

U.S. COPYRIGHT BASICS: Celebrating Creators*

By Sally Helppie

What a boring world we would live in if it were populated only with engineers, accountants and lawyers. Indeed, our founding fathers recognized the importance of the arts. They understood that, if individuals could not control (and profit from) their own work, then there would be little incentive for them to create. Accordingly, they enshrined the right of copyright into our Constitution.

Legal Authority:

Article I, Section 8 of the U.S. Constitution provides in part:

“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.”

For “Authors,” Congress exercises this Constitutional power in the Copyright Act, 17 U.S.C. §101 et seq. The Copyright Act governs, *inter alia*, what is protected by copyright, limitations on rights, and the duration of protection. Chapters II and III of Title 37 of the Code of Federal Regulations set out the rules and procedures for the US Copyright Office, such as those regarding notices, registration, and compulsory licenses for music.

Copyright Coverage:

Importantly, a copyright need not be registered at the Copyright Office to be valid. A common law copyright immediately attaches to any work (1) of independent authorship, (2) with a modicum of creativity, (3) that is reduced to tangible form. Examples include books, musical compositions, art and movies. Once a creator produces an original creative work in a way that it can be “perceived” by another, it is *automatically* protected under the common law. Notably, there is no requirement that the creative work be “good.”

Facts and ideas are *not* protected by copyright. But the way that facts are chosen and arranged could be, provided there is some creativity. For example, the original portions of a book about a historical figure can be protected by copyright even though the facts themselves are not. On the other hand, alphabetical phone directories are not protected by copyright as there is nothing creative about arranging names in alphabetical order.

Rights of Copyright Owners:

Copyright interests are property rights that can be bought, sold, transferred and licensed. The original creator of the work is the legal “Author” and owner unless there is a signed work-for-hire agreement or the work is produced as part of the creator’s regular employment. Be aware that work-for-hire agreements and copyright assignments must be in writing to be valid. The copyright owner

* This article appeared in *Headnotes*, a monthly publication of the Dallas Bar Association, January 2016, Vol 41, Number 1.

(whether she is the original Author or acquired the rights by written instrument) has the exclusive right to: (1) reproduce the work; (2) prepare derivative works; (3) distribute copies to the public by sale, rental, lease, or lending; (4) perform the work publicly; (5) display the work publicly; and (6) in the case of sound recordings, perform the work publicly by means of digital audio transmission. These exclusive rights, however, do not last forever. After a period of time, the rights revert to the public domain and are available for anyone to use. In addition, the Copyright Act sets out exceptions to these rights, including the concept of Fair Use.

Fair Use:

Fair Use is a principle providing that certain uses of original works do not constitute infringement. Contrary to urban legend, however, there is no “magic number” that makes the copying of part of a copyrighted work “fair.” Congress has recognized that some reproduction is appropriate, including for criticism, comment, news reporting, teaching, scholarship and research. How else, for example, could a television film critic show viewers the parts of a movie he hated? How could teachers compare works of art?

Determining fair use requires a careful analysis of four factors, none of which is controlling by itself: (1) the purpose and character of the new use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the original work that is being copied; (3) the amount and substantiality of the original copyrighted work that is used in the new work; and (4) the effect of the new use upon the potential market for or value of the original copyrighted work. Courts balance these factors on a case-by-case basis.

Copyright Registration:

Owners should register their copyrights with the U.S. Copyright Office. Not only does it put the public on notice that a copyright is claimed, it is a necessary prerequisite to filing a lawsuit for infringement. Moreover, if registration occurs prior to the act of infringement or within three months of publication, a copyright owner is entitled to certain statutory damages. And that’s when a world populated with lawyers can become a little less boring.

Sally Helppie is a lawyer at Vincent Serafino Geary Waddell Jenevein, P.C.; a film producer at Advocate Pictures; and an adjunct professor in SMU’s Meadows School of the Arts