



# COPYRIGHT BASICS

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# Overview

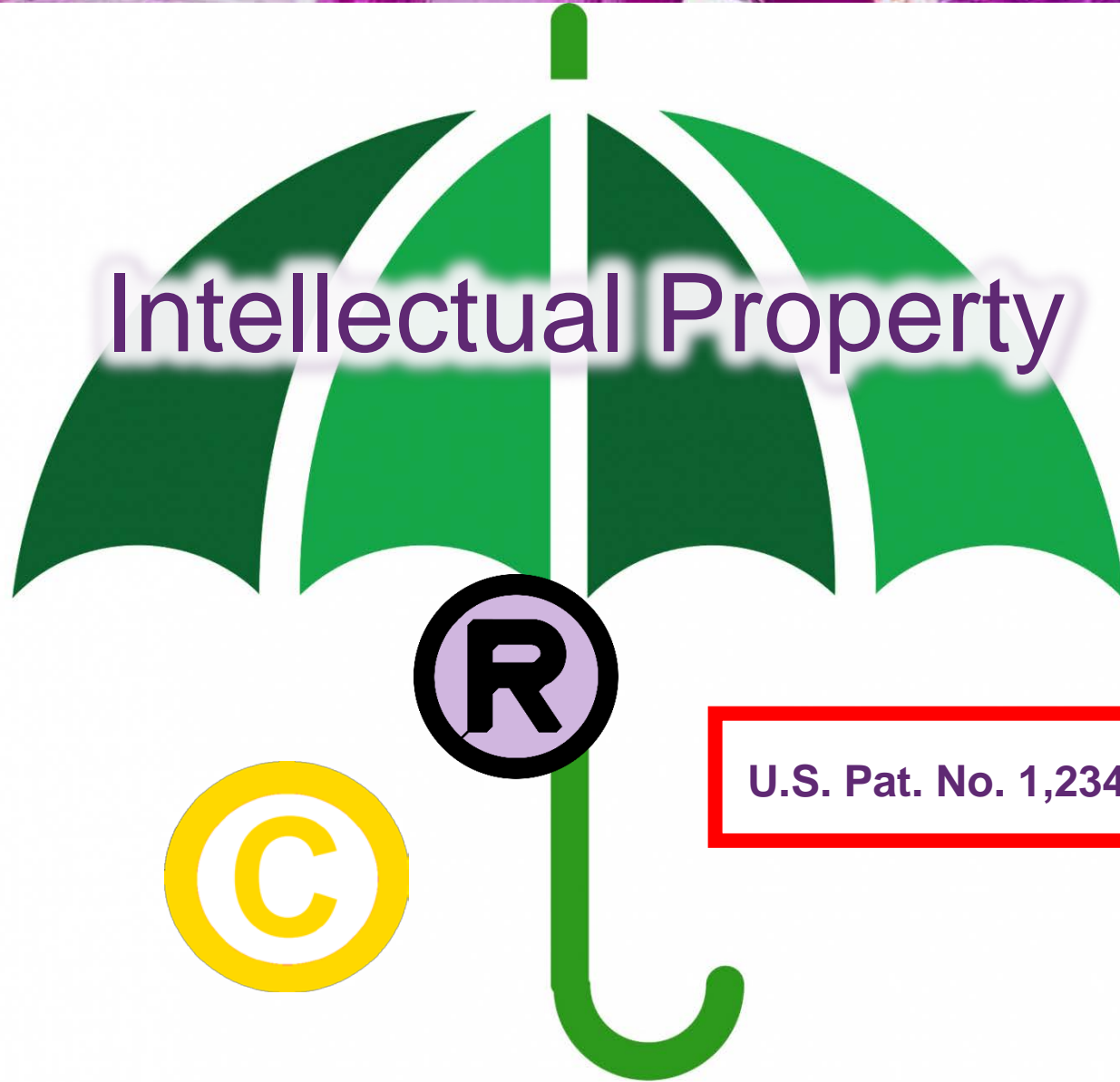
- What is copyright?
- Copyright infringement
- Copyright ownership
- Q&A

# 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.”**

# Intellectual Property



# Copyright Act of 1976

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)



# Copyright Act of 1976

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.

17 U.S.C. § 102(a)(1)-(8)

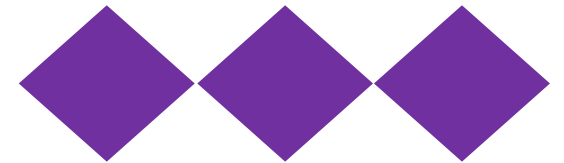
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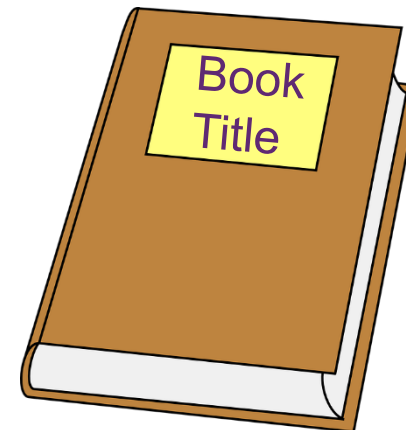
17 U.S.C. § 102(a)

# Copyright Act of 1976

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 items

*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 items
- ✗ **Ideas** (vs. expression)

*See Copyright Office Circular 33*

# What Cannot Be Copyrighted?

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

*See Copyright Office Circular 33*



# Copyright Act of 1976

**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)



# Copyright Act of 1976



[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



*See Copyright Office Circular 14*

# 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

*See Copyright Office Circular 15A*



# 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](http://www.copyright.gov)

See: [“The 5 W’s of Copyright Registration” Copyright Alliance](#)

See: [Copyright Registration Fee Schedule](#)

# Copyright Registration

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



# **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



# If your work is being used without your 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

# To establish copyright infringement, you must show:

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

# Defenses to Copyright Infringement

1. **Permission**
2. **Non-copyrightable subject matter**
3. **Independent creation (no access)**
4. **Fair Use**

# Fair Use is a *DEFENSE* to infringement

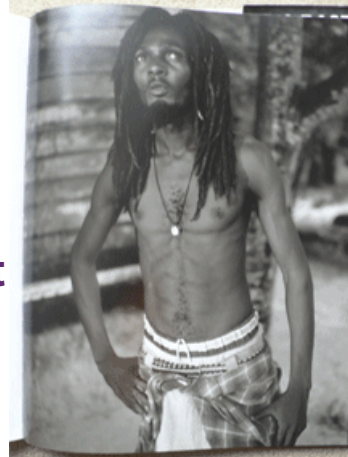
- Fair use **cannot prevent a claim** for copyright infringement!
- The **court ultimately decides** whether your use is fair
- Very **subjective** and hotly debated



# 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**



# 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.”

# **COPYRIGHT OWNERSHIP**

# 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 merged into independent parts of a unitary whole”

To qualify

1. Each author's contribution must be independently copyrightable
2. Each author's contribution must be distinct and identifiable as a separate part of the whole
3. The contributions were merged into a single work

Joint authors each have an **equal, undivided** ownership interest in the work

**GET IT IN WRITING**

# Work-Made-For-Hire

- Generally, without contracts (i.e. default rule):
  - **Employer/Employee** – work product is work-for-hire
  - **Independent contractor** – work product is NOT work-for-hire
- Under certain circumstances, parties can agree not to use these default rules via **written contract**

*See Copyright Office Circular 30*

# Employee or Independent Contractor?

To determine whether you are an employee or an independent contractor for copyright purposes, 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 an 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 specific uses, including:
  - 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



# Permission: License & Assignment

- Copyright ownership is distinct from physical ownership of a work
- When someone uses the copyrighted work of another (*for any purpose*), **best practice is to obtain permission** to use the work
- **Assignment** = full transfer of copyright from owner (can be terminated)
- **License** = limited transfer of rights from owner (limitations set by contract)
  - Exclusive vs. 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.”



# THANK YOU

VOLUNTEER LAWYERS FOR THE ARTS

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