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# COPYRIGHT ESSENTIALS

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VOLUNTEER LAWYERS FOR THE ARTS

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# Overview

- Intellectual property introduction
- Copyright
  - What is copyright?
  - Copyright infringement
  - Copyright ownership issues
- Q&A

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	Copyright	Trademark	Patent	Trade Secret
What It Protects	<p>Original works of authorship fixed in a tangible medium.</p> <p><b>Ex:</b> Photograph, artistic design</p>	<p>Word, name, symbol, device, or any combination used or intended to be used to identify and distinguish the goods or services of one party from those of others, and to indicate the source of the goods or services</p> <p><b>Ex:</b> Logo</p>	<p>Utility: Inventions, such as processes, machines, manufactures</p> <p>Design: ornamental design for an article of manufacture that does not affect the article's function</p> <p><b>Ex:</b> Shape of bottle (design)</p>	<p>Information that is not generally known or reasonably ascertainable by which a business can obtain an economic advantage over its competitors</p> <p><b>Ex:</b> Recipe</p>
How Something Receives Protection	<p>The work is original, creative and fixed in a tangible medium</p>	<p>The mark is distinctive (i.e., identifies the source of a particular good or service)</p>	<p>The invention is new, useful and nonobvious (Design patents are <i>not</i> useful)</p>	<p>The secret is used in business, and gives an opportunity to obtain an economic advantage over competitors who do not know or use it</p>
How Long It Lasts	<p>Life of the author, plus 70 Years</p>	<p>Theoretically forever, as long as the mark is used in commerce</p>	<p>Utility: 20 Years Design:</p>	<p>Theoretically forever, as long as owner makes efforts to maintain security</p>
Registration - Cost - Entity - Benefits	<ul style="list-style-type: none"> <li>• Copyright attaches upon fixation</li> <li>• Federal Registration <ul style="list-style-type: none"> <li>• ~\$45/work</li> <li>• U.S. Copyright Office</li> <li>• Proof of authorship, enhanced remedies, and ability to litigate in case of infringement</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Common law: obtain through use</li> <li>• Federal Registration <ul style="list-style-type: none"> <li>• ~\$225/class</li> <li>• U.S. Patent &amp; TM Office</li> <li>• Proof of priority ownership, enhanced remedies in case of infringement</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Federal Registration <ul style="list-style-type: none"> <li>• ~\$300+++</li> <li>• U.S. Patent &amp; TM Office</li> <li>• No patent without registration</li> </ul> </li> </ul>	<p>Business must identify and secure trade secrets, and behave in a way that proves intent to keep the information secret</p>

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# 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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# 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)

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# 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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# 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.

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# Copyright Act of 1976

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

- Originality = independent creation
- Minimal degree of creativity



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# What Is Not Copyrightable?

## ✗ Ideas

**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.

*See Copyright Office Circular 33*

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# What Is Not Copyrightable?

✗ Ideas

✗ Scènes à faire

✗ Words, short phrases

*See Copyright Office Circular 33*

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# What Is Not Copyrightable?

✗ Ideas

✗ Scènes à faire

✗ Words, short phrases

✗ Useful items

**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 . . .

*See Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. \_\_\_\_ (2017)

*See Copyright Office Circular 33*

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# What Is Not Copyrightable?

✗ Ideas

✗ Scènes à faire

✗ Words, short phrases

✗ Useful items

✗ **Facts & historical events**

- **See** *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)

*See Copyright Office Circular 33*

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# Copyright Act of 1976



[Naruto et al v. David Slater](#)



[Portrait of Edmond Belamy](#)

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# 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.**

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# 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)

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# 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*



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# Moral Rights

- **Right of attribution** = right to credit
- **Right of integrity** = prevent distortion, mutilation, or modification of the work
- **Visual Artists Rights Act of 1990 (VARA)**
  - Affords moral rights to a “work of visual art” (paintings, drawings, prints, sculptures, and photographs produced for exhibition purposes only, existing in a single copy or a limited edition of 200 signed and numbered copies or fewer)

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# Copyright Duration

- **Works created on or after Jan. 1, 1978**: life of author plus 70 years
- **“Joint works”**: 70 years after the death of the last surviving joint author
- **“Works-made-for-hire”**: 95 years from publication or 120 years from creation, whichever comes first
- **“Public domain”**: materials not protected by intellectual property laws

*See Copyright Office Circular 15A*

See [Copyright Term and the Public Domain in the United States](#)

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# Obtaining Copyright Protection

- 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](#)

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# Copyright Registration



- Public record
- Prerequisite for infringement **lawsuit**
  - **See** *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, 586 U.S. \_\_\_\_ (2019)
- **Statutory damages** per work (if timely registered)
  - **Within 3 months** of publication
  - Or **before infringement**
- Presumption of **ownership** (\*if registered w/in 5 years of publication)

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# 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 for lawsuit = **3 years** from the date of infringement

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# How to Establish Infringement

1. You hold 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

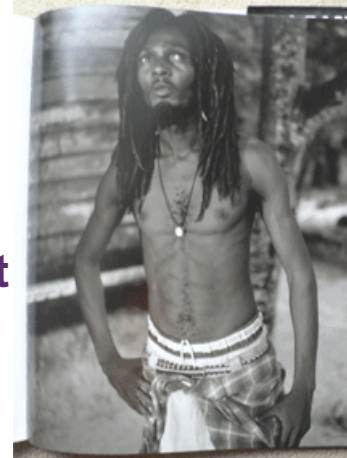
- **Permission**
- **Unprotected subject matter**
  - Public Domain
  - Not protectable
- **Independent creation** (no access)
- **Fair Use**

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# Fair Use

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

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





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# 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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# 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**

- Must account to co-author for \$\$ proceeds
- Cannot grant exclusive license or assignment

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# 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*

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# 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

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# 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

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# 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
- **License** = limited transfer of rights from owner (limitations set by contract)
  - Exclusive vs. nonexclusive?
  - Specific uses?
  - Geographic scope?
  - Duration?
- **Assignment** = full transfer of copyright from owner (can be terminated)

All **assignments** and **exclusive licenses** must be in **writing** to be valid!

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# THANK YOU

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