



Legal Minute

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The Importance of Understanding U.S. Copyright Law When Creating Brochures and Websites

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Charities and microentrepreneurs should have a basic understanding of U.S. copyright law to avoid getting into trouble when developing materials like logos, brochures, or websites and to protect their copyright in the finished result. This Legal Minute highlights basic concepts that may be useful in this endeavor.

What is copyright?

Copyright is a form of protection provided by U.S. law to authors of “original” works. Copyright gives the owner of such original work exclusive rights to do the following: (1) reproduce the work, (2) make a derivative work, (3) distribute copies by sale or other transfer, (4) publicly perform the work, (5) publicly display the work, and (6) in the case of sound recordings, publicly perform the work through a digital audio transmission.

What kinds of works are copyrightable?

The following is a non-exclusive list of works that are copyrightable and those that are not:

Copyrightable

Software (considered a literary work)
Pictorial, graphic, and sculptural works
Sound recordings
Compilations

Not Copyrightable

Facts
US government works (laws, court decisions, etc.)
Works in the public domain (the copyright has expired or been disclaimed)
Unoriginal compilations of uncopyrightable materials, such as facts

Does an entity own the copyright if an employee designs a logo for its use?

Not necessarily. The “work made for hire” doctrine makes the employer the author and owner of the copyright in any work created by an employee within the scope of his or her employment. However, rather than have to prove that the employee created the work within the scope of employment, the safe approach is to require all employees to sign a copyright assignment to cover those situations that might not technically be in the scope of an employee’s employment. (For example, that question might arise if the grant writer designed the logo rather than the communications director.)

Who owns the copyright if the entity hires an outside web designer to create a website?

The “work for hire” doctrine does not cover work done by an independent contractor unless the work is specially ordered or commissioned and it is expressly agreed in writing that it will be a work made for hire. The conservative approach is to have all independent contractors sign a copyright assignment, but this may increase the price of the work. In a business that is “copyright intensive,” such as a software company or photography studio, you should always get an assignment of copyright from both employees and independent contractors to alleviate any doubt about what you own.

Can an entity ever legally make use of a copyrighted work?

Yes. The “fair use” doctrine carves out exceptions to the copyright owner’s exclusive rights. Section 504(c)(2) of Title 17 of the

United States Code lists four factors to be considered in deciding what qualifies as fair use:

- The purpose and character of your use,
- the nature of the copyrighted work,
- what amount and proportion of the whole work was taken, and
- the effect of the use upon the potential market for or value of the copyrighted work.

There are seldom clear answers for what qualifies as “fair use” and what does not. There are even special rules and exceptions for libraries and other educational users of a copyrighted work. (See fairuse.stanford.edu for more details.) Therefore, it is wise to consult an attorney before using any substantial portion of a work.

When and how do I ask for permission to use a copyrighted work?

You should ask for permission when fair use may not apply. “Permission” can be gained through an assignment (you gain ownership of the right through a permanent transfer), an exclusive license (you don’t own the right but you are the only one who can exercise it), or a non-exclusive license (you can exercise the right along with anyone else the owner gives like permission).

Does a photograph or writing have to have the little “©” on it for it to be protected?

Not necessarily. Any copyrightable work created after March 1, 1989 is automatically protected upon creation. No registration, publication, or marking is required. However, placing this mark on a copyrightable work, along with the first year of publication and the owner’s name, prevents someone who infringes a copyright from claiming that they did not realize that a work was copyrighted (called “mistaken” or “innocent” infringement). The rules vary for works created before March 1, 1989.

Why and how would I register a copyright?

Your work must be registered before filing a suit for infringement. If you register the work within five (5) years of publication, the registration is considered *prima facie* (presumptive) evidence in a court of law that the copyright is valid. You must register within (3) months of publication to be eligible for statutory damages and attorney’s fees. Otherwise, you may only collect actual damages and profits. Registration also gives you some international protection. See <http://www.copyright.gov/circs/circ38a.pdf> for a complete list of countries that recognize a registered US copyright.

To learn how to register a copyright, visit www.copyright.gov. There are complexities to registration of certain works, such as versions of software, which may require the services of an attorney.

What do I do if I think my copyright is being infringed?

You can send the alleged infringer a “cease and desist” letter clearly identifying your ownership of the copyright in the work and asking that they cease their infringing use. You can also file a lawsuit asking the court to order the infringer to stop the unauthorized use and pay monetary damages. You can also offer the alleged infringer a license to use the copyrighted work with your permission in exchange for a fixed sum or royalties. If the infringement is by a website, you may be able to send a Digital Millennium Copyright Act (“DMCA”) notice.

What if I infringe someone else’s copyright?

If sued, you could be subject to an award of the copyright owner’s damages, your profits, or “statutory damages” in an amount up to \$150,000 for each act of willful infringement. Criminal penalties may also apply under the DMCA.

Useful Resources:

MELVILLE B. NIMMER ET AL., NIMMER ON COPYRIGHT §§2.01-2.02, §6.07, §6.12 (2007);

“Copyright Basics” at <http://www.copyright.gov>;

The UT System Crash Course in Copyright at www.utsystem.edu/ogc/Intellectualproperty/cprtindx.htm.

Sample work for Hire contract at <http://www.utsystem.edu/OGC/INTELLECTUALPROPERTY/contract/workhire.htm>

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