

10 Copyright Myths

by Gina Carter

Copyright rights are constitutionally derived. The U.S. Constitution grants Congress the explicit power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their ... Writings....”¹ Congress has codified and elaborated on these 19 words through the Copyright Act,² which has been overhauled and amended numerous times since the 19th century. Although we live in a time when people daily read, watch, listen to, and use a host of copyrighted works, the parameters of legal use and exploitation are fundamentally misunderstood. The public’s understanding of the law in this arena, while perhaps slightly improved by cases like those involving Napster,³ YouTube,⁴ and Grokster,⁵ still remains flawed and incomplete, probably because it is difficult to shake two centuries of myths, misconceptions, and misunderstandings (in this article, collectively referred to as “myths”).

This article debunks what the author believes are the top

Although we live in a time when people daily read, watch, listen to, and use a host of copyrighted works in a variety of forms and media, what constitutes legal use and exploitation is fundamentally misunderstood. Here, the author debunks 10 copyright myths, misconceptions, and misunderstandings.

10 myths, conveying some basic facts about copyright law to improve Wisconsin lawyers’ understanding of the law.

Myth 1: There is no copyright notice on the work, and so it’s not copyrighted and I am free to use it.

Although true at one time in the United States, this has not been the case for more than three decades. Copyright rights arise automatically at the moment an original work of authorship “fixed in a tangible medium” is created, regardless of whether the work carries a notice or whether the copyright has been registered at the U.S. Copyright Office.⁶ Registration of works offers some significant benefits to the copyright holder in terms of expanded remedies if an infringement lawsuit is pursued.⁷

Myth 2: If I give credit to the creator of a work, it is legal to copy, distribute, or otherwise use the work.

This is incorrect because the owner of a copyright has exclusive right to 1) reproduce the work; 2) distribute the work; 3) prepare derivative writing based on the copyrighted work (for example, make a film from a book or a play from a film); 4) perform the work; and 5) display the work.⁸ Only the copyright owner can give permission or a license for a third party to exercise one or more of these five exclusive rights.

Myth 3: If I use less than 10 percent of someone’s copyrighted work, there is no infringement.

There is no bright-line test for legal or fair use of a portion of a copyrighted work. Under the fair-use doctrine,⁹ there is no simple test to determine if a use is a fair use and therefore permissible under the law. The law articulates four criteria that are to be evaluated on a case-by-case basis: 1) the purpose and character of the use, including the commercial or noncommercial nature of the use; 2) the nature of the copyrighted work; 3) the amount of the copyrighted work that is used; and 4) the effect of the use on the potential market or value of the copyrighted work. Use of portions of a copyrighted work for review, criticism, or parody – especially in educational or news reporting contexts – often will be considered a fair use. However, the fair-use doctrine



applies only in limited situations and will seldom shield wholesale copying of the mark regardless of its purpose.¹⁰

Myth 4: If I receive no commercial or monetary benefits from my copy or other use of a copyrighted work, it is permissible. This is a common misconception. The absence of commercial activity does not make copying permissible. Monetary benefit is not required to prove an infringement, although it could affect the recoverable damages.

Myth 5: When I buy a book or CD, I own it, and so I am permitted to copy it. The purchase of a CD, DVD, or other copyrighted work gives you only the right to use the purchased copy for personal use. The first-sale doctrine¹¹ permits you to give away or sell the work to someone else, but not to make copies and then redistribute them.

Myth 6: If I just change a copyrighted work somewhat, I have created a new work that I own. Using another person's work in your own work is a "derivative work" and requires the copyright owner's explicit permission.

Myth 7: If I hire a professional photographer, videographer, or software developer to take photos or video or develop software, I own the work that is created. This assumption is incorrect. In the absence of a written agreement that assigns the copyright to the commissioning party or unless the work otherwise fits into one of nine categories set forth in the Copyright Act that are considered works made for hire, or is created by an employee within his or her scope of employment, the creator of the work will own the copyright.¹² When a work is a work made for hire, the employer or the commissioning party is considered the author and therefore the copyright owner.

Myth 8: I can't get in serious trouble for infringing someone's copyright. This is clearly false. Although most infringement cases are civil matters, the No Electronic Theft Act¹³ renders certain acts of infringement criminal matters, such as those involving works with a total value of more than \$2,500. Penalties include significant fines and prison terms. Even if only a civil infringement action is filed against an infringer, the damages could include actual monetary damages. If the copyright is registered within three months after publishing the work or before an infringement, statutory damages of between \$150 and \$30,000 per work for unintentional infringement and up to \$150,000 per work for intentional infringement and attorney fees may be awarded.¹⁴

Myth 9: I have a great idea for a new game and will copyright it. Ideas are not protected by copyright. A copyright only arises when an idea is tangibly expressed. The idea

need not be unique, but its expression must be original to the author.

Myth 10: There is no copyright protection if the work is really old. In the United States, works dating back to the 1920s could still have a protected copyright. The 1998 Sonny Bono Copyright Term Extension Act¹⁵ extended the duration of copyright for many works that were about to fall into the public domain (for example, Mickey Mouse and Minnie Mouse). For works created on or after Jan. 1, 1978, the duration of the copyright is the life of the author plus 70 years. For works owned by an entity, it is the shorter of 95 years from the date of publication or 120 years from the creation date.¹⁶

Where to Get More Information

The U.S. Copyright Office (www.copyright.gov) is part of the Library of Congress (www.loc.gov) and publishes several guides that provide detailed information on all aspects of copyright protection for works of all kinds, including literary, audiovisual, and architectural works, software, and more. The Business Software Alliance (www.bsa.org) is another excellent resource for tips on avoiding infringement of software.

Endnotes

¹U.S. Const. Art. I, § 8, clause 8.

²17 U.S.C. §§ 101-1332.

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

⁴*Viacom Int'l Inc. v. YouTube Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

⁵*MGM Studios Inc. v. Grockster Ltd.*, 545 U.S. 913 (2005).

⁶17 U.S.C. § 201(a).

⁷17 U.S.C. § 501(b).

⁸17 U.S.C. § 106.

⁹17 U.S.C. § 107.

¹⁰*See, e.g., American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994) (holding that buying a single professional journal or magazine and making copies for other employees of the company is not fair use).

¹¹17 U.S.C. § 109.

¹²17 U.S.C. § 201(d).

¹³Pub. L. No. 105-147 (amending 17 U.S.C. §§ 101, 506, 507; 18 U.S.C. §§ 2319, 2320; 28 U.S.C. § 1498).

¹⁴17 U.S.C. §§ 408, 412.

¹⁵Pub. L. No. 105-298 (amending 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304(c)(2)).

¹⁶17 U.S.C. §§ 302, 303, 304. 



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