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## Comment

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## COMMENT

### *COPYRIGHT LAW •*

**COPYRIGHT LAW** in the United States is derived entirely from the Constitution and the statutes which have been enacted under its authority. It is purely a federal matter; the individual states have no legislative power in this field. Copyright Law is established for the purpose of granting a property right in the results of certain types of creative or productive activity. In order to establish such rights *exact* compliance with statutory requirements is essential. Once these statutes are understood the procedure is simple and very inexpensive, yet the scope of protection afforded by the statute against unauthorized copying is so complete that copyrights are usually observed, and any infringement which does occur is usually the result of some misunderstanding of the facts or misinterpretation of the truly wide scope of protection afforded by the copyright law.

The present article is intended to provide a guide to authors, artists, and composers with respect to the fundamental steps which are easily and simply available to them for the protection of their rights in their original works. The discussion is limited to the United States law, and to the principal questions which arise. For simplicity herein, the term "author" is used to include artists, composers, photographers, as well as those who compose verbal works. No attempt has been made to draw fine lines between what can and what cannot be copied with impunity, nor to set forth to what extent one may disregard certain requirements of the law and still end with a valid and enforceable copyright registration. Rather, an attempt has been made to lay down simple rules, which if followed carefully will generally result in the maximum protection which can be obtained under the copyright law.

Copyrights must be distinguished from patent and trade-mark rights, as the three have little in common except that they provide the basis for litigation in the Federal Courts, and may end in someone being very much disappointed when judgment goes against him. Patents are granted for machines, processes and chemical compositions, as

• At our request, Mr. Hobart N. Durham, of the New York bar, has supplied us this primer on copyright law. We offer it as a Xmas present to all the interested, but most especially to the Youngwritinghood lucky enough to find a grandma in the commercial woods.—Ed.

well as for ornamental objects; trade-marks are the name or symbol by which a manufacturer or merchant pledges his reputation for those goods which carry his mark; copyrights are for intellectual works and secure the author against copying of the expression of an intellectual or artistic work. A copyright does not protect the underlying idea of a work, but only its unauthorized copying in one medium or another, whether as words, music, or as two or three-dimensional art.

To obtain full copyright protection, a work having at least some originality is published with "notice of copyright," after which the copyright is registered in the Copyright Office. Thereafter all published copies must bear the proper notice and one's right is thereby firmly established. Each phase of this simple outline is more fully developed below.

Although the first requisite is that the work should have some substantial originality, even a new compilation of a street directory may have enough originality, as may one's photograph of a scene, or even one's reproduction of a famous painting. Works contrary to good morals cannot be protected, but some fifty years ago a circus poster was held not to be obscene.

Copyright in any work is established by publication of the work with the proper copyright notice appearing on the work. There is *nothing* which need be done *prior to this publication with notice of copyright*, and once such publication has taken place, formal steps are taken to register the copyright.

The only forms of copyright notice which are legally sufficient for all kinds of works are "Copyright 1954 John Smith" and "Copr. 1954 John Smith" appearing in the proper place. (Obviously I am using "John Smith" as a generic substitute for the individual owner's name.) Proper notice must include the word "Copyright" or its abbreviation, the year of first publication, and the name of the copyright "proprietor" (owner). On some kinds of works, a different form of notice may be used, but it is most essential that the requirements with respect to proper notice be rigidly observed.

Books and dramatic works require that "Copyright 1954 John Smith" or "Copr. 1954 John Smith" appear on the title page of the work or on the page immediately following the title page, and, if the work is written in English and seeks a United States copyright, it must usually be printed in the U.S.A.

Periodicals require that the same full notice be used either on the first page of text of each separate number, or on the title page, or under the title heading (masthead).

Maps which include textual material also require the full notice, but if there is no text, the notice may be shortened to "© J.S." provided the copyright owner's full name appears somewhere on the map.

Musical compositions (which include the words of a song) require the full notice on the title page or the first page of music.

Works of art (paintings, sculpture, etc.), models and designs for works of art (sketches or models for a statue), reproductions of works of art, drawings and plastic works of a scientific or technical character (engineering and architectural drawings, blueprints, relief maps), still photographs, pictorial prints and illustrations, and labels and prints used for articles of merchandise may be marked with any form of the copyright notice: "© J.S.," "© 1954 J.S.," "© 1954 John Smith," "Copr. J.S.," or "Copyright 1954 John Smith," provided that where the initials of the copyright owner are used, his name also appears on some accessible portion of the work, or on the margin, frame, base or pedestal of the work.

Motion pictures require that the notice be "Copyright 1954 John Smith" or "Copr. 1954 John Smith," and the notice should be placed below the title of the picture.

Failure to observe these strict requirements in every detail renders the copyright void. The proper notice must be repeated on every copy published. Thus a copyright would be void and unenforceable if the symbol © were used on a book, or if the year of publication were omitted on a book or musical composition, or if the name of the copyright owner were omitted from a book, or if the initials, mark or monogram of the proprietor were omitted from a drawing, work of art or photograph, or if the initials were properly used, but the name of the copyright proprietor did not appear on some portion of the work or on the margin or pedestal of the work.

Other examples of fatally defective marking are: the use of a later year than the actual date of publication (books marked 1952 actually sold at Christmas 1951); use of "© John Smith" on a separately sold

book illustration which had originally been copyrighted as part of a book; consistent or intentional omission of the copyright notice by one's licensees; use of the wrong name in the notice (as where a copyright has been assigned, the assignment has not been recorded and the copyright notice uses the new owner's name); and, of course, sale of even a single unmarked copy before copyright, although all subsequent copies bear the proper notice.

Many kinds of works may be copyrighted before they are published, but this is not true of books, written articles for periodicals, maps, and some other types of works. However, lectures, sermons, radio scripts, plays, dramatic works, musical dramas, music (including song words), works of art, plastic works, technical drawings, photographs, and motion pictures may be copyrighted before publication, but must again be registered after publication.

The copyright of a published work is registered by sending to the Register of Copyrights the appropriate application blank properly filled out, a fee of \$4.00 (\$6.00 in the case of labels or prints for articles of merchandise), and two copies of the best edition of the copyrighted work, bearing the proper copyright notice. In the case of most books and periodicals in English, all of the mechanical work (including type-setting, plate making, printing and binding) must have been done in the U.S.A., and the same is generally true of lithographic and photoengraved illustrations. In registering copyright of three-dimensional works of art, 8" X 10" photographs (as many views as are needed to identify the work, each bearing the title of the work) should be furnished in addition to the two copies of the work. If a work of art has not been reproduced in copies for sale, only one identifying photograph need be filed.

The application blanks referred to may be obtained free from the Register of Copyrights, Library of Congress, Washington 25, D.C., by specifying the kind of copyrighted work (book, map, music, etc.) to be registered and whether it is published or unpublished.

The Copyright Office registers the copyright and issues a certificate of registration which is proof of one's ownership of the copyright.

Those kinds of works which can be copyrighted before publication have the copyright registered in much the same manner except that

only one copy of the work need be deposited with the Register of Copyrights; the fee is \$4.00 and must be accompanied by the properly filled out, appropriate application form.

Where an unpublished work has been copyrighted and registered it must again be registered after publication but publication must be an actual, bona fide "publication" of copies of the work, such as offering them for public sale, a bona fide sale or general free distribution of the work.

*Ad nauseam*, I would stress that the first copy and all subsequent copies must bear the proper copyright notice.

Neither performance of a dramatic work, nor rendition of a musical composition is a publication of the work, nor is the exhibition of a painting in a gallery where copying is forbidden.

Only so long as an author or artist can keep his writing or painting to himself has he "common law rights" which prevent copying without liability. Thus, an author may not lose any rights by submitting his unpublished manuscript to a publisher for inspection, but a real problem arises because some publishers may be unwilling to receive a manuscript from an unknown author in view of the legal difficulties of establishing the original authorship of the one submitting the manuscript. Proof of unauthorized copying of an unpublished manuscript may be difficult, but many "nuisance" suits have been brought and some prospective buyers, especially movie producers and music publishers, refuse to read or accept manuscripts from those unknown to them.

So-called infringement of one's common law rights in an unpublished manuscript or work of art does not come within the scope of the Copyright Law, and any legal action relating to an unpublished book, article, or to an *uncopyrighted* painting, statue, photograph or drawing would be a suit for the state courts. In this respect the law of each state varies, and no generalization is possible beyond the statement that the unauthorized copying and use of an unpublished work can usually be made the basis for recovery of damages. One may not recover for the unauthorized use of an idea or of an unsolicited plan for a sales campaign, but one can recover for the unauthorized publication of a copy of a manuscript or painting where the work was submitted

to the publisher for his inspection and with the expressed or implied understanding that the author would be recompensed. Between these two extremes, the ultimate decision depends upon the law of the particular state. Usually, these intermediate types of cases are provided for by specific agreements between the author and publisher, and such agreements are almost essential where the subject matter is a mere idea, such as a radio or television program, where subsequent programs will bear only a slight resemblance to the initial program.

There are many ways in which an author may dispose of his rights in an original work, and to a large extent he may place such restrictions as he chooses upon the sale or licensing of his work. These are determined by the type of contract which he agrees to. The author may place a restriction upon the number of copies to be produced, the type of publication to be made; he may allow one to make a movie from his book, to adapt his stage play to the motion picture field, to translate the work into one or more languages, or to have the work edited and changed only with his approval. The author's compensation may also be computed on almost any basis; for example, a percentage of the sale price of copies, an annual amount, a fixed price per copy, a single amount for the outright sale of his work, or so much for each performance of his musical or dramatic work.

If a work has been sold before it has been copyrighted, the copyright belongs to the purchaser of the work; but, if the work had been copyrighted before the physical work was sold, the copyright remains with the author and is transferred only by a written assignment.

Copyright in books, paintings and other works created for one who has agreed to pay for them, whether or not an advance payment has been made to the author, belongs to the client; but a painting, book or photograph done in the hope that the prospective purchaser will pay for it, leaves the copyright with its author until he transfers his copyright rights. If work is done by a hired employee, the copyright belongs to the employer.

Infringement may be most simply considered as the unauthorized copying of a copyrighted work, such as the photographing of a work of art, the reprinting of a book, the sketching of a statue, transcribing music, or adapting a novel to the stage. The independent production of an exact duplicate of the copyrighted work would not be infringe-

ment, as might be the case if two people independently prepared completely accurate city directories listing all of the residents. Infringement is not avoided by acknowledging the source of one's material, and it would not now be a defense to say, as did Molière, "je prends mon bien où je le trouve," even if one acknowledged the source. Infringement always involves copying, although one may not have intended to copy. The copying may have been unrealized, in which case it is known as "unconscious assimilation."

The copyright protects all substantial and original parts of a work, such as the illustrations of a book (even each original picture in a catalog) as well as each substantial part of each article in a publication—but not the facts stated by the article. These component parts of a copyrighted work may not be reproduced without permission, and when reproduced by the copyright owner (or with his permission) they must bear the original copyright notice.

Book reviewers may quote small portions of a book without infringing, and while they may discuss the contents of a book, may not reproduce substantial parts of the copyrighted work, nor summarize the book. They may criticize it as violently as they wish, and may read it aloud in public, but may not quote it extensively in print, nor condense the book.

Infringement is a most difficult subject and involves the fundamental question of whether or not one has taken a substantial, original part of the work and expressed it in substantially the same manner. One is entitled to copy a portion of the work which was not original, and one is also entitled to express the same idea as is found in a copyrighted work provided the expression is different, but one may not copy the copyrighted expression of the same idea. It is often most difficult to decide whether one has copied the idea or the expression of the idea, and to a large extent the question is decided upon the extent of originality which is found in the idea. A re-posed photograph of "September Morn" was held to be an infringement, but it would be difficult to think of the copyright on a postcard of the Lincoln Memorial being infringed by a subsequent photograph of the same subject, even though the second photograph were inspired by the one copyrighted.



In no instance is there any copyright in the title of a work—although appropriation of another's title may be prevented by the law of unfair competition.

Clearer examples of infringement are: the translation of a copyrighted book; the photographing of a copyrighted statue; the making of a statue from a painting; condensing a novel; producing a stage play from a novel; adapting a novel to the movies; making a phonograph record of a musical composition; or performing a copyrighted play or song for profit.

In the U.S.A. an author has no "moral rights" in his work. This term is used by those proponents of such rights to stigmatize those who disregard these extra-legal "rights." The term "moral rights" is usually understood to embrace the purely contractual rights of an author *who has provided for them in his contract*; to prevent mutilation or destruction of his painting, unacceptable changes in adapting a novel to the stage or movies, or the publication of a work without due credit to the author. A recent publicized example of the enforcement of "moral rights" (as provided for by the laws of many countries) was the atheistic work of Rivera in a hotel lobby in Mexico City. The hotel would not open until it had been blessed, the clergy would not bless the hotel until the atheistic inscription had been suppressed, and the work could not be changed without Rivera's consent, which he would not give. The problem was finally gotten around by fully draping the work—anyone who is *sufficiently* insistent may possibly see the work at some inconvenient time.

Of itself, a copyright registration is of little value, and its only value is what one may do with it.

When one's copyrighted work has been used without his permission, the usual remedy is by suit in the Federal Court. This is bound to be relatively expensive, but the penalties are so drastic and so frequently enforced that copyrights are held in high esteem by "pirates," freebooters and other plagiarists, and infringement is usually avoided.

The copyright owner may sue the publisher, vendor or printer or those who perform his drama or music without his authority, and the penalties recoverable are severe: \$1.00 per copy (or \$10.00 per copy of

a work of art even though it might be reproduced in the form of a postcard selling for 1¢). If the damages are over \$5,000, the copyright owner is still entitled to recover his provable damages and lost profits; and in any event, is entitled to an injunction to prevent further infringement, may have the infringing copies seized, the plates destroyed; the loser in the court battle may also be required to pay the attorney's fees of the winner, as well as his court costs. In important cases, such costs and expenses are considerable—\$19,000 in one case was the amount the plaintiff was required to pay the innocent defendant accused of plagiarism. Where the infringement has been wilful and for profit, criminal penalties are provided, but it is doubtful if these would be enforced except in an extreme case.

Payment of royalties is enforced under state law, and the resulting questions and those of ownership of copyrights, are usually litigated in the state courts. In general, contracts for the sale or licensing of copyrights are not substantially different from other contracts, and the formalities which are sufficient for one are almost always sufficient for the other. However, contracts involving copyrights present special problems which must be covered by the terms of the contract: Is the exclusive license to continue if a certain amount of minimum royalties have not been paid by the end of the fifth year? Or, during the tenth year, if an infringing work appears, who is to bear the cost of the litigation and who is to share in any money judgment? Under what conditions may a revised edition of the work be prepared and published?

The term of a copyright is for 28 years from the date of first publication, and prior to its expiration the copyright may be renewed for an additional term of 28 years. The right to renew the copyright is not transferred by the assignment of the original copyright, and if the original copyright was obtained by the author, the renewal may be obtained only by him or his heirs.

The questions of what rights a foreign author has respecting U.S.A. copyright, and what rights an American author has in his copyrights in foreign countries, are exceedingly complex. It is probably more complex with respect to American authors than others, by reason of the fact that the U.S.A. adheres to none of the principal conventions (treaties) affecting copyright.

In general, it can be said that the copyright laws of most countries are less formalistic than those of the U.S.A. and that those laws give almost automatic protection to the works of an author who is a citizen of one of the treaty countries.

To obtain U.S.A. copyright, a foreign citizen or resident must comply with the U.S.A. law. His first publication, even if in a foreign country, should bear the U.S.A. copyright notice, and if it is a book in the English language he is then usually subject to the requirements that subsequent copies be produced in the U.S.A.

For a U.S.A. citizen to obtain copyright in most foreign countries is even more troublesome; the work must be published (actually offered for general sale) in a country of the International Copyright Union simultaneously with the first sale in the U.S.A.; and for certain countries, it must bear the notation "All rights reserved". Thus, unless the work is simultaneously offered for general sale in the U.S.A. and one of the Copyright Union countries, there is no copyright protection in most foreign countries.

Most simply, full copyright protection can be obtained by offering the work for general public sale in Great Britain on the same day the work is first sold in the U.S.A., and by also marking the work "All rights reserved".

In certain countries, some subsequent proceedings or registration may be necessary or desirable. It must be remembered that there are about 100 countries to consider, each of which has its own copyright law, and usually applicability of this law depends more or less upon the provisions of several treaties. The only general advice which can be given is that, if the work is simultaneously offered for general sale in Great Britain and the U.S.A., and the work bears both the U.S.A. copyright notice and "All rights reserved", one will have securely established his copyright in most countries.

Special requirements apply to Mexico, Brazil, Cuba, Russia, Hungary, Japan, Turkey and some other countries. No copyright protection is available in some countries, such as Egypt, Iran and Venezuela, but it is completely beyond the scope of this article to point out more than the fact that the protection of one's rights in foreign countries

is a complex problem requiring special consideration of the laws of each of the foregoing countries of interest.<sup>1</sup>

<sup>1</sup> Since writing the foregoing portion of this paper, the Senate has ratified The Universal Copyright Convention of 1952, which had been signed in 1952 by most of the civilized nations, excluding those of the Soviet block. Some treaties, and this one specifically, do not automatically become domestic law on being ratified by our Senate, but it can be expected that Congress will enact suitable laws to put the provisions of the Convention into effect.

The Convention does not attempt to change our copyright laws so far as they apply to American nationals (citizens and residents) but it does provide for extension of our law to give a greater degree of less formalized protection to foreign nationals, and gains for American nationals adequate protection in foreign countries.

It is not unreasonable to hope that when the U.S.A. copyright law is amended, its simplified and extended provisions will also be available to citizens and residents of the U.S.A.

The more important provisions of the Convention may be summarized as follows:

The copyright notice required on foreign works is simplified. All rights in countries other than the country of first publication are preserved by use of the notice "© 1954 J. Smith" in any reasonable position on the work. Thus by using the copyright symbol, the date of publication and the proprietor's name, all foreign rights will be preserved, and the proprietor need add only such other notice as is required under domestic law. Thus, in the U.S.A., the notice might be "Copyright © 1954 J. Smith"; in certain other countries "© 1954 J. Smith, all rights reserved" might be required to give immediate and almost universal protection.

Any country may still require that its own nationals use the notice required by its domestic law, rather than the marking specified in the Convention, and until the U.S.A. law is amended with respect to U.S.A. nationals, foreign nationals may have the advantage of a simplified and less formal notice than is available to U.S.A. nationals.

The Convention includes special provisions with respect to the term of the copyright and requires that the initial term be for at least 25 years, but shorter terms may be provided for photographs and applied works of art. Other special provisions apply with respect to the translation of works, so that the translator may publish them, with compensation to the copyright proprietor even though he does not consent.

Unpublished works become entitled to protection under the laws of the various countries without any formality.

There is a specific provision in the Convention which states that it does not apply to any works which are permanently within the public domain. Thus no work which is now public property can later be the subject of copyright.

The Convention requires no change in the U.S.A. law as it applied to domestic authors, but will simplify and enlarge the rights of foreign nationals, and reciprocally give U.S.A. nationals greatly increased copyright protection in the foreign nations adhering to the Convention, after proper laws have been enacted.

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In closing, let me say what must by now be quite clear: that the subtleties and necessary vaguenesses of application of copyright law are strongly contrasted by the concrete exactness and ease of obtaining proper copyright ownership. But the more precisely a necessary legal procedure is set forth, the more important is exactness of compliance with it. Exact compliance with the Copyright Law is relatively simple, but even a minor failure in following the requirements as to the form and position of the required notice may result in a complete loss of one's rights in the copyright. This much, at least, can be clearly avoided in every case. The rest is a matter of individual circumstance.

HOBART N. DURHAM