Copyright Law Primer

SECOND EDITION
WITH FORMS

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No booklet on the subject of copyright law can be comprehensive. Nor is the booklet intended as legal advice to be relied on without the advice of competent legal counsel. We also publish comprehensive primers on the subject of advertising and trademark law. That said, we welcome your comments, criticisms and, especially, experiences.

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I. Copyright Law And How It Applies

A. Introduction

Copyright owners have exclusive rights, granted by federal law, to control their original works of authorship. The grant to owners of exclusive rights protect them from unauthorized use and access to their copyrighted works. Anyone who violates any of these rights is an infringer and may be subject to fines and sometimes criminal punishment, including imprisonment.

Because creative expressions, e.g. novels, software code, art, photographs, music, are often works of original authorship, whether created or purchased, a basic understanding of copyright law is essential to anyone involved in creating, licensing, selling, or buying creative products, or expressions. Failure to understand the rules governing copyright can result in embarrassment, multi-million dollar law suits or the loss of intellectual property. Today, people take copyright ownership seriously.

Copyright law has its origin in ancient Rome where artistic works were protected in perpetuity. Modern copyright law, at least in the United States, began with secret debate at the Constitutional Convention in Philadelphia in 1787 and found its way into the federal Constitution. Congress codified Copyright law in Section 17 of the United States Code, where it is separated into thirteen chapters, each one dealing with a distinct aspect of copyright.

> ***OBSERVATION:*** *Copyright law and patent law make reward to the owner a secondary consideration. The reason why the law confers what is in essence a monopoly is to provide a general benefit to the public derived from the labors of others. The law grants a limited term of monopoly to achieve this aim of*

conferring public benefit. But Congress, at the behest of private interests, has continued to extend this term, some say longer than is necessary to reward the labor of authors.

B. What Is Subject To Copyright Protection?

The Copyright Act (the "Act") grants copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[I] Each term used in the preceding sentence has important meaning, but this mouthful, the essence of the Act, can be distilled into terms that are easily understood.

The term "original works of authorship" means that the work owes its origin to the author and possesses a minimal level of creativity.[II] Because of its subjective nature, the threshold for creativity is extremely low and it varies with different types of works. Musical arrangements, along with scientific works, typically require higher levels of creativity to obtain copyright protection,[III] while fiction needs less.[IV] The more creative the work, the more protection it has, which means that a court will be more willing to declare that a similar work, created later by another person, infringes the first work. But for a work to qualify as an original work of authorship and for copyright protection, all that is required is that the author add some modicum of creative inspiration and originality. For example, alphabetizing a list of names to create a directory is not sufficient creativity although it might require considerable labor. But original does not mean new, novel or unique.[V]

Even if someone creates a work the same as or similar to an existing copyrighted work, the second work may still be subject to copyright protection. As long as the works were conceived independently by each author, both works will enjoy copyright protection if original.[VI] Many years

ago, a learned judge clarified this principle when he wrote: "[I]f by some magic a man who had never known it were to compose a new Keats' Ode On a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats."[VII]

Because only the tangible expression of an idea can be protected, the work must be "fixed";[VIII] more specifically, it must be "fixed in any tangible medium of expression," which merely means that it is embodied in a form that allows perception, reproduction or communication.[IX] As an historical aside, this requirement comes about due to language found in the U.S. Constitution referring to "Authors" and their "writings". Eventually, the Supreme Court determined that the word "writings" would refer to the fruits of an author's labors, as long as the results are tangible.[fn2] Fixation occurs when an author writes on paper, draws on canvas, creates a statue in clay, dictates onto a tape or types into a computer. Unless fixed, the work is transitory and is not subject to copyright protection because it is not sufficiently permanent or stable to permit it to be perceived, reproduced or communicated.[X] For example, the spoken words of a disc jockey are lost to copyright protection unless recorded.

A computer disk illustrates how a work can be fixed in a form where the aid of a machine is necessary to view the work, but even so, the work is still considered capable of being perceived, reproduced or communicated. Without a computer, the work fixed on the disk cannot be viewed. Under the Act, however, it is considered fixed.[XI] This aspect of the Act has evolved from a 1908 case that concluded piano rolls used for player pianos were not considered fixed because people could not "see and read" them.[XII] Today, a work is considered fixed and is copyrightable even when independent machinery or other equipment is required to see or experience the work.[XIII]

Often, interpretations of the Act lag behind existing and developing technology. Internet technology is an example. The Act, however, was written to encompass a broad range of works to be considered for copyright protection. For example, the phrase "now known or later developed",

written into the Act, lends itself to the flexibility necessary to protect works in our ever-evolving communications technology.[XIV] With the increased use of electronic transmissions, this phrase now makes copyright protection applicable to works never dreamed of in previous years such as digital, audio and video, information on computer bulletin boards, and perhaps holograms.

Perhaps, a step beyond the outer limits of fixation was the claim by fireworks company that its public fireworks displays, fired into the air, were fixed and the subject of copyright protection. Would the recordation of the display on video tape have saved the claim?

In summary, a work must be original and fixed to be protected under United States copyright law.

II. The Extent And Limitations Of Copyright Protection

A. Scope Of Copyright Protection

The scope of copyright protection extend to eight classes of works, enumerated by statute, although the statute states this list is not exclusive. These classes are:

- literary works (books, magazines, ad copy, and computer programs);
- musical works, including any accompanying words (songs);
- dramatic works, including any accompanying music (plays, skits);
- pantomimes and choreographic works (dance);
- pictorial, graphic and sculptured works (paintings, designs);
- motion pictures and other audio visual works (films);
- sound recordings (on CD, Cassette or Digital Audio Tape, or

MP3); and

- architectural works.[xv]
- titles of creative works

Are titles to literary works Protectable under copyright? In a word, "No". Copyright Office Regulations preclude registration of works and short phrases such as names, titles and slogans. 37 CFR § 202.1. That does not mean titles cannot be protected. In discussing protection of the title to a play, a highly regarded judge wrote

> The Plaintiff succeeds as soon as he shows an audience educated to understand that the title means HIS play. (International Film Service Co. v. Associated Producers, Inc. 273 F. 585 (S.D.N.Y. 1291).

The Learned judge was expressing the concept that a title can be protected under the laws of trademarks and unfair competition once the title comes to be associated with the source of the play; that is to say, once the title has developed "secondary meaning" under trademark law. Once that occurs, persons hearing use of the title by another playwright would likely assume, wrongly that the use was by the original playwright.

Warner Bros. Paid $200,000 for the title "Sex in the City", but bought little else. Likely, it brought in gross rights that were not protectable. Once, however, the title became associated with the producers of the hit series, the title became protectable, but under trademark, and not copyright law..

One final note. It is not likely that the Patent and Trademark Office will grant a trademark registration for a title of a literary work.[fn3] The basis for the refusal is that the name of a book is similar to a descriptive term, such as "cored pineapples in a can." However, once the author develops a series of books, the title may be registrable if the title serves to identify the publisher and author as the source of the series.

Architectural plans have always been protected but plans are often utilitarian and it is sometimes a task to distinguish an idea from an

expression. Generalized notions of placement of functional items such as doors and windows, traffic flow and methods of construction have been considered ideas.[fn4]

Works of original authorship, such as ads, may fit into different categories. For example, an ad may be print, video, a website or a radio spot. Regardless of the category, all types of works of original authorship are eligible for copyright protection, as long as they are fixed and have the minimum level of creativity required by the Copyright Act.[XVI] Also, with recent amendments to the Act, non-common elements of architectural structures are also protected, preventing a person from entering, measuring and duplicating, for example, an office building or model home.[fn5]

In 1990 the Act was extended to "the design of a building", including the actual, constructed building if habitable or used by humans. Even though buildings are now protected the law allows photographs to be taken and the owner to alter or destroy the work. Finally, only those design elements that are not functional are protected as "buildings".

TIP: Separate registrations are required for architectural plans and the underlying architectural works. Some applications for buildings have been rejected for lack of originality.

B. No Protection for Ideas

One of the most overlooked limitations in copyright law is that copyright protection does not apply to “any idea, procedure, process, system, method of operation, concept, principle or discovery.”[XVII] For example, the idea of a comic book character with superhuman powers, who battles evil, cannot be protected. However, the expression of a comic book hero with a red cape, blue suit and “S” on his chest can be copyrighted.[XVIII] Copyright protection, then, extends only to the tangible expression of the idea and not to the idea itself.[XIX]

TIP: Formulae and processes can be protected under the law of

trade secrets, which requires that the holder take steps to keep the information secret. However, an underdeveloped idea may not be protected under trade secret law unless it can be show to have independent value. A person desiring to disclose an underdeveloped, or a developed idea to a potential buyer can still protect the use or subsequent disclosure of the idea with a non-disclosure agreement under which the disclosee contracts to maintain the secrecy of the idea and not use it for purposes other than evaluation. A copy of a NDA is included in the Appendix.

Use of an NDA is crucial to protecting trade secrets when they are revealed for business reasons. An example of a business reason might be the disclosure of a process to a manufacturer who will make an inventor's product. A set of instructions, the mere listing of ingredients or contents of a package are not copyrightable because they lack the necessary creativity.[XX] This generally excludes recipes. Facts are also not copyrightable because no one can claim to be the "author" of the information.[XXI] Facts are discovered, not created by an author. Facts also lack the requisite level of originality.

C. The Creativity Requirement

Works that are solely utilitarian or functional are not copyrightable.[XXII] Forms intended for recording data or information, and not for original expression, are examples of this. To grant copyright protection to accounting forms, in essence, would be to grant a monopoly in the underlying art of accounting. One turn-of-the-century case actually discussed accounting forms, saying "the art it teaches cannot be used without the employment of methods and diagrams ... such methods and diagrams, are to be considered necessary incidents to the art."[XXIII]

However, if the work has an artistic aspect conceptually separate and

independent from its utilitarian function, the work can be subject to copyright protection.[XXIV] For example, the non-utilitarian design of backpacks, evidenced by the recent fad of backpacks in the shape of animals for school children, is copyrightable because the animal design of the backpacks goes beyond its obvious, useful purpose, demonstrating a creative flair. The copyright only applies to the animal design, not the underlying concept of backpacks in general.[XXV] The same rules apply to certain furniture and jewelry designs.[XXVI]

When the idea and the expression of the idea merge, copyright protection of the expression is lost.[XXVII] In copyright law, this is called the merger doctrine. Courts have also relied on the merger doctrine when there are only a limited number of ways to express an idea. Head-on product photos, used in advertising, may have so little originality that courts will refute protection under the merger doctoring (SKYY CASE) When merger occurs, these expressions cannot be copyrightable because to do so would limit use by others and may possibly force others to use imprecise phraseology.[XXVIII] Contest rules illustrate this. Since there are a limited number of ways to spell out contest requirements, courts have held that copying of contest instructions does not constitute copyright infringement. To allow otherwise would create a monopoly over the system to which the rule applied. In actuality, how many good ways are there to tell a contestant to supply a self-addressed, stamped envelope? Typically, games, sweepstakes or contests are not copyrightable. However, some limited copyright protection is available to certain design aspects of these items. As long as they possess the minimal level of creativity required, game labels, board or playing piece designs and game cards may obtain copyright protection.[XXIX] Remember, copyright protection is not extended to the manner in which the game is played.

While ideas are not protected under copyright law, under appropriate circumstances ideas can be protected under State law theories of misappropriation. NBC was sued by an employee who claimed he

submitted to it the idea for what became the BILL COSBY SHOW; a TV series that "would take place in a middle income Negro neighborhood". The court, however, ruled against the plaintiff stating that under state law the idea must be novel to be protected. To be protected under copyright, an expression need not be novel; to be protected under state law theories of theft of idea, the idea must be truly original, or novel.[fn6]

D. Copyright Law in the Digital Millennium

Many new clarifications and expansions of copyright law have recently been enacted in order to try to keep up with advances in technology.

Signed into law on October 28, 1998, the Digital Millennium Copyright Act (DMCA) is a complex piece of legislation that arguably represents the most significant revision of copyright law in more than two decades.[XXX] The Act is based primarily on treaties drafted by the World Intellectual Property Organization in 1996 and contains several provisions designed to combat piracy. Specifically, the DMCA makes illegal the circumvention of copyright protection and access control technologies, such as DVD encryption and password-access controls.[XXXI] The DMCA also prohibits trafficking in technology for circumventing such protective measures.[XXXII]

An interesting creation of the DMCA is the possibility that works in the public domain can again be protected by copyright law. While the DMCA protects only copyrighted works, it is possible for an old work to be encrypted along with the addition of new editorial or other matter. Then, any person attempting to gain access to what would otherwise be available to the public would be guilty of copyright infringement if access was gained through de-encryption.

In addition to its anti-circumvention provisions, the DMCA deals with copyright infringement liability for internet service providers (“ISP"s).[XXXIII] ISPs may include network access providers, file ____ services, search engine,

and services providing network transmissions, email, chat and filtering of online materials. Previously, ISPs could be found liable for copyright infringement by their customers for transmission, caching, linking or storage of infringing material.[XXXIV] By this amendment to the Copyright Act, ISPs may avoid direct liability for their customers' copyright infringement if: the activity is automated, not initiated by the ISP; the ISP implements and posts a copyright ISP policy, the ISP designates an agent to receive complaints and upon notification takes immediate steps to stop the infringing activity.[XXXV]

> ***TIP:*** *All ISP must adopt a written policy and incorporate it into contracts with their customers. Those contracts should allow the ISP to immediately discontinue service without liability if the customer violates copyright law.*

No new law is without challenge and the DMCA is no exception. Recent challenges to the DMCA arguing that the restrictions on decryption and on distributing circumvention tools violates freedom of speech rights have thus far failed. A federal appellate court recently upheld an injunction prohibiting the distribution of a software program called DeCSS used to unlock encrypted movie DVD's. The court rejected the argument that the dissemination of the DeCSS program was protected speech and a fair use.[XXXVI]

Finally, the DMCA adds new protection for the integrity of copyright management information, such as copyright notice on works, by making it illegal to falsify, remove, or alter such information without the copyright owner's permission.[XXXVII]

Technically, violations of the DMCA are not infringements, they are independent violations and are separately actionable under the DMCA. Recently, Lexmark used the DMCA to prevent a competitor from selling replacement toner/cartridge for its printers. The basis of this action was

that a chip on the competitor's product a work in the printer and the replacement cartridge to function like the original.

How long does copyright protection last? In ancient Rome, the works of authors were protected forever. Modern laws are not so beneficial to the author as they are truly intended to grant certain rights to authors in exchange for eventually providing the public with free access to the works. Prior to 1998, copyright protection was available for the life of the author plus fifty (50) years. If the author was a corporation or other entity, the term was seventy-five (75) years. The Sonny Bono Copyright Term Extension Act lengthened U.S. Copyright protection by an additional twenty (20) years.[XXXVIII] This Act applies to works published in or after 1923, but does not affect works that have already passed into the public domain prior to 1923. For example, a work published in 1925, which previously had protection only until 2000, now has protection until 2020.

In February 2001, the United States Court of Appeals for the District of Columbia Circuit rejected an attempt by a collection of corporations, associations, and individuals to challenge the constitutionality of Congress' extension of the copyright term.[XXXIX] Unless voluntarily amended or repealed by Congress or invalidated by the United States Supreme Court, the extension will remain law. Recently, the Supreme Court found the extension Constitutional. Still, the term of exclusive rights granted to authors grows and one has to wonder whether the purposeful grant of rights and benefits the public or the author.

Another recent change includes the adoption of the Fairness in Music Licensing Act of 1998, which exempts small bars and restaurants (under 2000 gross square feet) from paying royalties for playing copyrighted background music in their establishments.[XL]

III. Creativity Spawns New Copyrights For Derivative Works And Compilations

A. Derivative Works

The requirement of originality for copyright protection is one that may confuse persons unfamiliar with copyright law. To be original under the Copyright Act a work need not be entirely new or unlike any other; it need only possess a minimal level of creativity.[XLI] For this reason, copyright protection extends to derivative works as well as to entirely original works.[XLII]

A derivative work is one "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[XLIII]

OBSERVATION: The owner of the copyright for original work has the exclusive right to prepare derivative works based upon the original work.[fn7]

To create a derivative work, an author must make sufficiently original new additions to the underlying work on which this derivative work is based.[XLIV] Because the right to create or authorize others to create a derivative work belongs solely to the copyright owner of the underlying work, the author of the new work must obtain the permission of the copyright owner of the pre-existing work to avoid infringing the earlier copyright.[XLV] The copyright in the derivative work extends only to the added material, not to the preexisting material.[XLVI]

TIP: *The creator of the derivative work owns what is added. But, without a license from the original author,*

the use of the original matter in the derivative work infringes. If the unauthorized derivative author cannot separate her work from the original work, she will lose her ability to protect the new contribution.

For example, a screenplay is a derivative work if it is based on a novel.[XLVII] In order to avoid infringing the novelist's copyright, the screenwriter must obtain the novelist's permission to create a new work based on or incorporating the existing work. A relatively small amount of variation or originality will suffice to gain copyright protection in the new work.[XLVIII] Even if 90 percent of a work is reproduced from another source and the other 10 percent of the derivative work is no more than the derivative author's interpretation of the existing work, the new work qualifies for copyright protection.[XLIX] Once again, the new copyright would apply only to the additions to the underlying work and would not affect the original copyright.[fn8]

The derivative work must possess more than a trivial variation of the underlying work in order to be the subject of copyright protection.[L] Reproducing an object with minor alterations is insufficient to gain a copyright in the "new" object. For example, when a metal bank is reproduced in plastic, the plastic version is not the subject of copyright protection because a mere change in the medium of the work does not constitute a legally distinguishable variation in the work.[LI]

OBSERVATION: *Where new material is added to an original work to make a derivative work and the original work lapses into the public domain, the derivative work cannot be duplicated without license from the owner of the derivative work.*[fn9]

In advertising, for example, a derivative work might be an adaptation of a song for a commercial, the modification of a photograph or illustration, or even the revision of a script written by another author. In computer programming, the translation of a computer program into a different

programming language would be a derivative work. So would the translation of a French novel to English.

> ***TIP:*** *Consultants who do not desire to see their reports altered and circulated can protect them under copyright law by refusing their employers the right to create derivative works through alterations. At least one court has ruled, however, that an agreement between a consultant and employer granted a license to the employer to "reproduce, publish and use the work in whole or in part."*[fn10]

B. Compilations

Like derivative works, compilations are works in which an author builds a new work by making use of pre-existing work(s).[LII] Compilations are collections of works, often already copyrighted, such as short stories or articles. Compilations are copyrightable if they contain a minimal degree of creativity.[LIII] Short story anthologies are common examples of compilations. If the compiler exercises creativity in the arrangement of the stories, the compilation may be subject to copyright protection, but only for the arrangement of the work.[LIV] The earlier copyright holders maintain the copyrights in the individual stories.

Because facts are discovered, not created, facts contained within a compilation (or any place else, for that matter) are not protected by copyright.[LV] Only the organization of the facts, being the creative aspect of the work, is given copyright protection if the organization meets the minimum level of creativity required by law.

A telephone directory is an example of a compilation and one which illustrates when such a work may be subject to copyright protection.[LVI] When names and addresses are arranged alphabetically for inclusion in a directory, without any other creative input, the work is not copyrightable. However, if certain listings are eliminated for some reason or cross-

referenced to a color-coded key, this might satisfy the requirement of a minimal level of creativity. Thus, the work could obtain a valid copyright, but only for the arrangement and color-coded key, not for the names or phone numbers contained in the directory.

Congress includes computer databases n the literary works category of copyright protection, but, similarly, only databases that are organized in some creative fashion are subject to copyright.

> ***TIP:*** *Databases are best protected by contracts, such as terms of use agreements clicked through by users.*

IV. Ownership Of Copyright

A. Original Author

A copyright in a work vests initially in the "author or authors of the work."[LVII] Ownership of the copyright is distinct from the ownership of the physical object in which the copyrighted work is embodied. A copyright owner does not own words, sounds or pictures, comprising the work, but only the rights associated with the tangible objects (the five exclusive rights a copyright owner enjoys are addressed in Section V).[LVIII]

A joint work is a work prepared by more than one author who intend that their product be merged into inseparable or interdependent parts of a whole.[LIX] Absent an agreement to the contrary, joint authors own the work equally.[LX] The authors' contributions need neither be equal nor occur at the same time. For example, when a song is created, one author may write the lyrics and at a later time, the other author may compose the music.

> ***TIP:*** *Joint authorship generally requires that each author fix his or her contribution in a tangible medium of expression. It is not enough to verbally direct the other*

author.

TIP: *Joint authorship allows each author to "exploit" the joint work without consent of the other author, although any money received must be shared. To avoid this result, joint authors can contract with each other to control how their work will be exploited.*

To be entitled to copyright ownership, one must be the author or walk in the shoes of the author by virtue of assignment or some other transfer. Assignment of copyrights is discussed below at subsection C.

B. Works Made For Hire

Generally, if an employee within the scope of employment creates a work, it is a "work made for hire."[LXI] When a work is a work made for hire, the employer or other person commissioning the work is the "author" and owns all rights in the copyright unless otherwise contractually agreed upon.[LXII] A work by one who is not an employee may only be considered a work made for hire if the parties expressly agree in writing that the work is a work made for hire AND the work is specially ordered or commissioned as a contribution to a collective work, as a part of a motion picture or audiovisual work, as a translation, as a supplementary work (e.g., the foreword to a novel written by another), as a compilation, as an instructional text, as a test, as answers to a test, or as an atlas.[LXIII] If the work does not fall in one of these categories, the employer owns only the particular copy of the work purchased from the creator, and the creator retains the copyright in the work. Work for hire status also abrogates the creator's right to exercise termination rights 35 years after transfer under Section 203 of the act.

TIP: *Even if the work is not a "work made for hire," a party commissioning the creation of a copyrightable work may require the creator to assign all rights and*

interest in the work, including copyright, to the commissioning party. This assignment must be written. A sample copyright assignment is included in Appendix A.

"Work made for" hire disputes often center around whether the author was an employee or an independent contractor. In a case involving a Baltimore sculptor, the United States Supreme Court shed some light on this important distinction.[LXIV] According to the Court, employment status is determined by the hiring party's right to control the manner and means by which the final product is accomplished.[LXV] The sculptor, hired to produce a statue for a non-profit organization, was considered an independent contractor because of the hiring party's lack of actual control over the manner and means by which the final product was accomplished.[LXVI]

Factors that help to distinguish employees from independent contractors include the skills required to create the work, the source and ownership of the tools and equipment used by the creator, the place at which the work is done, the duration of the relationship between the parties, method of payment, whether the hiring party is in any business and the extent of employee benefits.[LXVII]

The Supreme Court's decision that a common law employee's efforts are a "work made for hire" owned by the employer has interesting applications in an academic environment where tradition, not copyright law, dictates that a professor owns the intellectual fruits of his labor. One answer, if a court is pushed for a decision on this issue, is to perhaps decide that the professor's writings are outside the scope of his employment and therefore not subject to the "work made for hire" requirements of employer ownership.

In June of 2001, the United States Supreme Court decided *New York Times v. Tasini*, a case holding that publishers could not upload electronic versions of previously published articles by freelance writers into databases without a written agreement from the freelancers permitting such use. The

Times was unable to convince this court that the license granted to it by the freelancer entitled it to create a new (electronic) version and did not require an additional license to do so. The Supreme Court reasoned that an electronic database that displays articles outside the context of the original newspaper issue is not a revision of the original edition but a new and unlicensed use of copyrighted works.[LXVIII]

> ***TIP:*** *Always contract in writing for creation of the work, describing ownership, payment, use, and delivery terms. Publishers should obtain all rights from the author. Writers should negotiate compensation for each type of use the publisher wishes to obtain.*

C. Assignments

Because a copyright is a form of property, it can be bought, sold, assigned, or bequeathed to another.[LXIX] An assignment can transfer all or any combination of rights held by a copyright owner. Consequently, separate parties can own separate but exclusive rights in a copyright. For example, an author may license one person to reproduce a novel while at the same time license a second person to make a movie based on the novel.

Assignments must be executed in writing and should clearly express the intent of the original owner.[LXX] The phrase "assign the copyright" used without any limitations has been interpreted to mean an assignment of all rights under the copyright.[LXXI] A sample copyright assignment appears in Appendix A.

One final note on assignments. In some instances, they are terminable, whether created under new or old copyright laws. 17 U.S.C. § 203 allows an author or his or her heir or estate to terminate any transfer or license of a copyright work, unless the transfer was made under the author's will. To be effective the exercise must be made during a five-year period beginning 35 years after the date of the transfer intended to be revoked.

TIP: *This is a very important right for authors and their s heirs or estates to be mindful of. In 1938 Messrs. Siegel and Shuster transferred all rights to SUPERMAN to NATIONAL COMICS for $130, but waived their termination of transfer rights. Can you imagine what those rights would have been worth had they been allowed a second bite of the copyright apple?*

The Sonny Bono Copyright Term Extension Act adds to the Act a new termination right formed at Section 30A(d). At the end of the 75th year of copyright an author, for five years, can elect to recover copyright for the 20 years added by the Bono Act.

D. Government Ownership Of Copyright

Works created for the United States government by its employees acting within the scope of their employment are not copyrightable.[LXXII] This exclusion from copyright means that all government works are in the public domain for use by anyone. This is true regardless of whether the works are original and otherwise meet all the requirements for copyright protection. This provision allows anyone to use photographs or other information gathered by government agencies without obtaining permission to do so unless the use would violate some other right such as the right of privacy or the right of publicity.

However, a work owned by the government may be protected by copyright if the copyright is transferred to the government by assignment, bequest or in another manner.[LXXIII] For example, if a patriotic author transferred ownership of a work to the government by bequest, the government could display the work or collect royalties for the work while maintaining the same exclusive rights in the work as are enjoyed by copyright holders generally.

TIP: *Government archives provide a rich, and free,*

source of photography, illustrations and writings.

V. Copyright Owner Enjoys Five Exclusive Rights To Control Use of Work

Unlike trademark ownership, copyright ownership creates for the owner a virtual monopoly of use. Copyright holders are given five specific rights in their work to the exclusion of all others: the rights of reproduction, modification, publication, performance and public display of the work.[LXXIV] The copyright holder's exclusive rights exist, however, in conjunction with certain limitations set out in the Copyright Act, such as the fair use doctrine.[LXXV]

The copyright holder can license others to exercise any or all of these rights. Through license, for example, content is obtained for websites, screenplays are created from novels, and music is licensed for use in commercials. After the term of the license expires, the licensee's right to use the material expires and all rights in the work revert to the original copyright holder. Use of a work in violation of the terms of a license constitutes copyright infringement. Failure to pay the license fee does not necessarily result in an infringement action if the work is used. Exclusivity, territory, and duration of use are all negotiated and fees vary depending on the particular rights granted. A sample copyright license appears in Appendix A.

> ***TIP:*** *Claiming breach of contract limits the author to remedies provided under the contract. A claim of copyright infringement of a registered work permits recovery of statutory damages and attorneys, and likely exceeding unpaid royalties under breach of contract.*

The Act requires that exclusive licenses must be in writing and signed by the owner of the copyright,[LXXVI] but non-exclusive licenses can be verbal.[LXXVII] Practically speaking, however, verbal licenses are *always* a bad

idea as their terms are subject to disagreement and are difficult to prove.

> ***TIP:*** *Always put licenses in writing. Be certain to describe fees, term, territory, and permitted use. If not written, you are asking for a judge or jury to rewrite for you the terms of your agreement, and you may not like what they write.*

It is also important to consider not only one's own use of copyrighted material, but also the use made by others. This is because while the direct violation of the exclusive rights granted to a copyright owner is infringement, under the concept of vicarious liability, a person may be liable for an infringement done by another if the infringer is under the control of someone who could stop, and is in a position to benefit from, the infringement. One of the most famous cases involving vicarious liability is the recording industry's suit against Napster. There the industry contended that Napster was vicariously liable for the infringements of others because it knew that infringements were happening and provided the means of uninfringement. So far, the courts have sided with the recording industry.[LXXVIII] In pre-computer days, dance hall landlords were found liable for the infringing acts of their tenants if they had the means to control their use of copyrighted works. Thus, merely facilitating any of the following types of infringement may subject one to the same liability as committing the infringement directly.

Finally, it needs to be said that in a small company the "boss", a person who has a pecuniary interest in, and a right to control the actions of, infringement will always be sued along with the company for copyright infringement. Many people think that having corporate or limited liability company status will insulate them from liability for the infringing acts of their corporate, or LLC, alter egos. But they need to think again for in almost every case they will be held jointly

and severally liable with the entity meaning that the successful copyright plaintiff can recover damages from either or both the entity and its owner.

A. Right To Reproduction

The first right granted copyright owners is the right to "reproduce the copyrighted work in copies or phono-records."[LXXIX] A copy is "a material object, other than a phono-record, in which a work is fixed."[LXXX] By definition, the Copyright Act also regards the original work as a copy.[LXXXI] Fixation means that the work is embodied in a form that allows perception, reproduction or communication, thus preventing the work from being transitory.[LXXXII]

Phonorecords are "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed."[LXXXIII] Phonorecords include cassette tapes, compact discs, and MP3s, just to name a few.

Reproduction of a copyrighted work without permission from the owner is copyright infringement.[LXXXIV] Infringement includes reproducing the work (in whole or in part), by duplicating it exactly or by imitation or simulation.[LXXXV] An infringer can be held responsible for monetary damages[LXXXVI] and attorneys' fees.[LXXXVII] In infringement cases where trial is necessary, attorneys' fees can exceed $100,000.

B. Right To Modification

The Copyright Act provides copyright owners with the exclusive right to prepare derivative works based on their copyrighted works.[LXXXVIII] This right somewhat overlaps the right of reproduction, but it is more expansive because the infringing derivative work does not need to be fixed in a tangible medium.[LXXXIX] This would occur, for example, if the derivative work is a

play or skit based on a copyrighted novel.

A derivative work is a work based upon one or more preexisting works.[XC] It may be a translation, musical arrangement, dramatization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.[XCI] To be a derivative work, the author must add to the original or underlying work, on which the derivative work is based, sufficiently original new work.[XCII] A work is not considered a derivative work unless it has been substantially copied from the prior copyrighted work, such as an adaptation of a movie to a play, modification of a musical score or a translation from one language, including computer, to another.[XCIII] The infringer would own its contribution to the work and the original owner would own the underlying work.[XCIV] However, courts will not allow the use of the infringing derivative work so the infringer is not likely to ever enjoy the fruits of its labor, unless it negotiates a license to create the derivative work. If the poison cannot be separated from the soup, the courts will require the chef to toss the soup.

C. Right To Distribution

Copyright owners are also granted the exclusive right to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending.[XCV] Through this grant the author, or the licensee, is the only person who can introduce an authorized copy of its work to the public through sale, gift, rental or loan.[XCVI] Note, however, that what is commonly, but inaccurately, called the “first sale doctrine” provides that once an authorized copy is introduced, the owner of that copy may generally sell or give his copy away. For example, if you were to buy a video tape of a movie sold by authorization of the copyright owner, your subsequent sale of that copy would not be an act of infringement. If, however, you made 1,000 copies of that movie and sold them, you would be

an infringer. Restrictions apply to certain categories of works where the owner of a particular copy wishes to rent, lease, or lend that copy.

In exchange for a promise to publish, the author will either grant a license or assign the copyright to the publisher who will publish the work and probably pay a royalty to the author. For works registered with the Register of Copyrights, it is important for the new owner to obtain a written assignment and record this assignment with the Register of Copyrights.[XCVII] Otherwise, the author could later transfer the rights in the work to another, and that later transferee might have a valid ownership claim.

Generally, a vendor does not register a work prepared for an advertiser or its agency and all that is needed is a written assignment of ownership signed by the author. An author of a manuscript may register the work in his or her name, or the work may be registered in the name of the publisher. If the author is "renting" the work for a fee, a license agreement is needed. This should be in writing and specify exactly what rights are acquired and what the author will receive in exchange.

> ***TIP:*** *Where a license is to be entered into by an advertising agency, the agency must be particularly careful to inform its clients that copyright has not been purchased and that only limited rights are acquired. This is because many agency/client contracts require the agency to transfer "ownership" to its client of anything purchased for the client with the client's funds.*

> ***OBSERVATION:*** *Copyright can be compared to an onion, with the layers of an onion similar to the layers of rights held by a copyright owner. For example, an owner can license his art for greeting cards for one season, and at the same time sell the original canvas from which the greeting cards are created. Next, the artist can license the art for the cover of an annual report and finally allow someone to modify the art and create a derivative work. All the while the person who bought the original canvas has only the right to hang the art for private exhibition, or to sell the canvas to another collector.*

TIP: *We believe it is better for an author of a manuscript to register the work in his or her name instead of in the publisher's name. Then, if there is a breach of contract, say, for example, the publisher stops publishing the work or refuses to remit royalties, the author retains copyright ownership and need not divest these rights from the publisher in a legal proceeding.*

VI. Fair Use Doctrine Gives Others Rights To Limited Use Of Copyrighted Works

A. The Fair Use Doctrine

Although a copyright owner is granted five exclusive rights in his or her copyrighted work, the owner's rights are limited by the doctrine of "fair use."[XCVIII] Fair use grants someone other than the copyright owner a limited privilege to use the copyrighted material in a reasonable manner, without the copyright owner's consent.

Fair use began as a judicial doctrine; Congress added a statutory fair use right when it revamped the Act in 1976. Even though set out in the statute, Congress left to the courts when and how to determine whether a use is "fair". That directive provides uncertainty and flexibility in interpretations.

The fair use defense to the copyright holder's exclusive rights was developed to prevent a strict interpretation of the law which would inhibit the use of works for scholarship, education and criticism.[XCIX] Under section 107 of the Copyright Act, the use of copyrighted works for purposes of criticism, comment, news reporting, teaching, scholarship or research is generally not considered copyright infringement.[C]

Fair use is intended to balance the need to preserve the copyright holder's exclusive rights in his work with the public's need for access to the protected information by limiting the exclusive rights of the copyright owner

where circumstances dictate a need to promote the public benefit gained from creative works.[CI] Fair use presupposes good faith and should only be upheld if a finding of fair use would be equitable.[CII] The fair use doctrine will not protect persons who use copyrighted material for a commercial purpose without paying for the benefit of its use.

B. Factors To Consider In Evaluating Fair Use

The statute directs the courts to consider four main factors to determine whether use of a copyrighted work is a fair use or an infringement. These factors, which are discussed in detail below, include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the economic impact of the use on the market.[CIII] No one factor is by itself determinative.[CIV] Fair use is always determined by evaluating all circumstances surrounding the use of the copyrighted material.[CV] Courts equitably balance the four factors on a case-by-case basis to determine whether a use is fair.[CVI]

In determining the purpose and character of the use, courts consider whether the work is for profit (commercial) or non-profit (educational).[CVII] Educational use does not automatically shield a work from a finding of infringement.[CVIII] Similarly, a commercial purpose does not always mean it is not a fair use, although courts have typically, but incorrectly, viewed commercial use as presumptively unfair.[CIX] Since fair use presupposes good faith, the intent of an alleged infringer is also a material consideration in a fair use determination.[CX]

The second factor to examine is the nature of the copyrighted work.[CXI] Courts consider whether the work is published or unpublished. The scope of fair use is broader for published works.[CXII] Typically, the unpublished nature of a work is very important, although not determinative, in ruling whether to allow a use as a fair use.[CXIII] Courts also weigh whether the

work was designed to inform or entertain. Informational or factual works are more likely to be considered a fair use as opposed to creative or nonfactual works.[CXIV]

The third factor, the amount and substantiality of the portion used, requires the court to evaluate the quantity (in terms of the percentage of the work used), as well as the quality of the copied portion.[CXV] Generally, to qualify as a fair use, the user is not allowed to copy any more of the copyrighted work than is necessary for his or her purpose.[CXVI] Copying of an entire work, or large portions, is not normally a fair use. Copying of only a small amount may still be actionable if the copied portion contains the true essence or "heart" of the work.[CXVII] These determinations are extremely fact-intensive.

The economic impact of the use upon the market, potential market or value of the copyrighted work is the fourth and arguably the most important factor in determining whether a use is fair.[CXVIII] Evaluation of this factor balances the public benefit if the use is permitted against the personal gain the copyright holder would be denied if the use is allowed.[CXIX] If the value of a protected work is destroyed or impaired by the use, it's not a fair use. Imagine the total reproduction and distribution of a copyrighted book by a college professor so her class can study the author and her work. Contrast this with the copying by the professor of the introduction to the book, or even one chapter. If the use will detract from someone's need to buy the work in the future because of the created access to the questionable, the duplication probably infringes.[CXX]

> ***OBSERVATION:*** *In 1981 Universal Studios sued Sony claiming that sale of its Betamax recorders violated copyright law by assisting infringement. Ultimately, the Supreme Court held that copying movies in the home was a fair use. The studios appealed to Congress who refused to change the law. Years later Congress enacted the Digital Millennium Copyright Act in response to a treaty requirement that de-encryption of*

copyrighted works, generally in digital format, be made illegal. Ironically, the DMCA helps to eliminate fair use because if a work is encrypted, which might mean password-protected, a person who wants to sample that work and use a snippet for commentary would violate copyright law by the act of de-encryption. In other words, the Act declares certain actions pertaining to works fair uses, and places those works in a library. The DMCA then places a lock on the library and makes it a violation of law to enter without consent.

C. Parodies As Fair Use

A parody of a copyrighted work is often a fair use. This is because parody can provide social comment, whose value overrides the rights of an author to control her work. Advertisers sometimes rely on a fair use defense when they parody a famous product or ad. Copying of only the minimal amount necessary to recall the original is permitted. Taking more than is necessary to "conjure up" an image is not a fair use.[CXXI] Courts weigh the same four factors discussed above in a fair use analysis of parodies.

In a 1991 case involving Adolph Coors Company and the Eveready Battery Company, the court concluded that Coors' parody of the Energizer Bunny in one of its television commercials was a fair use.[CXXII] The ad featured Leslie Nielsen with bunny ears, tail and feet, carrying a bass drum imprinted with the Coors Light logo. The message of the ad was that Coors Light was becoming increasingly popular and that it was "growing and growing and growing . . . ," obviously parodying the "it keeps going and going and going . . ." message of the Energizer Bunny commercials. The court concluded the Coors ad did not borrow more than was necessary of the Eveready commercials. It copied certain elements of the original, but only to the extent necessary to make their parody successful.

TIP: *While parodies may be acceptable, satires never are. A parody makes fun of the original work for purposes of criticism. A satire employs the original*

work to make fun of society.

D. Academic Fair Use

In a 1996 case[fn] the court ruled in favor of the publishers of academic works and against a copy service that made course packs for professors at the University of Michigan, one of which ordered copied 30 percent of Princeton Professor Nancy Weiss' academic book. The court, referring to the copying, decried the "systematic and premeditated character, its magnitude, its anthological content and its commercial motivation." While there were guidelines for classroom copying created by various publishing interests, the court held they did not have the force of law and fair use must be analyzed under Act Section 107 and judicial precedent.

Congress recently amended the copyright law to expand academic fair use of materials as digital classroom resources and distance learning. So long as the materials are used in connection with actual instruction, non-dramatic literary or musical works as well as reasonable and limited portions of any work including dramatics works such as film may be delivered digitally to any location.

VII. Copyright Registration Ensures Flexibility When Enforcement Is Needed

A. Proving Copyright Infringement

Copyright infringement is not a good thing. It happens when any of the exclusive rights granted to authors in their copyrighted work is violated without consent. These rights are reproduction, modification, public distribution, performance and display.[CXXIII] For example, printing a

copyrighted work without permission of the owner infringes the copyright owner's exclusive right to reproduce the work. In this example, infringement occurs even if the unauthorized copies are not sold or publicly distributed.

To win a copyright infringement case, the copyright owner must prove ownership of the copyright and copying of the work by the defendant.[CXXIV] Intent to infringe need not be proven for there to be infringement, and innocent copying is *never* a defense. All a plaintiff needs to prove is that it owns the work, that the work is copyrightable subject matter, and that the defendant copied the work.

Copyright ownership is easily proven by registration of the copyright with the Copyright Office.[CXXV] Alternatively, the putative owner can prove he was the author or that he bought the work from a third party.[CXXVI] The purchaser of a copyright can record an assignment of copyright with the Copyright Office.

> ***TIP:*** *Anytime you purchase or receive a transfer of a work registered with the Registrar of Copyright, it is a good idea to record with that office the transferor's written assignment of his copyright. To do this refer to the name of the author, the title of the work and the registration number.*

A plaintiff can prove that the defendant copied the work by direct or circumstantial evidence.[CXXVII] Direct evidence of copying is difficult to obtain, so the courts allow a plaintiff to prove that the defendant copied the work by circumstantial evidence of access to the copyrighted work and substantial similarity between the works.[CXXVIII] The defendant's access is generally a threshold question in infringement actions. The copyright holder will need to prove by reasonable evidence that the alleged infringer had access to the copyrighted work.[CXXIX] When an infringer takes a work that has been played on the radio or sold in bookstores for years, access is easily proven. Conversely, when the copyrighted work has a very limited

distribution, proving the infringer had access is not easy.

To show that the defendant's work is substantially similar to the plaintiff's, the copyright holder must prove that the infringer's work is more than trivially similar to the copyrighted work.[CXXX] A verbatim copying, however, is not necessary to prove infringement. Infringement can occur even if only a few words are copied if the copied material is the "heart" or essence of the work.[CXXXI] Even a few key notes taken from a popular song can infringe.

Exact reproduction of whole or part of a work is sometimes referred to as "literal" copying, which is the type most people would understand to constitute infringement. Courts have long held, however, that copyright protection is not limited to literal copying. Infringement may also be found in cases of "non-literal" copying, as where a playwright does not directly borrow the dialogue of a play but mimics the scenery, costumes, the appearance of the actors, and other copyright protected elements.[CXXXII] Likewise, one who emulates the copyrightable elements of a computer program's graphical user interface without literally copying the underlying code may nonetheless be a copyright infringer.[CXXXIII]

B. Remedies Available To The Copyright Owner

All copyright infringement lawsuits must be brought in the federal courts.[CXXXIV] The plaintiff's remedies in a copyright action include injunctions,[CXXXV] actual damages suffered by the copyright holder, and profits received by the infringer.[CXXXVI] Statutory damages (of up to $150,000) and attorneys' fees are available if certain procedural requirements, such as filing a timely registration, are met.[CXXXVII] These very important additional remedies of statutory damages and legal fees are only available to the owner of an infringed copyright that is registered before the infringement occurs, although there is a grace period that allows recovery if infringement occurs before registration, and registration is made within

ninety days after first publication.[CXXXVIII]

Many copyright owners miss the opportunity to recover attorneys' fees and statutory damages when either they fail to register before the infringement occurs or, if the infringement occurs before registration, they fail to register within 90 days of the date the work is first published. A defendant who has yet to make a profit, or its insurance company, should be fearful if statutory damages and attorneys' fees are in the cards. This defendant is more likely to settle a case without risking trial and assessment of statutory damages and attorneys' fees.

If a plaintiff cannot recover statutory damages because it has not timely registered its copyright, or, alternatively, if the infringed party does not elect statutory damages as the remedy, a court will hold the infringer liable for the copyright owner's actual damages and any profits earned by the infringer as a result of the infringement of the work (so long as these two are not duplicative).[CXXXIX] Factors used to determine actual damages include the fair market value of the infringed rights, the revenue lost by the plaintiff, and the value received by defendant.[CXL]

Instead of actual damages and profits, a copyright owner may choose to recover statutory or "in lieu" damages, the amount of which is discretionary with the court. Statutory damages for a non-willful violation range from $750 to $30,000.[CXLI] Courts or juries can increase statutory damages to $150,000 if they find the infringement willful.[CXLII] A copyright defendant has a right to a jury trial.

Although discretionary, attorneys' fees are often awarded because they seem to provide equal access to the courts and encourage infringement challenges.[CXLIII] Prevailing defendants are entitled to recover their attorneys' fees, the reason being the encouragement of meritorious defenses. We have seen situations where attorneys' fees in copyright cases exceed $100,000, so these are high stakes. Without timely registration, the courts are prohibited from awarding attorneys' fees to the copyright owner, and this prohibition often cripples the opportunity to bring a copyright infringement action

where the defendant has not earned a good profit and the plaintiff has not suffered large damages.

> ***TIP:*** *Sometimes copyright infringement coverage may be found in an insured's comprehensive general liability insurance policy under "advertising injury." Always provide notice of an infringement claim to your insurance carrier as soon as you become aware of the claim.*

> ***TIP:*** *Be careful when considering suit. While the owner of the copyright is allowed attorneys' fees only if registration of the copyright is timely, a successful defendant is always entitled to attorneys' fees.*

VIII. Appendices

A. Sample Copyright and Confidentiality Agreements

While no single form is appropriate in every situation, we have found the forms below useful in many basic copyright and confidential disclosure transactions.

The first agreement, entitled “Copyright License Agreement,” serves many purposes. When licensing rights in a copyrighted work, the party can establish very specific parameters for the use of the work. For example, the license may only be valid in a specified geographic region or may only be for use of the work in a specific industry. The parties can also specify which of the five exclusive rights the copyright owner is conveying. This sample agreement includes various options set out in brackets which allow the parties to tailor the license to their individual needs.

The second agreement, entitled “Assignment of Copyright” is used for the limited purpose of conveying complete ownership of all of the copyright owner’s exclusive rights. An assignment may also be used to permanently transfer one or more of the copyright owner’s rights in the work. An agreement transferring some rights but not all would appear in a form more similar to the Copyright License Agreement described above.

The third agreement is a "Non-disclosure Agreement," useful when a person holding proprietary information, not protected by copyright law, wants to disclose it to another in anticipation of financing, sale or other exploitation.

Please remember that neither these nor other pre-constructed forms should be used as a substitute for the advice of a qualified attorney, as effective legal advice must be tailored to account for the specific circumstances of each case. Should you wish to register, transfer, license,

or otherwise obtain or dispose of intellectual property, it would be wise to seek the advice of competent local counsel.

1. COPYRIGHT LICENSE AGREEMENT

This Agreement is made by and between _____ ("Licensee"), whose address is

_____ and

_____("Licensor"), whose address is _____. The Licensor represents and warrants that he/she is the sole owner of {description of the work} (the "Work"), a {copy/detailed description} of which is attached as Exhibit A, and holds complete and undivided copyright interest in the Work.

In consideration of the mutual promises and agreements set forth herein, Licensor and Licensee agree as follows:

1. The Licensor hereby grants to Licensee the {non-exclusive/exclusive} right to {reproduce/prepare and use derivative works based on/distribute copies of/publicly perform/publicly display} the Work and use the Work and/or reproductions or derivatives thereof throughout the {United States/World/etc.} in {newspapers/ advertisements/ television/any and all media} for the purposes of _____ (the "License"). This License shall continue in effect until {X year(s)} from the effective date of this Agreement.
2. In consideration of the License granted herein, Licensee agrees to pay Licensor {fee structure such as one-time fee, fee per use, or royalty payments}, which shall be paid {timing for payment}.
3. The Licensor agrees to execute all papers and to perform such other proper acts as the Licensee may deem necessary to secure the rights conveyed herein.
4. Licensor retains all other rights in the Work not expressly conveyed by the terms of this License. Licensee or any other person may not use

the Work for any purpose not expressly permitted by the terms of this License.

5. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns, provided that Licensee may not assign the License without the prior written consent of the Licensor.

In witness whereof, the parties have executed this Agreement by their duly authorized representatives, effective this _____ day of _____, 20___.

Witness/Attest

_____ (Licensee)

By: _____

Title: _____

_____

_____ (Licensor)

By: _____

Title: _____

_____

2. ASSIGNMENT OF COPYRIGHT

This Agreement is made by and between _____ ("Assignee"), whose address is

_____ and

_____("Assignor"), whose address is

_____ _____. The Assignor represents and warrants that he/she is the sole owner of {description of the work} (the "Work"), a {copy/detailed description} of which is attached as Exhibit A and holds complete and undivided copyright interest in the Work.

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Assignor and Assignee agree as follows:

1. The Assignor hereby sells, assigns, and transfers to Assignee, its successors and assigns, {the entire right, title, interest, and copyright} in and to the Work and any registrations and copyright applications relating thereto now or hereafter existing and in and to any renewals and extensions thereof, and in and to all works based upon, derived from, or incorporating the Work or derivatives thereof, and in and to all income, royalties, damages, claims and payments now or hereafter due or payable with respect thereto, and in and to all causes of action, either in law or in equity for past, present, or future infringement based on the Work, and in and to all rights corresponding to the foregoing throughout the world.
2. The Assignor agrees to execute all papers and to perform such other proper acts as the Assignee may deem necessary to secure the rights herein assigned.

In witness whereof, the parties have executed this Agreement, effective this _____ day of _____, 20___.

Witness/Attest

_____ (Assignee) _____

By: _____

Title: _____

_____

_____ (Assignor) _____

By: _____

Title: _____

_____

3. NONDISCLOSURE AGREEMENT (IDEAS)

This Agreement, entered into between _____ ("Discloser") and _____ ("Disclosee").

Discloser has developed certain valuable information, concepts, ideas, or designs, which he deems confidential (hereinafter referred to as the "Confidential Information");

Disclosee is in the business of using such Confidential Information and wishes to review the Confidential Information; and

Discloser wishes to disclose the Confidential Information to Disclosee.

In consideration of the premises and the promises hereinafter set forth the parties hereto agree as follows:

1. *Disclosure*: Discloser shall disclose to Disclosee the Confidential Information, which concerns: _____ _____.

2. *Purpose*: Disclosee agrees that this disclosure is only for the purpose of its evaluation to determine its interest in the commercial exploitation of the Confidential Information.

3. *Limitation on Use*: Disclosee agrees not to manufacture, sell, deal in, or otherwise use or appropriate the Confidential Information in any way whatsoever, including but not limited to adaptation, imitation, redesign, or modification. Nothing contained in this Agreement shall be deemed to give Disclosee any rights whatsoever in and to the Confidential Information.

4. *Confidentiality*: Disclosee understands and agrees that the unauthorized disclosure of the Confidential Information by Disclosee to others would irreparably damage Discloser. As consideration and in return for the disclosure of the Confidential Information, the Disclosee shall keep secret and hold in confidence all such Confidential and not disclose it to any person or entity.

5. *Good Faith Negotiations*: If on the basis of the evaluation of the Confidential Information Disclosee wishes to pursue the exploitation thereof, it agrees to enter into good faith negotiations with Discloser to arrive at a mutually satisfactory agreement for that purpose; although Disclosee and Discloser shall not be obligated to contract with each other. Until and unless such and agreement is entered into, this Agreement shall remain in force.

6. *Exclusions*: Confidential Information shall not include any information:

(i) That Disclosee can show was know to it prior to the date of disclosure to Disclosee by Discloser; or

(ii) That becomes publicly known, by publication or otherwise, not due to any unauthorized act or omission of Disclosee or any other party having obligation of confidentiality to Discloser; or

(iii) That is subsequently disclosed by Discloser to any person, firm or corporation on an non-confidential basis; or

(iv) That Disclosee can show was developed independent of any access to the Confidential Information.

7. *Miscellaneous*: This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective legal representatives, successors, and assigns. All actions to enforce this agreement shall be brought exclusively in the courts of Maryland, and the prevailing party shall receive all of its reasonable legal fees, costs and expenses associated with that action.

WITNESS/ATTEST

_____ _____(Seal)

Discloser

_____ _____(Seal)

Disclosee

B. Helpful Copyright Resources

The purpose of this appendix is to provide direction to additional resources to help readers familiarize themselves with copyright issues that may affect them. Numerous links to web sites are provided below. While every effort is made to provide current information on the best available resources, we have no control over web sites listed below and cannot be responsible for either their content or their movement.

1. Helpful Copyright Websites

To visit any of the following web sites, type the appropriate URL (http:// . . .) into the address bar of your Internet browser.

United States Copyright Office Home Page –
http://www.loc.gov/copyright
Copyright Law of the United States --
http://www.loc.gov/copyright/title17
Copyright Basics -- http://www.loc.gov/copyright/circs/circ1.html
Copyright Registration Procedures --
http://www.loc.gov/copyright/reg.html
Copyright Search – http://www.loc.gov/copyright/search/
Copyright Office Regulations -- http://www.loc.gov/copyright/title37/
Summary of the DMCA --
http://www.loc.gov/copyright/legislation/dmca.pdf
Copyright Internet Resources --
http://www.loc.gov/copyright/resces.html
The Copyright Website -- http://www.copyrightwebsite.com
Findlaw.com Copyright Resources --
http://guide.lp.findlaw.com/01topics/23intellectprop/01copyright/index.html

BMI – http://www.bmi.com

ASCAP – http://www.ascap.com

Harry Fox Agency -- http://www.nmpa.org/hfa.html

2. Copyright Materials in Hard Copy

Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (10 vols. Matthew Bender & Co., Inc.)

Paul E. Geller & Melville B. Nimmer, *International Copyright Law and Practice*, (2 vols. Matthew Bender & Co., Inc.)

Alexander Lindey, *Lindey on Entertainment, Publishing and the Arts*, (4 vols. West Group Publishing)

Donald S. Chisum & Michael A. Jacobs, *Understanding Intellectual Property Law* (Matthew Bender & Co., Inc.)

[I] 17 U.S.C. § 102(a).

[II] *Atari Games Corp. v. Oman*, 888 F.2d 878, 883 (D.C. Cir. 1989).

[III] *Levine v. McDonald's Corp.*, 735 F. Supp. 92,96 (S.D.N.Y. 1990).

[IV] *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 28 (C.D. Cal. 1984).

[V] *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976).

[VI] *Feist Publications, Inc.*, 111 S. Ct. at 1288.

[VII] *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936).

[VIII] 17 U.S.C. § 102(a).

[IX] *Trenton v. Infinity Broadcasting*, 865 F. Supp. 1416, 1421 (C.D. Cal. 1994).

[fn2] Goldstein v. Calif

[X] *Id.*

[XI] *Tandy Corp. v. Personal Micro Computers, Inc.*, 524 F. Supp. 171, 173 (N.D. Cal. 1981).

[XII] *Id.*

[XIII] 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §2.03[B][1].

[XIV] *Lotus Development Corp. v. Paperback Software Int'l.*, 740 F. Supp. 37, 48 (D. Mass. 1990).

[XV] 17 U.S.C. § 102(a).

[fn3] Application of Cooper, 254 F.2d 611 (C.C.P.A. 1958).

[fn4] attia Society of N.Y. Hospital, 201 F.3d 50 (2d Cir. 1999).

[XVI] *Feist Publications*, 111 S. Ct. at 1288.

[fn5] Cite

[XVII] 17 U.S.C. § 102(b).

[XVIII] *Warner Bros. Inc. v. American Broadcasting Companies, Inc.*, 523 F. Supp. 611, 615 (S.D.N.Y. 1981).

[XIX] *Id.* at 616.

[XX] *Arica Institute, Inc. v. Palmer*, 761 F. Supp. 1056, 1063 (S.D.N.Y. 1991).

[XXI] *Feist Publications*, 111 S. Ct. at 1296.

[XXII] *Schnadig Corp. v. Gaines Mfg. Co.*, 620 F.2d 1166, 1167 (6th Cir. 1980).

[XXIII] *Baker v. Selden*, 101 U.S. 99 (1879).

[xxiv] *Superior Form Builders v. Dan Chase Taxidermy Supply Co.*, 851 F. Supp. 222, 223 (E.D. Va. 1994).

[xxv] *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 507-508 (7th Cir. 1994).

[xxvi] *DBC of New York, Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414, 416 (S.D.N.Y. 1991).

[xxvii] *Digital Communications Associates v. SoftKlone Distributing Corp.*, 659 F. Supp. 449, 457 (N.D. Ga. 1987).

[xxviii] *Id*. at 458.

[xxix] *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F.2d 143 (7th Cir. 1963); *Selchow & Righter Co. v. Goldex Corp.*, 612 F. Supp. 19 (D.C. Fla. 1985).

[fn6] Murray v. National Broadcasting Co., 844 F.2d 988 (2nd Cir. 1988).

[xxx] H.R. 2281, 105th Cong. (1998)(enacted).

[xxxi] 17 U.S.C. § 1201(a)(1)(A).

[xxxii] 17 U.S.C. § 1201(a)(2).

[xxxiii] 17 U.S.C. § 512.

[xxxiv] 17 U.S.C. § 512 (a) – (c)

[xxxv] 17 U.S.C. § 512 (a), (b), (c) and (i).

[xxxvi] *Universal City Studios, Inc. v. Corley*, _____ F.3d _____, 2001 WL 1505494 (2d Cir. Nov. 28, 2001).

[xxxvii] 17 U.S.C. § 1202.

[xxxviii] 17 U.S.C. § 513

[xxxix] *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

[xl] 17 U.S.C. § 513

[xli] *Atari Games Corp.*, 888 F.2d at 883.

[xlii] 17 U.S.C. § 103(a).

[xliii] 17 U.S.C. § 101.

[fn7] 17 U.S.C. 106

[xliv] *Apple Computer Inc. v Microsoft Corp.*, 759 F. Supp. 1444, 1454 (N.D. Cal. 1991).

[xlv] *Stewart v. Abend*, 110 S. Ct. 1750, 1761(1990).

[xlvi] *Fasa Corp. v. Playmates Toys, Inc.*, 869 F. Supp. 1334, 1348 (N.D. Ill. 1994).

[xlvii] 1 *Nimmer* § 3.07 [C].

[XLVIII] *L. Batlin & Son, Inc.*, 536 F.2d at 490.

[XLIX] *Apple Computer Inc.*, 759 F. Supp. at 1454.

[fn8] Russell v. Price 612 F.2d 1123 (9th Cir. 1979).

[L] *L. Batlin & Son*, 536 F.2d at 490.

[LI] *Id.* at 493.

[fn9] Russell v. Price

[fn10] Kennedy v. National Juvenile Detention Ass'n, 187 F.3d 690 (7th Cir 1999).

[LII] *Feist Publications, Inc.*, 111 S. Ct. at 1289.

[LIII] 1 *Nimmer* § 3.03.

[LIV] 1 *Nimmer* § 3.02.

[LV] *Feist Publications, Inc.*, 111 S. Ct at 1289.

[LVI] *Id* at 1297.

[LVII] 17 U.S.C. § 201.

[LVIII] *U.S. v. Smith*, 686 F.2d 234, 240 (5th Cir. 1982).

[LIX] *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994).

[LX] *Id.*

[LXI] 17 U.S.C. § 101 (defining a "work made for hire").

[LXII] 17 U.S.C. § 201(b).

[LXIII] 17 U.S.C. § 204 (a) (The Satellite Home Improvement Act of 1999 amended the definition of "a work made for hire" by inserting "as a sound recording" after "audiovisual work." Pub.L.No. 106-113, 113 Stat. 1501, app.I at 1501A-544. The Work Made for Hire and Copyright Corrections Act of 2000 amended the definition of "work made for hire" by deleting "as a sound recording" after "audiovisual work." Pub.L.No. 106-379, 113 Stat. 1444. The Act also added a second paragraph to part (2) of that definition. *Id.* These changes are effective retroactively, as of November 29, 1999.)

[LXIV] *C.C.N.V. v. Reid*, 109 S. Ct. 2166 (1989).

[LXV] *Id.* at 2178.

[LXVI] *Id.* at 2179.

[LXVII] *Id.* at 2178-79.

[LXVIII] *New York Times, Inc. v. Tasini*, 121 S.Ct.2381 (2001)

[LXIX] *Erickson*, 13 F.3d at 1071.

[LXX] 17 U.S.C. § 204(a).

[LXXI] *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306 (2d Cir. 1939).

[LXXII] 17 U.S.C. § 105.

[LXXIII] *Schnapper v. Foley*, 471 F. Supp. 426, 428 (D.D.C. 1979).

[LXXIV] 17 U.S.C. § 106.

[LXXV] 17 U.S.C. § 107.

[LXXVI] 17 U.S.C. § 204 (a).

[LXXVII] *Id*.

[LXXVIII] *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

[LXXIX] 17 U.S.C. § 106(1).

[LXXX] 17 U.S.C. § 101.

[LXXXI] *Id*.

[LXXXII] *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986).

[LXXXIII] 17 U.S.C. § 101.

[LXXXIV] *Feist Publications Inc.*, 111 S. Ct. at 1296.

[LXXXV] *Id*.

[LXXXVI] 17 U.S.C. § 504.

[LXXXVII] 17 U.S.C. § 505.

[LXXXVIII] 17 U.S.C. § 106(2).

[LXXXIX] 1 *Nimmer* § 2.01[B].

[XC] *Apple Computer, Inc.*, 759 F. Supp at 1454.

[XCI] *Twin Peaks Productions v. Publications International, Ltd.*, 996 F.2d 1366, 1375 (2d Cir. 1993).

[XCII] *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994).

[XCIII] *L. Batlin & Son*, 536 F.2d at 490.

[XCIV] *FASA Corp.*, 869 F. Supp. at 1348.

[XCV] *National Car Rental Systems, Inc. v. Computer Associates, Int'l, Inc.*, 991 F.2d 426, 428 (8th Cir. 1993).

[XCVI] *American Tobacco Co. v. Werckmeister*, 201 U.S. 284, 299 (1907).

[XCVII] *I.A.E. Inc. v. Shaver*, 74 F.3d 768, 774 (7th Cir. 1996).

[XCVIII] 17 U.S.C. § 107.

[XCIX] *Stewart*, 110 S. Ct at 1764.

[C] 17 U.S.C.A § 107.

[CI] *Hustler Magazine, Inc. v. Moral Majority, Inc.,* 796 F.2d 1148, 1154 (5th Cir. 1986).

[CII] *Id.*

[CIII] 17 U.S.C. § 107.

[CIV] *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1174 (1994).

[CV] *Id.*

[CVI] *Harper & Row, Publishers, Inc. v. The Nation,* 471 U.S. 539, 560 (1985).

[CVII] *Campbell,* 114 S. Ct. at 1174.

[CVIII] *Association of American Medical Colleges v. Mikaelian,* 571 F. Supp. 144, 151 (E.D. Pa. 1983).

[CIX] *Campbell,* 114 S. Ct. at 1174.

[CX] *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir.1986).

[CXI] 17 U.S.C. § 107(2).

[CXII] *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

[CXIII] *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 841 (S,D.N.Y. 1995).

[CXIV] *Diamond v. American Law Corp.*, 745 F.2d 142 (2d Cir. 1984).

[CXV] 17 U.S.C.A § 107(3).

[CXVI] *Leibovitz v. Paramount Pictures, Inc.*, 948 F. Supp. 1214 (S.D.N.Y. 1996).

[CXVII] *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. at 566.

[CXVIII] *National Rifle Ass'n of America v. Handgun Control Federation of Ohio,* 15 F.3d 559, 560 (6th Cir. 1994).

[CXIX] *MCA, Inc. v. Wilson*, 677 F.2d 180,185 (2d.Cir. 1981).

[CXX] *Id.*

[CXXI] *Dr. Seuss Enterprises L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1567-1568 (S.D. Cal. 1996).

[CXXII] *Eveready Battery v. Adolph Coors*, 765 F. Supp 440, 448 (N.D. Ill. 1991).

[fn] Princeton Univ. Press v. Michigan Document Service, 99 F.3d 1381 (6th Cir. 1996)

[CXXIII] 17 U.S.C. § 106.

[CXXIV] *Lee v. Deck the Walls, Inc.*, 925 F. Supp. 576, 578 (N.D. Ill. 1996).

[CXXV] *National Risk Management, Inc. v. Bramwell,* 819 F. Supp. 417 (E.D. Pa. 1993).

[CXXVI] 3 *Nimmer* § 12.11[C].

[CXXVII] *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987).

[CXXVIII] *Id.*

[CXXIX] *Id.*

[CXXX] *Wildlife Exp. Corp.*, 18 F.3d at 502.

[CXXXI] *Harper & Row Publishers*, 471 U.S. at 566.

[CXXXII] *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

[CXXXIII] *Lotus Development Corp. v. Paperback Software Intl.*, 740 F. Supp.37 (D. Mass. 1990).

[CXXXIV] *Creative Technology, Ltd. v. Aztech System, Inc.*, 61 F.3d 696, 700 (9th Cir. 1995).

[CXXXV] 17 U.S.C. § 502.

[CXXXVI] *Nintendo of America, Inc. v. Dragon Pacific Int'l*, 40 F.3d 1007, 1010 (9th Cir. 1994).

[CXXXVII] *Id.*

[CXXXVIII] 17 U.S.C. § 412.

[CXXXIX] 17 U.S.C. § 504(b).

[CXL] *Northwest Airlines, Inc. v. American Airlines, Inc.*, 870 F. Supp. 1504, 1512-1513 (D. Minn. 1994).

[CXLI] 17 U.S.C. § 504.

[CXLII] 17 U.S.C. § 504(c)(2).

[CXLIII] 17 U.S.C. § 505; *In Design v. Kmart Apparel Corp.*, 13 F.3d 559, 568 (2d Cir. 1994).