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COPYRIGHT BASICS



VOLUNTEER LAWYERS
FOR THE ARTS

LAURA LEVIN-DANDO
VLA STAFF ATTORNEY

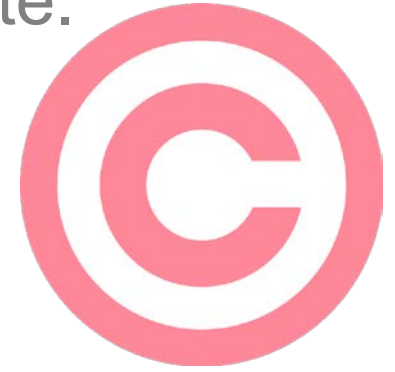
OVERVIEW



Copyright

- What is copyright?
- Copyright infringement
- Clarifying copyright ownership

WHAT IS COPYRIGHT?



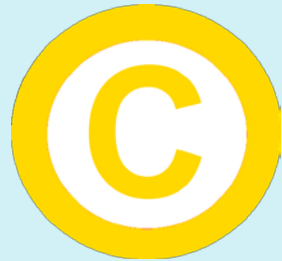
Art. 1, Sec. 8, Clause 8 of the U.S. Constitution

[The Congress shall have power] **“To promote the Progress of Science and useful Arts**, by securing for limited Times to Authors and Inventors the exclusive **Right to their respective Writings and Discoveries.**”



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Intellectual Property

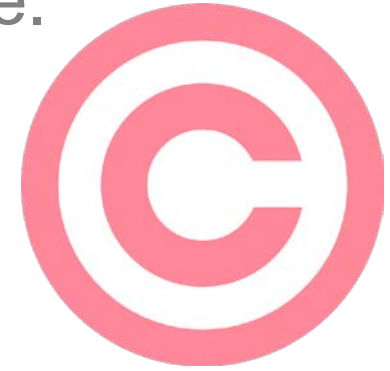


U.S. Pat. No. 1,234,567



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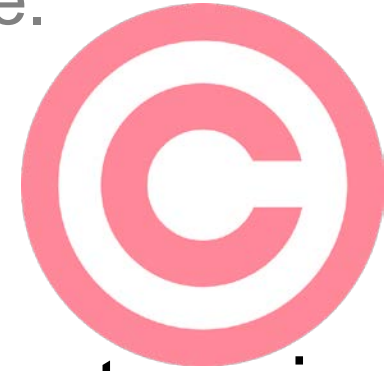


Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 102(a)



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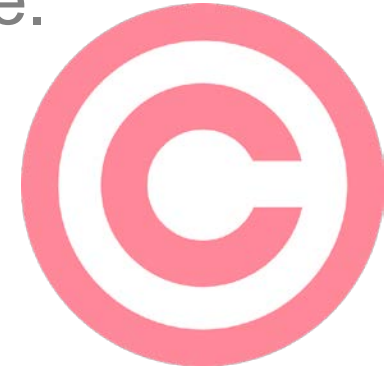
Works of authorship **include** the following categories:

- (1) **literary** works;
- (2) **musical** works, including any accompanying words;
- (3) **dramatic** works, including any accompanying music;
- (4) pantomimes and **choreographic** works;
- (5) **pictorial, graphic, and sculptural** works
- (6) **motion pictures** and other audiovisual works;
- (7) **sound recordings**; and
- (8) **architectural** works.



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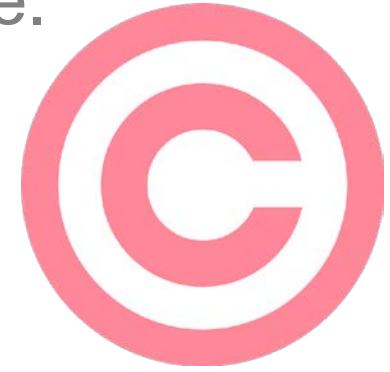


Copyright protection subsists . . . in original works of authorship **fixed in any tangible medium of expression**, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

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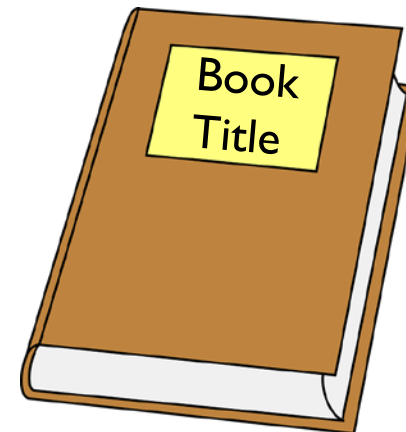
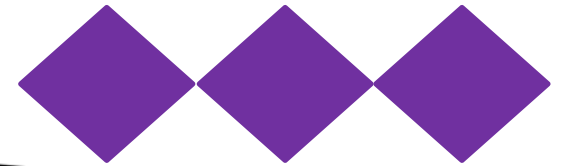
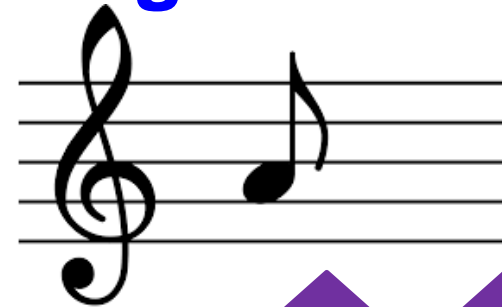


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Copyright protection subsists . . . in **original works of authorship** . . .

- Independent creation
- Minimal degree of creativity



WHAT CANNOT BE COPYRIGHTED?

- ✗ Words, short phrases
- ✗ Scènes à faire
- ✗ Useful articles



See Copyright Office Circular 33

STAR ATHLETICA V. VARSITY BRANDS

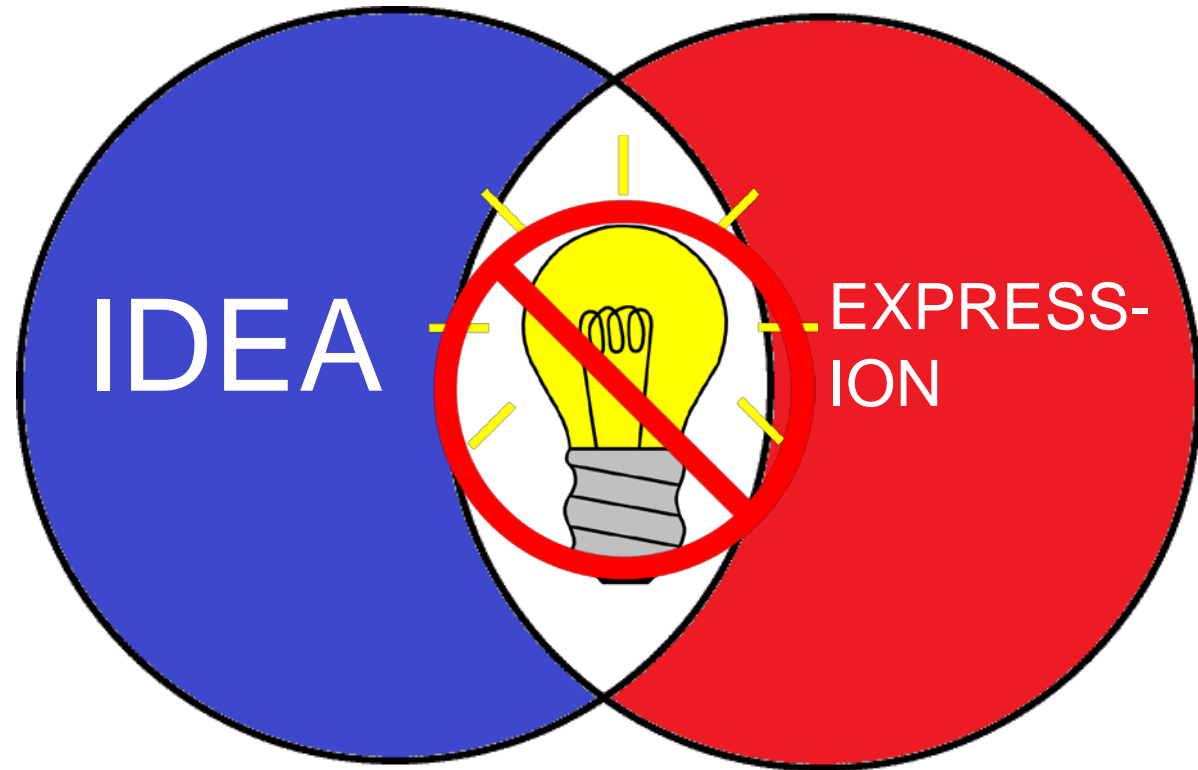
580 U.S. ____ 2017

- **Separability test** - features on a useful article are protectable if they:
 1. Can be perceived as a . . . work of art **separate from the useful article**, and
 2. **Would qualify as a protectable work** . . . on its own or fixed in some other tangible medium . . .



WHAT CANNOT BE COPYRIGHTED?

- ✗ Words, short phrases
- ✗ Scènes à faire
- ✗ Useful articles
- ✗ Ideas



See Copyright Office Circular 33

WHAT CANNOT BE COPYRIGHTED?

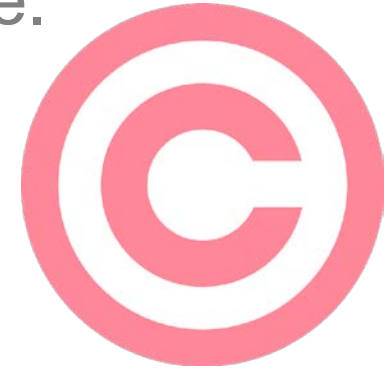
- ✗ Words, short phrases
- ✗ Scènes à faire
- ✗ Useful articles
- ✗ Ideas
- ✗ Facts & historical events



See Copyright Office Circular 33

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In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102(b)



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Naruto et al v. David Slater



Portrait of Edmond Belamy



EXCLUSIVE §106 RIGHTS

The owner of copyright . . . has the **exclusive** rights to do and to authorize:

- (1) to **reproduce** the copyrighted work;
- (2) to **prepare derivative works** based upon the copyrighted work;
- (3) to **distribute** . . . the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform** the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display** the copyrighted work publicly; and
- (6) in the case of sound recordings, to **perform the copyrighted work publicly by means of a digital audio transmission**.



EXCLUSIVE §106 RIGHTS

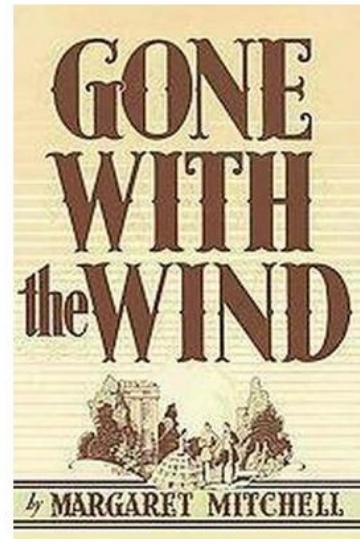
- **Reproduce copies** of the work
- Create **derivative works** based on the work
- **Distribute** copies of the work to the public (e.g. publish or sell)
- Publicly **perform** the work (musical or theatrical works)
- Publicly **display** the work (visual or sculptural works)
- Perform by **digital transmission** (sound recordings)



DERIVATIVE WORKS

“Work based on or derived from one or more already existing works”

- Translations
- Musical arrangements
- Film adaptation of a book or play
- Art reproductions
- Abridgements
- Condensations
- Compilations



COPYRIGHT DURATION

- Works created after Jan. 1, 1978: **life of author plus 70 years**
- Works created before 1978: 95 years
- **“Works-made-for-hire”**: 95 years from publication or 120 years from creation, whichever comes first
- **“Joint works”**: 70 years after the death of the last surviving joint author



PUBLIC DOMAIN

- Once the copyright term for a work has **expired**, it enters the public domain
- Works prepared by an officer or employee of the **federal government** as part of their official duties are in the public domain
- Works have entered the public domain if the work was published:
 - In the US **before 1924**
 - Between **1924-1963** w/out © renewal
 - Without © notice from **1923-1977**
 - Without © notice from 1978-1989 and without subsequent registration within 5 years
- This does not include **derivative works** that were based upon the work in the public domain



COPYRIGHT REGISTRATION & NOTICE

- Protection is **automatic** upon creation

- **Copyright notice** is optional, but can be helpful:

© [year of first publication], [name of copyright owner]

- **Registration** with the U.S. Copyright Office is **beneficial**

www.copyright.gov



COPYRIGHT REGISTRATION

- Public record
- Presumption of **ownership**
 - (*if registered within 5 years of publication)
- **Statutory damages** per work
 - **Within 3 months** of publication
 - Or **before infringement**
- Prerequisite for **lawsuit**



COPYRIGHT INFRINGEMENT DAMAGES

- **Actual damages**
 - Economic loss suffered as a result of infringement
 - Can be hard to prove
- **Statutory damages** (+ attorney's fees)
 - \$750 to \$150,000 per work
 - Reasonably related to actual damages
 - **Must register work in time**



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COPYRIGHT INFRINGEMENT

COPYRIGHT INFRINGEMENT

- Anyone who **violates any of the following exclusive rights** of the copyright owners is an infringer of the copyright:
 - **Reproduce** copies of the work
 - **Distribute** copies of the work to the public
 - Prepare **derivative works** based on the work
 - Publicly **perform** the work
 - Publicly **display** the work
- Statute of Limitations = **3 years** from the date of infringement



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IF AN ARTIST'S WORK IS BEING USED WITHOUT PERMISSION

1. Consult an **attorney!**
2. Issue a **cease and desist** letter to try and settle, then
3. Sue the secondary user for **copyright infringement** within **three years** of the infringement



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TO ESTABLISH COPYRIGHT INFRINGEMENT, YOU MUST SHOW:

1. You own a **valid copyright** in the artwork; and
2. Secondary user **copied protected elements** of your work
 - **Access**; and
 - **Substantial similarity**



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DEFENSES TO COPYRIGHT INFRINGEMENT

1. Independent creation
2. Non-copyrightable subject matter
3. Permission
4. Fair Use



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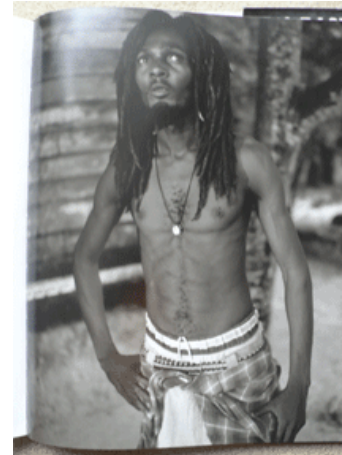
FAIR USE IS A DEFENSE TO COPYRIGHT INFRINGEMENT

- Fair use **cannot prevent a claim** for copyright infringement!
- The **court ultimately decides** whether your use is fair
- Very **subjective** and hotly debated



IS IT FAIR?

- Transformative
- For the purposes of criticism & comment
- News reporting
- Teaching
- Scholarship or research



Courts evaluate fair use claims on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry. **This means that there is no formula to ensure that a predetermined percentage or amount of a work—or specific number of words, lines, pages, copies—may be used without permission** – U.S. Copyright Office



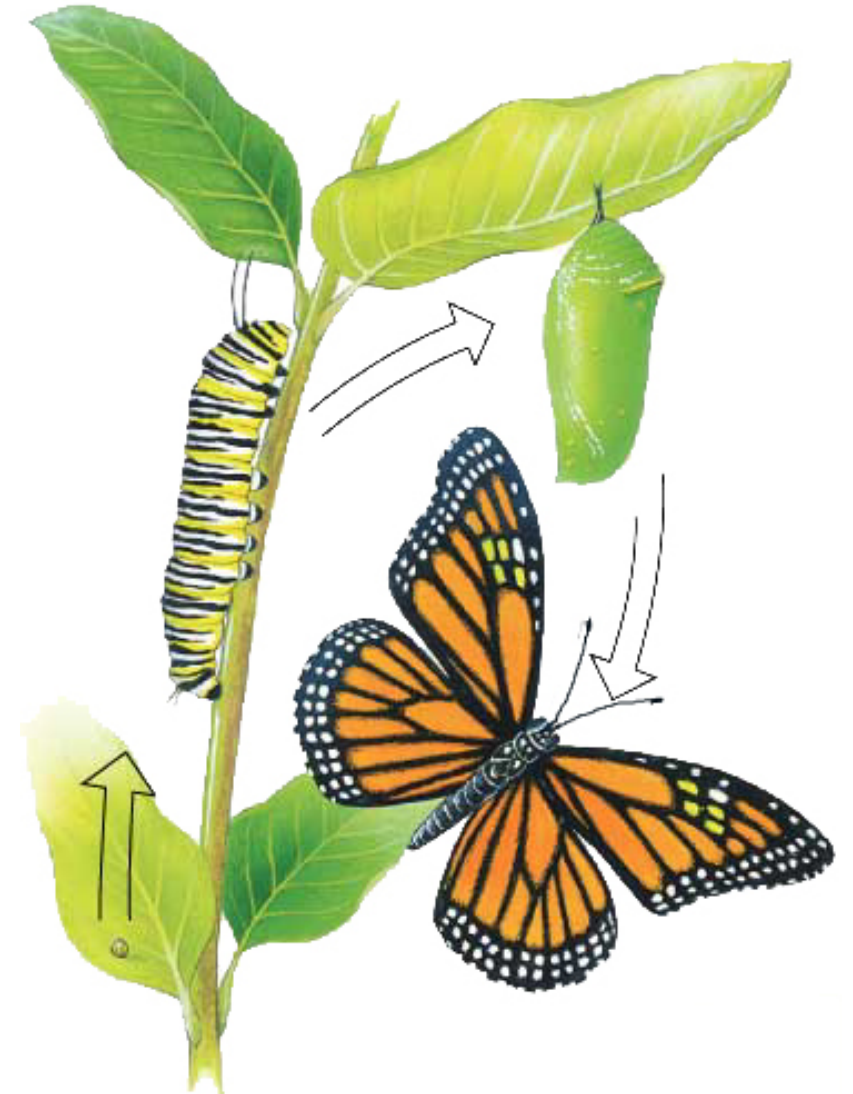
FOUR BALANCING FACTORS

1. The **purpose and character** of the secondary user's use and whether that use is of a commercial nature;
2. The **nature** of the copyrighted work;
3. The **amount and substantiality** of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the **potential market for or value of** the copyrighted work.



1. PURPOSE & CHARACTER OF THE USE

- Does the use **transform** the copyrighted work? How much?
- Presumption of transformativeness for:
 - ✓ Criticism (+ parody)
 - ✓ Comment
 - ✓ News reporting
 - ✓ Teaching
 - ✓ Scholarship
 - ✓ Research
 - ✗ Advertising



2. NATURE OF COPYRIGHTED WORK

- The more **creative** a copyrighted work, the more **difficult** it is to use fairly
- It is easier to fairly use **published** works rather than unpublished works

- ✓ Published work
- ✓ Factual work
- ✓ Educational objective

- ✗ Unpublished work
- ✗ Creative work
- ✗ Fictional work



3. AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

- Whether you took the **heart** of the copyrighted work
- There is no specific amount of material that may be taken without permission
- **“Appropriate amount”** for your purpose – not more
 - ✓ Small portion
 - ✓ Non-central part
 - ✓ “Appropriate amount” for purpose
 - ✗ Large portion
 - ✗ Whole work
 - ✗ “Heart” of the work



4. EFFECT ON POTENTIAL MARKET FOR OR VALUE OF COPYRIGHTED WORK

- Importance varies with the strength of the “purpose and character” factor
- Use should not **materially impair marketability** of copyrighted work
- **Commercial use** – Likelihood of market harm is presumed
- **Noncommercial use** – Copyright owner must show that the use is harmful, or that if it were to become widespread, it would adversely impact the potential market for the copyrighted work



PREVENT INFRINGEMENT

- Copyright notice
- Watermark
- Upload lower quality versions
- Name and contact information
- CMI = Copyright Management Information
 - “Information conveyed with a copyrighted work that identifies the owner and nature of that copyright.”



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COPYRIGHT OWNERSHIP

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WHO IS THE AUTHOR?



JOINT AUTHORSHIP

“A work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”

To qualify as a joint work:

1. Each author **intended** the other to be a joint author
 2. Each author’s contribution was **independently copyrightable**
 3. The contributions were **merged** into inseparable or interdependent parts of the whole
- Joint authors each have an **equal, undivided interest in the work**



JOINT AUTHORSHIP

“A work prepared by two or more authors with the intention that their contributions be inseparable or interdependent parts of a unitary whole”

To qualify

1. Each author's contribution must be a substantial part of the whole
2. Each author's contribution must be inseparable or interdependent parts of the whole
3. The contributions were made with the intention that they be treated as parts of the whole

- Joint authors have an **equal right to nonexclusive use** of the work without permission of the joint owner, BUT must account to other joint author for an equal share of proceeds

GET IT IN WRITING



WORKS-MADE-FOR-HIRE

- Generally, without contracts:
 - Employer/Employee – work product is work-for-hire
 - Independent contractor – work product is NOT work-for-hire
- Parties can agree not to use these default rules via **written contract**



EMPLOYEE OR INDEPENDENT CONTRACTOR?

To determine whether you are an employee or an independent contractor, consider:

- **Source of instrumentalities and tools**
- **Method of payment**
- **Provision of employee benefits**
- **Tax treatment of the hired party**
- Hiring party's right to control the manner and means by which the product is accomplished
- Skill required for the work
- Location of the work
- Duration of the relationship between the parties



WORK CREATED BY INDEPENDENT CONTRACTOR CAN BE WORK FOR HIRE IF:

1. The parties expressly **agree** that Work will be considered a work-for-hire;
2. In a **signed** writing; and
3. Work is “**specially ordered or commissioned**” for use as:
 - Contribution to a collective work (ex: magazine)
 - Part of a motion picture or other audiovisual work
 - Supplementary work (ex: a foreword, afterword, chart, illustration, editorial note, bibliography, appendix and index)
 - Compilation
 - Translation, instructional text, test, answer material for a test, atlas



COPYRIGHT LICENSING & ASSIGNMENT

- Copyright ownership is distinct from ownership of a physical work
- When an artist uses the copyrighted work of another, **best practice is to get a license** to use the work

Assignment – full transfer of copyright from owner

License – partial, often limited, transfer of rights from owner

- Exclusive or nonexclusive
 - Specific uses
 - Geographic scope
 - Duration
- All assignments and exclusive licenses must be in writing to be valid



SAMPLE © LICENSING TERMS

- **Grant of Rights:** “The Artist grants to Licensee the **exclusive** right to use and reproduce and distribute the Image solely for the publication “XYZ Monthly” **throughout the universe** for the period of **three (3) years** (the “Term) starting from the date of execution of this agreement. Upon expiration of the Term of this Agreement, Licensee shall be permitted to reproduce the image only if reprinting the entirety of the issue of the Publication in which the image appeared originally.”
- **Ownership of Copyright:** “The Artist shall retain all copyright ownership in and to the Image. Licensee shall identify the Artist as the creator of the Image on the Publication and shall reproduce thereon a copyright notice for the Artist that shall include the word “Copyright” or ©, the Artist’s name, and the year of first publication.”

