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*An Intellectual Property and Business Law Firm*

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## **COPYRIGHT BASICS**

First, we want to give the disclaimer that copyright law is extremely dependant upon the facts and circumstances in each particular situation - and what a lay person may perceive as small differences in the facts may have a large legal effect. Therefore, any time you have questions concerning a potential copyright issue it is extremely important that you consult with an attorney that regularly practices in this area.

### **What is and protected under copyright law?**

In general, Copyright law protects works of original artistic expression that are fixed in a tangible form. It extends certain protections to the authors of "original works of authorship" (often times referred to as a "Work"), which include musical, literary, artistic, dramatic and certain other intellectual rights (such as software code, vessel hull designs, and architectural plans). Under the U.S. Copyright act, copyright owners have the right:

1. To reproduce the Work in copy for or phonorecords (including tape, CD, electronic medium etc.)
2. To create derivative works based on the copyrighted work
3. To distribute copies of the work
4. To perform the copyrighted work publicly (applies to literary, musical, motion pictures and other audio visual works, and other performance arts)
5. In the case of sound recordings only - to perform the work publicly by means of a digital audio transmission.

When someone violates any of these above mentioned rights, it is called infringement (for more on infringement [click here](#)). However, the above rights are not always absolute - the law has carved out a few exceptions. One of the most notable exceptions is called the "fair use exception". ([Click here](#) for a more detailed overview of the fair use exception.) Additionally, certain rights are subject to a compulsory license, which will allow another party to use the work as long as they pay the required royalty and comply with certain other legal obligations. Compulsory licenses are most often used when dealing with copyrighted music.

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### **What is not protected under copyright law?**

Now that we have defined what copyright law in the United States protects, lets take a quick look at what is doesn't protect. Here are some examples:

1. Copyright does not protect a concept or an idea - it can protect an individuals' expression of a concept or idea, but is does not protect the idea itself.
2. Copyright does not protect titles, names, short phrases or slogans, familiar symbols or designs (most of these may be protectable under trademark law. [Click here](#) to see our discussion of trademarks.)

### **Ownership of Copyrights**

One big question is always "who is the owner (or claimant) of the copyrights?" In general, it is the individual who created the work that owns the copyrights. In some circumstances another individual who is granted rights from the author can also be considered a copyright claimant (by assignment of all or some of the rights for example). Therefore, if you and I are visiting the same park, and I take a picture of you sitting there reading a book, I own the copyright to the photograph because I was the one who took your picture. However, my right to commercialize and profit on that photograph may be limited by a theory of law called the "right of publicity". The Right of Publicity is the right of an individual to control ones own image and likeness. The Right of Publicity is based on state law, so it will differ depending on the state where you live. Some states, such as Colorado do not recognize the Right of Publicity. For more information on the right of publicity please [click here](#).

One major exception to the ownership rule set out above is called a "work for hire". Basically, this legal doctrine provides that the copyrights to a work that is created by an employee in the scope of their employment belong to the employer and not the employee. Two big factors that are often argued over are 1) is the individual an employee as opposed to an independent contractor and 2) was the creation of the work within the scope of the employees employment (i.e. were they hired to do that job). In addition to the above situation, a work may be considered a work for hire if that work was:

1. Specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas

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And

2. The parties expressly agree, in a written instrument signed by both parties that the work shall be considered a work made for hire.

Lastly, it should be pointed out that ownership of the underlying work such as a painting, sculpture or book does not confer any copyrights to the owner/possessor of the property -those are retained by the artist/author/musician and are not transferred unless specifically assigned by the copyright owner. Non-exclusive transfers of copyrights may be verbal, however, exclusive assignments must be in writing and signed by the owner of the rights that are to be conveyed. Transfers of copyright may be recorded with the copyright office (and certain advantages can be obtained by doing so, including certain enforcement rights against third party bonafied purchasers in good faith), however they are not required to make such transfers valid as enforceable between the parties. In some circumstances, the current law in the United States permits the termination of a transfer of rights after 35 years. Parties wanting to terminate such transfers need to do so within strict time limits - so I you think this may apply to you, you should seek the advice of an attorney.

### **Derivative Works**

One of the rights of a copyrights holder enjoys is the right to produce derivative works. This may not seem like a big deal if you don't know what a derivative work is - but trust us it is! A derivative work is a work that is based on or some how incorporates an existing work. One of the easiest examples of a derivative work is a screenplay or motion picture based on a book. Other examples include new musical arrangements of previous works, multimedia versions of written materials and so on. If the original work is still protected by copyright, then only the copyright owner (or those under authorization or a license from the copyright holder) may prepare derivative works. Failure to obtain such permission violates the rights of the copyright holder and could subject to you liability for an unauthorized derivative work. If on the other hand, the work is in the public domain, an author of a derivative work can have rights to the extent that the derivative work contains new original additions to the pre-existing work. The law on derivative works and what specific level of originality is required for rights in a derivative work to accrue is very fact specific and often confusing area of the law. An attorney should always be consulted when issues of derivative works arise.

### **Public Domain**

Copyrighted works are not entitled to perpetual protection. They do have a term for with the protection lasts at the end of which the material will enter the Public Domain. The length of time a work is protected depends on when it



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was created. The current term is the life of the author plus seventy or ninety five years from date of publication or one hundred twenty years from the date of creation, whichever is shorter for works for hire. If the work was created before 1978, a more complex analysis needs to be done to determine the works term or protection. Additionally, works may enter the public domain if the author overtly or through their actions deliberately places the work in the public domain. Examples of public domain works include Shakespearian plays, and music that has been around for a few hundred years such as Mozart, Brahms, Chopin and early American folk music.

***Leyendecker & Lemire, LLC is a Denver-based law firm offering a full spectrum of Intellectual Property, Business and Entertainment related legal services for entrepreneurs, individual inventors, and businesses of all sizes. We pride ourselves in providing large firm quality, but with personalized service and attention the large firms do not provide to their smaller clients. Our strength is working with a client from the beginning of his/her venture to maximize the venture's value and potential, as well as, help minimize the risk of legal disputes. Call (303) 768-0123 or e-mail us at [info@coloradoiplaw.com](mailto:info@coloradoiplaw.com) today to see how we can help you!***

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