

# COPYRIGHT PROTECTION: REAPING THE BENEFITS OF LITERARY OR ARTISTIC CREATIVITY

All businesses own or use copyrighted material. Protecting such materials from abuse, misuse and/or piracy may be critical to prevent erosion of a competitive advantage. Yet many companies do not focus on management of copyright assets while planning their competitive strategies. Active management of copyright, along with other intellectual property rights, is essential for all businesses, big or small, as it impacts directly or indirectly on their performance, profitability and competitiveness. This first of two articles exploring copyright issues for business provides a basic background on copyright and copyright industries, as well as a look at what businesses need to do to ensure that their use of protected works is in line with copyright law.

## *The Copyright Industries*

The kinds of works covered by copyright include novels, poems, plays, reference works, newspaper articles, computer programs, databases, films, musical compositions with or without texts, choreography, paintings, drawings, photographs, sculptures, architecture, advertisements, maps, technical drawings and multimedia productions. Copyright industries can therefore be divided into the following three categories:



- ▶ **Core copyright industries:** These are industries that create copyright materials as their main product. They include book publishers and related industries, the music publishing industry, theater, film and television production companies, the visual arts industry, computer software, etc.
- ▶ **Partially copyright-based industries:** These are industries in which part of their product is directly related to the creation or exploitation of copyrighted works. Such industries include advertising agencies, computer consultants, architectural services, stationary manufacturing, commercial or job printing services, web page design services, etc.
- ▶ **Copyright-based distribution industries:** This category includes businesses involved in paper product wholesaling, computer and software retailing, film and video distribution, and motion picture projection as well as libraries, museums, performing arts' venues, video hire outlets, photographic film processing, etc.

In order to sustain their competitiveness and success in business, copyright industries need to safeguard the fruits of their creativity and innovations from free-riders, imitators, and copiers. In fact, the viability of these industries rests on the existence and proper functioning of the copyright system in domestic and international markets.

Most businesses, although not directly involved in the copyright area, print brochures or publish advertisements that create and/or use copyright-protected materials. Even shopping malls, bars, nightclubs, hotels, airlines, restaurants and other retail outlets play music – protected by copyright – to attract customers and influence their behavior, entertain employees, and increase turnover and profits. Thus proprietors of these businesses must understand the basics of copyright law as safeguarding copyright and securing the permission of others before using copyrighted material is not only a legal necessity but also good business sense. Many businesses, especially small ones, do not have a sufficient understanding of the importance and relevance of copyright to their business success or bottom-line.



## ***Rights Granted Create a Market for Copyrighted Works***

Copyright law provides the basis for enabling authors or creators to legitimately seek and receive remuneration for the use of their original literary or artistic work, enabling them to support themselves from their works. It gives entrepreneurs the opportunity to generate profits to reinvest in tomorrow's creations and their



distribution. The potential financial reward provides an impetus for creators to produce more works, thus introducing a wider variety of products into the marketplace and enhancing the choices available to consumers. At the same time, products become more affordable, permitting more people than ever before to benefit from, enjoy and be entertained by copyrighted works.

Copyright allows the creator or owner of rights to control the use of their copyrighted work in the marketplace by granting them *economic*

*and moral rights* over the work. Economic rights accord control over copying or reproduction and other uses, such as rental of computer programs and films; distribution of copies to the public; public performance; recording; broadcasting or transmission by cable; availability on the Internet; and translation, adaptation or modification. Moral rights preserve the link between the author and the work, which includes the right to be named as the author, and the right to object to any distortion, mutilation or other modification that may affect the honor or reputation of the author.

Copyright protects only the form of expression of ideas, not the ideas themselves. The creativity protected by copyright law is in the choice and arrangement of words, musical notes, color and shapes. The literary or artistic merit of a work is not assessed when afforded protection under copyright law.

Copyright begins from the moment a work is created, or under some national laws, when it is expressed in a tangible or fixed form. No formalities are required to obtain copyright protection, but for a work to be eligible for copyright, it must be original and, under some national laws, be in a material, tangible, form. A work is considered original if it owes its origin to the author and was not copied from an existing work. A work can be original without being novel or unique as long as the author or creator has applied skill or labor in



producing it. The exact level of originality required varies to some extent between national legislations.

Copyright protection is limited in time – the author or creator's lifetime plus at least 50 years – and to the geographical boundaries of the relevant country. For nationals of the 149 countries that are members of the WIPO-administered Berne Convention for the Protection of Literary and Artistic Works, protection is automatically granted in the other 148 member countries.

### ***Limitation of copyright***

In most national copyright laws there are categories of information (such as names, titles of publications, slogans, ideas and information such as research data) and works (government publications in certain countries) which are either excluded from copyright protection or use of which is exempted from copyright infringement action. In addition, some national laws limit the exclusive rights

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of owners, whereby certain usage of a copyrighted work is considered to be "fair" use or dealing. In such cases, for example when use is personal and private, for educational purposes, for criticism, comment or review, journalistic reporting, in judicial proceedings, in parody or research, the user is exempt from seeking permission of the copyright owner or creator.



Whether a given case is fair use or not depends on national law and the facts of each situation. The purpose of the use, the nature of the work, the amount used, and the effects of the use on the market for the original article have to be considered, so the following questions must be answered:

- ▶ Is it a competitive use?
- ▶ How much material has been used?
- ▶ How is the material used?

When in doubt, businesses should either seek permission or avoid using the work. Mere attribution does not amount to having permission. In most business situations, fair use is not a practical possibility. The only works that can be used without permission are those that are in the public domain.

### **Getting Authorization**

The first step in seeking permission to use copyrighted material is to identify the rightful owner of copyright. This in itself may not be easy, especially in the multimedia area where a number of different rights' owners may be involved. Often the best way to start is to contact the original publisher or, in the case of literary or musical works, the relevant collective management society. When the rights owner is identified, the terms and conditions for the use must be negotiated, and a licensing agreement established.

The copyright owner may give permission to or prohibit someone from using his work. Selling a physical embodiment of a copyrighted work – whether a CD, a sheet of music, or other physical form – does not amount to selling the copyright in it. Copyright may be assigned or sold in part or full, but generally permission to use a work is granted in the form of a non-exclusive or exclusive license in exchange for royalty payments. Such fees may be collected directly by the copyright owner, or

through an intermediary such as a copyright clearance center or a collective management society, which is often also empowered to permit the use of works on behalf of the copyright owner.

### **Copyright ownership**

The author or creator generally has the ownership of copyright in a work, but he or she may transfer it through assignment or licensing. In all relationships, including those with employees and third party contractors, it is important to ensure through a written agreement – before the work is created – who will own the copyright of the work. It often comes as a shock to contractors, who pay for the creation of a work, to find out that they do not own the copyright. The ownership of the copyright in the work depends on national law. A contractual agreement will clarify matters so that subsequent dealings can be carried out without dispute.

Copyright owners can leverage copyright, for example by securing revenue streams arising from a bundle of copyrighted works such as music or software. This could open new doors in raising finance based on intangible assets. Part II of this article will focus on how business owners can further obtain the benefits of copyright.

