(b) permits the “legal or beneficial owner of an exclusive right” to bring suit for “any infringement of that particular right committed while he or she is the owner of it.”

Claiming Copyright Infringement

In Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), the United States Supreme Court established a two-prong test for copyright infringement claims. The Supreme Court stated that to sustain a claim of copyright infringement, a copyright owner must prove (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original. Feist, 499 U.S. at 361. Usually, a certificate of registration shall constitute prima facie evidence of the validity of the copyright and satisfy the first Feist prong.

With regard to the second Feist prong, to prove actionable copying, the copyright owner must first establish that the alleged copyright infringer “actually used the copyrighted material to create his own work.” Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1541 (11th Cir. 1996) (quoting Eng'g Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335, 1340 (5th Cir. 1994)). Proof of copying can be shown by direct evidence of copying or inferred from proof of access to the copyrighted work and “probative similarity.” Id. (internal quotations citations omitted). The copyright owner must also demonstrate that the copyrighted work taken satisfied the originality requirement. Id. at 1542.

Then, the copyright owner must prove that “the copying of copyrighted material was so extensive that it rendered the offending and copyrighted works substantially similar.” Bateman, 79 F.3d at 1542 (quoting Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 815 (1st Cir. 1995)). In most circuits, “substantial similarity” is made by the “ordinary observer” test: whether the accused work is so similar to the copyrighted work that an ordinary reasonable person would conclude that the copyright infringer unlawfully appropriated the copyright owner's protected express by taking material of substance and value.2

Infringement on Derivative Works and Compilations

Section 103 provides that derivative work or a compilation is copyrightable if it represents an “original work of authorship” and falls within one or more of the categories listed in § 102. The terms “compilation” and “derivative work” are both defined in § 101. Under § 101, a derivative work is a work based upon one or more preexisting works, such as “a translation, musical, arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast,

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transformed, or adapted.” The section defines “compilation” as a “work formed by the collection and assembling of preexisting material or of data that are selected coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship, including collective works. For example, a compilation of facts can be copyrighted, even though the facts themselves are not copyrightable. See e.g. Feist Publications, Inc. v. Rural Tele. Serv. Co., 49 U.S. 340 (1991).

DAMAGES AND REMEDIES

Injunctive Relief

Courts have discretionary power to grant “preliminary," “temporary," "interlocutory," “permanent," or “final" injunctions and restraining orders to prevent or stop infringements of copyrights. See 17 U.S.C. § 502(a). If a copyright owner obtains an injunction in one state, the owner will be able to enforce it against a defendant located elsewhere in the United States.

Actual Damages and Profits; Apportionment

A copyright owner in a copyright action is entitled to recover “the actual damages suffered by him or her as a result of the infringement”, plus any of the copyright infringer’s profits “that are attributable to the infringement and are not take into account in computing the actual damages.” See 17 U.S.C. § 504(b). This precludes the award of damages and profits cumulatively. However, if the copyright owner has suffered damages not reflected in the copyright infringer’s profits, or if there has been profits attributable to the copyrighted work but not used as a measure of actual damages, then § 504(b) permits the award of both.

Only those profits “attributable to the infringement” are recoverable. If some of the copyright infringer’s profits are the result of the infringement and some of the profits are the result of different factors, the court may have to make an apportionment.

Under § 504(b), a copyright owner must prove only “the infringer’s gross revenue,” and the copyright infringer must prove “his or her deductible expenses” and “the element of profit attributable to factors other than the copyrighted work.” In effect, the burden of proof is on the copyright infringer-defendant.

Statutory damages

Calculating Statutory Damages

In the alternative, a copyright owner may elect to recover statutory damages at any time before a court has rendered its final judgment. See 17 U.S.C. § 504. If an owner chooses to recover statutory damages (and successfully proves the copyright was infringed), the court must award between $750.00 and $30,000.00 for all infringements with respect to any “one work.” Unless one of the exceptions provided by § 504(c)(2) applies (see below), the court cannot award less than $750.00 or more than $30,000.00, if a copyright owner has chosen to recover statutory damages. A copyright infringer of a single work is liable for an amount between $750.00 and $30,000.00 no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series.
Alternatively, if the copyright infringer has infringed on more than one independent work, minimum statutory damages must be awarded for each work. While the minimum and maximum statutory damages for each work must be multiplied where multiple works are involved, the same is not true with respect to multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations. H. R. Rep. 94-1476, 94 Cong. 2d Sess. 162 (1976). Similarly, where the work was infringed by two or more joint tortfeasors, the joint infringers are joint and severally liable for an amount between $750.00 and $30,000.00. But, for separate infringements where there is no joint liability, separate awards of statutory damages may be appropriate. See id.

Exceptions

Section 504(c)(2) provides for exceptions in which the maximum award of statutory damages could be raised from $30,000.00 to $150,000.00 and in which the minimum recover could be reduced from $750.00 to $200.00. The section gives courts discretion to increase damages in cases of willful infringement and to lower the minimum damages in cases of innocent infringement. With regard to willful infringement, the burden of proving willfulness rests with the copyright owner. With regard to innocent infringement, the burden of proving innocent infringement rests with the copyright infringer. The court must make a finding of either willfulness or innocence in order to award an amount under § 504(c)(2).

Registration is a prerequisite to certain remedies for infringement. Statutory damages generally are not available for infringement of unregistered works. See 17 U.S.C. § 412.

Royalties

In some cases, a copyright owner’s actual damages from copyright infringement will be measured by the royalty payments it would have received from the copyright infringer’s use of the copyrighted material. See e.g. United States v. Am. Soc’y of Composers, Authors, and Publishers, 627 F.3d 64 (2d Cir. 2010); Softel, Inc. v. Dragon Med. And Scientific Commc’n, 891 F. Supp. 935 (S.D.N.Y. 1996).

Fees

Section 505 provides the court with discretion to award the full costs by or against any party. The section further provides that the court may award reasonable attorney’s fees to the prevailing party as a party of the costs. An award of costs and/or fees is not compulsory.

As with statutory damages, attorney’s fees are not available in the case of infringement of unregistered works, subject to certain exceptions set forth in Section 412.

FAIR USE: AN AFFIRMATIVE DEFENSE

The Fair Use doctrine is a well-established limitation on the exclusive rights of copyright owners. The claim that an alleged copyright infringer’s acts constitute a fair use, rather than an infringement, is regularly raised as a defense in copyright actions. The affirmative defense of fair use is a mixed question of law and fact and the alleged copyright infringer carries the burden of proof. Peter Letterese & Assoc., Inc. v. World Inst. of Scientology Enter., 533 F.3d 1287, 1307 n. 21 (11th Cir. 2008).
The Copyright Act expressly recognizes this limitation in § 107. Section 107 permits fair use of copyrighted work for purposes such as “criticism, comment, news reporting, teaching, scholarship, or research.” Section 107 also provides four non-exclusive factors, that courts should use to determine whether the infringer’s actions constitute fair use: “(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for and value of the copyrighted work.” Courts reason that the fourth factor is the single most important element of fair use.

Analysis of the fourth factors requires a court to determine (1) “the extent of the market harm caused by the particular actions of the alleged infringer,” and (2) “whether unrestricted and widespread conduct of the sort engaged in by the defendant [] would result in a substantially adverse impact on the potential market.” Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

**DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)**

In 1998, the United States Congress enacted the Digital Millennium Copyright Act (“DMCA”), which amended the Copyright Act. The DMCA, first, brought United States copyright law into compliance with two 1996 World Intellectual Property Organization treaties. The DMCA also added §§1201-1205 to the Copyright Act.

Additionally, the DMCA contained the Online Copyright Infringement Liability Limitations Act (“OCILLA”), which added § 512 to the Copyright Act and created a “safe harbor” for qualified online service providers and other Internet intermediaries. The provisions protect qualifying service providers from liability for all monetary relief for direct, vicarious, and contributing infringement, and leave copyright owners with limited injunctive relief. See 17 U.S.C. § 512(j). These provisions only apply to service providers that adopt a policy to terminate service access for repeat copyright infringers, inform users of this policy, and implement the policy in a reasonable manner. See 17 U.S.C. § 512(i)(1)(A).

Section § 512 provides that a qualifying service provider will not be liable for infringement of copyright by reasons of the provider’s “transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for that service provider, or by reason of the intermediate and transient storage of that material.” In order for a service provider to be immune from liability under § 512(a), that provider must satisfy the following requirements: (1) the transmission of the material was initiated by someone other than the service provider, (2) the transmission, routing, storage, and connections are carried out through an automatic technical process; (3) the service provider does not personally select recipients of the material; (4) no copy of the material made by the servicer is maintained in a manner ordinarily accessible to anyone other than anticipated recipients; (5) no copy of the material made by the servicer is maintained in a manner ordinarily accessible to anticipated recipients for a longer period than is reasonably necessary; and (6) the material is transmitted through the system or network without modification of its content.

If the service provider becomes aware of the infringing material, then the service provider must act expeditiously to remove, or disable access to, the material. See 17 U.S.C. § 512(c)(1)(A)-(C). Section § 512(c)(3) provides the manner in which a copyright owner can...
provide notification of a claimed infringement to a service provider. If a service provider satisfies all the requirements for protection under the DMCA’s safe harbor provisions, then the copyright owner can only bring claims for injunctive relief pursuant to § 512(j) against the service provider for any alleged infringement falling with the Copyright Act.