COPYRIGHT

A copyright is established immediately upon the creation of your work. That is, when you put pen to paper, when you record your song, when you paint that picture, or when you click the camera, you create and claim your copyright. If you wish to enforce it, however, you will have to show a registration from the Register of Copyrights (the Copyright Office. We will help you obtain your registration and we will advise you with regard to the what, how, and when. We will not make your decision, but we will make your decision easier.

The United States adheres to the Berne Convention. Since 1978 it is no longer necessary to register your copyright. But, you should always place a copyright notice, whenever possible.

Here's an example for a copyright notice: **© 2010 Owner**

WHAT IS COPYRIGHTABLE?

1. *Constitutional Limits*

The United States Constitution, Article I, section 8, does not much to limit copyrights: "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." Early caselaw struggled with the boundaries of copyright protection. For instance, today no one questions whether photographs are copyrightable. In 1884, however, the Supreme Court had to decide whether a photographer had exclusive rights to photographs he took of Oscar Wilde. The court held that photographs were covered under constitutional authority. The early cases spoke of original intellectual conceptions. The 1976 Act requires original authorship. A similarly intriguing story surrounded the 1903 Supreme Court decision in *Bleistein v. Donaldson Lithographic Co.* which dealt with a poster for the Wallace circus. The infringers insisted that "a simple representation of realistic looks" could not be protected. However, the Court disagreed and stated that even "ordinary posters" were good enough for copyright protection. A dissenting voice emphasized the argument that a mere advertisement

does not further the useful arts. No intrinsic value attaches other than the advertisement function.

2. *Fixation Requirement*

In order to become copyrightable, a work must be fixed in tangible medium of expression. § 101. Fixation may be in words, numbers, notes, sounds, pictures, any other graphic or symbolic indicia. Embodied in written, printed, photographic, sculptural, punched, magnetic, or other stable form. The work must be capable of direct perception or with a machine or device "now known or later developed." This is the dividing line between statutory and common law protection. For instance, a live broadcast is protected because it is simultaneously recorded. A work is fixed if the fixation takes place simultaneously. Also, video games are protected because they are fixed in the computer memory, albeit with real-time variations when they are played.

3. *Originality Requirement*

In order to be copyrightable, a work must be original. Creativity is inherent in originality. The standard of originality, however, in contrast to patents, does not include novelty, ingenuity, aesthetic merit. For example, in *Feist Pubs. v. Rural Tel. Serv.,* a 1991 case, protection for telephone directories was severely limited. Feist published a combined white/yellow pages area directory. They obtained licenses from ten public telephone companies to copy their white page listings. Rural refused to give a license (to protect their yellow pages position). Feist copied Rural's listings - but made several changes: omitting listings outside Feist's area, adding street addresses. However, they also copied four bugs inserted by Rural. The court held Rural's listings not infringed, because white page directory listings are not copyrightable. Two primary propositions follow which are of interest to the intellectual properly portfolio manager: Facts are not copyrightable, compilations are. Facts do not originate from the author. Facts – scientific, historical, biographical, and news of the day – are in the public domain and are available to every person. Compilations may be sufficiently original: The author decides how to compile, what to include, what to omit, how to arrange the facts, may interweave his original expressions, etc.. According to *Feist*, "original" means only that the work was independently created by the author (not copied from another work), and

has some minimal degree of creativity. Even if a work is identical to another one, if it was not copied and the similarity is by chance, it may still be original. The Copyright Office defines subject matter which is 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."

4. *The Idea/Expression Dichotomy*

The copyright law (§ 102) does not allow protection for an "idea, procedure, process, system, method of operation, concept, principle, discovery." The principles were first explained in the seminal Supreme Court decision of *Baker v. Selden* (1879), where Selden obtained copyright on an accounting book with instructions for a bookkeeping system, published with ledger lines and entry charts. The Court emphasized, however, that the system of accounting presented in the book is not copyrightable. That holding led to the *blank form rule* which states, in essence, that if the form does not itself convey information it is not copyrightable or, in other words, that the law cannot give the author of a book exclusive on the art described in the book. This is the province of the letters patent, which is subjected to examination. Anyone is free to use and make the stuff described in the book. The public is only prevented from copying the book itself. There exists no copyright on blank account books. Aspects of a work which must necessarily be used as incident to the idea are not protectible.

A similar principle emerged in the so-called *merger doctrine*: When court is persuaded that only a few ways exist of expressing a particular idea or system, then none of those is afforded protection (otherwise it would be possible to monopolize the idea by covering all of the possible expressions). Also, according to the s*cenes a faire doctrine*, "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic" are not subject to copyright. Standard expressions and stock scenes (e.g. the typical German beer hall scene with the Heil Hitler greeting in an anti-Nazi movie) are not protectible because they are required to express a specific topic or a certain era feel.

5*. Derivative Works*

A derivative work is a variation or a new-medium-adaptation of an original work. To receive copyright protection, the derivative work must be more than "merely a trivial variation" of original work. Also, the author of the derivative work needs the permission of the original owner who holds the copyright in the original work.

Compilations are works formed by collecting and assembling preexisting materials or data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works. § 103 protects compilations and derivative works - including the material lawfully incorporated which is under copyright protection. The copyright extends only to the contribution of the new author - there attaches no implication of exclusive right to the preexisting material.

6*. Artistic Elements Of Useful Articles*

This is the area of copyright law which most intimately overlaps with patent law. Until 1954 it was widely assumed that only statutory protection for the designs of utilitarian articles was design patent law. However, several disadvantages attached to design patents: (1) often such protection was inappropriate: patents must be original, novel, non-obvious. (2) Judicial hostility: Very few design patents survived in court. (3) Cost: Average US$1400 or more. (4) Delay: Average design application is pending well over twenty months. Protection is afforded fourteen years from issue.

A useful article is defined as an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article usually a part of a useful article is a useful article. The test whether copyright attaches is essentially a two-prong analysis: Is the article original with minimal creativity? If yes, is it a useful article? If the answer is no, then the item is copyrightable. If the answer is yes, we test for separability: are the artistic features able to exist independently of utilitarian aspects of article? If the answer here is yes, then the artistic aspects are copyrightable.

7. Architectural Works

The basis for the protection of architectural works is found in the Constitution and in the Architectural Works Copyright Protection Act of 1990: Indeed, the Berne Convention forces its member states to protect architectural works. Architectural works, therefore, form a new category outside the pictorial, graphical, and sculptural realm.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features. As stated in §120, creativity in architecture often means selection, coordination, arrangement of unprotectible elements. One may incorporate new, protectible design elements in otherwise standard building features.

STATUTORY FORMALITIES

Publication/Notice Before the 1976 Act

The omission of a copyright notice on published works in the United States always placed the work in public domain prior to 1976 Act. If a work was published after January 1, 1978 without notice, the omission could be cured by registration and other action by the copyright owner within five years. At that point, however, the United States was still not in compliance with the Berne Convention, which requires that "the enjoyment and exercise of [copyright] shall not be subject to any formality." The federal Berne Convention Implementation Act of 1988 (effective March 1, 1989) did away with the notice requirement. The portfolio manager, therefore, must carefully review whether the copyright notice requirement was violated and/or whether the work came into the public domain prior to the Berne implementation.

However, the **copyright notice** is still advantageous. Whenever a work protected under the federal copyright statute (§ 401) is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright may be placed on all publicly distributed copies from which the work can be visually perceived. A proper notice consist of the symbol © followed by the year of first publication and the owner.

Sound recordings on phonorecords may carry the symbol (P) in a circle - to indicate reservation of copyright in the sound recording.

According to § 405, if a work published prior to 1989 omitted the notice, it will not be considered fatal if (1) the notice was omitted from relatively small number of copies, or if (2) registration has been made or is made within five years after publication and reasonable effort to place notice on all copies available in United States, or if (3) the notice was omitted in violation of a directive from the copyright owner. An innocent infringer incurs reduced liability (no actual damages, no statutory damages.

The optional nature of the notice requirement after the Berne Implementation Act, is quite suggestive, however: If the work carries notice then the owner takes away the infringer's defense of innocent infringement in mitigation of statutory or actual damages. § 504(c)(2) reduces the statutory limit from $500 to $200. It follows quite clearly that a notice should be placed wherever and whenever possible.

COPYRIGHT INFRINGEMENT VIA COPYING

According to § 106, the copyright owner has the exclusive right to do and to authorize:

reproduce in copies or phonorecords

prepare derivative works

distribute copies to public by sale, lending, rental, transfer . . .

perform publicly

display publicly.

Proof of infringement by copying is subject to a two-part test. Both parts are questions of fact. First, the plaintiff must show that the defendant copied from the plaintiff's work. This point may be conceded by the defendant (without conceding the second part of the test), or it may be proved by the plaintiff by circumstantial evidence. Second, the plaintiff must show that the defendant took more of the copyrighted material than allowed, i.e. he crossed the line.

The circumstantial evidence in the first part of the infringement test includes plaintiff's proof that the alleged infringer had access to the copyrighted work. Access, in this case, is a reasonable opportunity to copy (from) the work. Access may also be inferred from specific popularity of the original work. The first part of the test also requires a showing that the works exhibit such striking similarities as to render access more probable than not. Striking similarities, whether quantitative or qualitative, are probative of copying and this threshold is thus referred to as "probative similarity".

Once the plaintiff has shown that the defendant indeed copied, the plaintiff must prove that the defendant unlawfully appropriated too much of the copyrighted material. The degree of appropriation crosses the line where the works are substantially similar. Such "substantial similarity" may be proved in various ways (depending on the rule of law which the court adopts). For instance, we may ask questions such as (1) would an ordinary observer have overlooked the differences? or (2) would an ordinary observer have noticed the taking? or (3) did the defendant take expression of substance and value? or (4) do the two works share the same "total feel and concept"? Generally, the degree of similarity is tested from the perspective of a lay observer. Some courts have made specific allowances for the target audience, i.e., they have colored the frame of reference towards a more defined and refined observer.

Depending on the level of abstraction at which the comparison between the two works is performed, the copying may be found in the overall plot, in individual portions (scenes), in individual characters, interactions, etc. The taking may be by literal copying of the entire work or of parts (fragmented literal similarity) or by the taking of concepts developed in the original work (non-literal similarity).

Where characters are "taken", the courts look at the degree of development of the character in the copyrighted work. The more specifically the character is developed, the more protection is afforded.

A famous copyright infringement case dealt with George Harrison's rendition of *My Sweet Lord* which was held to plagiarize *He's So Fine*. The latter had been a hit song in the United States and in England. Harrison had access (because the song had been widely played). The fact that he copied subconsciously had no bearing on the

outcome of the proceeding. Even subconscious infringement is infringement. The lesson to be learned from that rule is that the portfolio manager must most carefully scrutinize not only the behavior of the artistic contributor but also the content of the artistic endeavor.

There is no uniform test with regard to copyright infringement and, particularly, with regard to the question of substantial similarity: Different courts have coined different tests, such as, for instance: Would an average observer overlook differences? Would an average observer notice the taking? Did the defendant take an expression of substance and value? Do the two works have the same total feel and concept?

Fair Use

While, as noted above, the copyright owner has the exclusive right over his copyrighted material, the statutes have carved out a wide-ranging exception which allows anyone to make fair use of the materials. The statutory *fair use test* according to § 107 has four factors:

Nature of infringing work (non-commercial, educational?)

Nature of copyrighted work (rather fact driven, more artistic, exclusively artistic).

Amount/substantiality of portion used in relation to copyrighted work.

Effect on the market, including potential market (no need to show actual harm).

All four factors must be taken into account. However, it appears that the economic effect factor (4) is the single most important element of fair use.

Parody

The probably most applicable fair use is in the parody arena. Here, there is no plagiarism because the parodist does not try to hide the taking. Instead, the parodist uses the materials openly with reference to the original work. Great stylistic differences suggest that the parody will not substitute for the original work in the marketplace. Another factor is that the owner of a serious work will not likely give a license for parody. Finally, in order to be effective, a parody must use some of the original work.

One of the most noted cases dealing with the parody topic dealt with the taking by the rap group *2 Live Crew* of Roy Orbison's "Pretty Woman", the rights to which were owned by the Acuff-Rose Publishing Company. In the first prong of the test, the purpose and character of the use were inspected, including the differences between commercial or nonprofit: Does the work merely supersede the objects of the original, or add expression/character/meaning/message? Is the new work transformative? The more transformative the new work, the less significance is given the other factors like commercialism. If the commentary has no critical bearing on the substance or style of original, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, then the claim of fairness in borrowing diminishes or vanishes and other factors (e.g. commercialism) loom larger. Whether the parody is in good or bad taste does not matter. In the second prong, the nature of the copyrighted work was rather artistic and fictional as opposed to factual collections or compilations. The song was clearly the material of protectible works. In the third prong, the Court looked to the amount and substantiality of the portion used in relation to the copyrighted work: Even if the infringer did not take much, he may have taken the heart of the original. If much was copied verbatim, then the "transformative" character is more difficult to show. In the *2 Live Crew* context, the test was that the parody must conjure up enough of the original so as to make the critical wit recognizable. Finally, the effect of the unauthorized use upon potential market for or value of the copyrighted work must be determined: It is thereby important to also consider the potential market for derivative works. In the *2 Live Crew* situation, therefore, one must consider the potential harm in the rap music market.