

International Issues in Copyright:

Frequently Asked Questions

BY CHRISTOPHER JUILLET, *Fellow*

As a practicing attorney in intellectual property law, I often hear questions about copyright, copyright protection, fair use, and international copyright issues. This article presents, in the form of an FAQ, the best, most current answers I've been able to muster to some of those copyright questions.

Note: I'll use the term *author* to mean whoever created the work. You can substitute *artist*, *composer*, *photographer*, *architect*, *programmer*, *developer*, or whatever other term is appropriate to the work under consideration. *Work* means just about anything that the author creates: a novel, manual, painting, photograph, illustration, drawing, program, Web site, or other creative or scientific work that falls into the ever-broadening category of "intellectual property."

Frequently Asked Questions

What is "copyright"? Where does it come from?

Copyright is an exclusive right to copy a creative or scientific work (book, article, photograph, drawing, painting, music, lyrics, software, Web site, and so on) for a limited duration. In most countries, copyright protection extends for a period of fifty years after the author's death (or, in the case of a "work for hire," seventy-five years after the work was created). In the United States, these durations are longer: seventy years after the author's death, and ninety-five years after the creation of a work for hire.

Copyright traces its origins to 1710 and the British Parliament's enactment of the Statute of Anne, the world's first copyright law. While the protections provided by this law are meager in comparison to contemporary copyright laws, the Statute of Anne was the first to recognize an author's right to authorize the copying of his or her works.

Today, most countries provide copyright protections to their citizens. While those protections vary from country to country, many nations are party to the Berne Convention for the Protection of Literary and Artistic Works, an international agreement administered by the World Intellectual Property Organization (WIPO). The Berne Convention provides minimum copyright protections. An excellent overview of the origins and current state of copyright law is available in a paper entitled "International Protection of Copyright and Related Rights," prepared by the international bureau of WIPO. This paper serves as a primary source for the information presented here. (The Web site address of this paper is listed in "Suggested Readings.")

"Work for hire"—what's that? Who holds the copyright?

A work for hire is created by a person employed by a company or individual during the "scope and pendency" of the author's employment. This means that the work needs to be part of the author's assigned duties and created

while he or she is a regular employee. If this is the case, ownership and copyright of the work belongs to the employer. For example, Mickey Mouse is a drawing owned by the Walt Disney Company, which alone has the right to copy this image (or license that right to others).

It's important to note here that consultants and independent contractors are *not* employees, and a work created by a consultant or contractor is not, by default, a work for hire. When an independent contractor creates a work, ownership and copyright of that work rests with the contractor. For ownership and copyright to belong to the hiring company, the author must "assign" that ownership and copyright in an agreement that the author signs. Just because the company (or person) who commissioned the work paid for it does not mean that it actually "owns" the work.

A common example of this issue arises when you attempt to make copies of professional photographs (for example, kids' school pictures) at the local drugstore photo kiosk. The clerk invariably asks whether you took the pictures and explains that you can't make copies of photographs you didn't actually take yourself. As strange as it seems, the clerk is correct. Even though you paid the photographer to take the pictures and you own the copies in your hand, you do not generally own the right to make copies of them, even for your own use.



Copyright “protection” is precious little protection at all.

What about international copyright? How can I protect my works in other countries?

Strictly speaking, “international copyright” does not exist as such. Copyright is territorial in nature and is provided by the laws of individual countries. Most countries provide copyright protection to works published in other countries under the terms of the Berne Convention and the Universal Copyright Convention (UCC).

My co-author lives in another country. Under what country’s law is our work protected?

If you both live in or are citizens of countries that are party to the Berne Convention and UCC (most countries are), you can have protection under the copyright laws of both countries if the work is published in two or more such countries within thirty days of its initial publication. The work is considered to have been published simultaneously in these countries.

Do I need to register my copyright to have protection? What about posting a copyright notice on the work?

Under the terms of the Berne Convention, copyright notice and registration are not required for a work to be protected by copyright. Copyright “attaches” (that is, a work is protected

by copyright) when a work is set into a tangible form. However, there are significant benefits to registering copyright. In the United States, for example, substantial criminal penalties and civil remedies against infringers are available, but only if the infringed work has been registered with the U.S. Copyright Office.

Under the UCC, formal notice in the form of the ubiquitous “©” symbol, accompanied by the first year of publication and the owner’s name, must be placed so as to give reasonable notice of the owner’s claim to copyright. While such notice is not required under U.S. law, it does offer advantages; for example, it can help a copyright holder defeat a claim of “innocent infringement.”

What do I do if someone copies my protected work?

One of the most important points to remember is that copyright “protection” is precious little protection at all. It does not prevent others from copying your work without permission. Rather, copyright protection is an offensive tool that provides a means (albeit often an expensive one) of stopping someone who is infringing. When you learn that someone is infringing on your copyright, the first step is to send a letter informing the infringer that the work is protected under the copyright laws of your country. Demand that the infringement immediately cease and desist. This may work, especially if you

hire an attorney to draft and send the letter. Just as often, however (and especially if the infringement is in another country), your letter and plea will be disregarded.

Step two depends on whether the infringement is on a Web site or in some tangible (probably printed) form. If the infringement is online, you (or your attorney) can inform the Internet service provider (ISP) of the alleged infringement and demand that the ISP remove the material from its system. This approach is more likely to be successful, as most ISPs have little desire to become embroiled in legal action resulting from the activities of their users. If the infringement is in a tangible form, however, your only recourse may be to bring legal action against the infringer. Undertake such an endeavor with great care (and trepidation), as the costs vastly outweigh the benefits in all but a fraction of cases.

When I submit an article for publication, who owns the copyright?

Unless you have written your article as a work for hire, you hold all rights to your work when you put it into a tangible form, such as writing it on paper or storing it on a computer disk or other electronic medium. Most publications, however, require that you assign ownership and copyright to them or their parent company or organization before they publish your work.

Once you have assigned your copyright to a publication or organization, it can sell reprints, use the piece in other publications, and even license the work to other publishers—all without your permission and without paying you (except as stipulated in the assignment agreement). You can’t even reprint the article or post it on your own Web site without permission unless it’s part of your deal. It’s as if you sold your house. Once done, the house belongs to the new owners, and they may do with it what they please.

May I translate someone’s work into another language?

Not without permission. The Berne Convention is explicit on this point, prohibiting translations without the

author's express permission. The act of translation is, in a sense, the creation of a derivative work—a new work based on an earlier work. Creation of a derivative work (subject to the fair use exception described later) requires the permission of the author of the original work.

After I've published, may I submit my work to another publication?

Assuming that you have assigned the copyright of your work to the publisher, you may *not* submit the article for subsequent publication unless you have reserved that right or obtained permission. Say, for example, that you have assigned the North American rights to your publisher. In so doing, you probably have retained the European rights and would be able to submit to a publication located there. This practice, however, is becoming increasingly rare and is generally available only to well-known authors with enough clout to have negotiation power with their publishers. For the rest of us, the smart and proper course is to either obtain written permission to republish or simply refrain from doing so.

What are "serial rights"?

Serial rights refer to the right of a publication to print the work in portions. Such rights are generally applicable to larger works, usually to novels. When you grant serial rights, you are giving the publisher permission to print your work in parts, most likely in a periodic publication such as a magazine.

What about putting my published article on my Web site? Is this infringement?

Again, the issue boils down to copyright ownership. If you have reserved the right (or obtained permission) to post the article on your Web site, by all means do so. If not, you should obtain written permission from your publisher. Otherwise, you may be infringing on your publisher's copyright. The best approach is to obtain written permission *before* assigning copyright to your publisher—while you have something your publisher wants, and thus, some negotiating leverage.

What about posting the works of others on my Web site?

A good rule of thumb: if you didn't write it (or draw or make or compose it), don't post it without permission. While there are myriad works now in the public domain (generally, those for which copyright had lapsed prior to 1978, when U.S. law changed to comply with the terms of the Berne Convention), anything created after 1978 will remain in copyright until long after it was created. There are attorneys who make a substantial portion of their livelihood searching the Internet for infringing articles and artwork, and then sending threatening "cease and desist" letters to webmasters and ISPs. These are not the sort of letters you want to receive.


One way to avoid the wrath of copyright attorneys is to include a link from your Web site to the location where the information you want to show is located. Be careful, though, to link in a way that does not leave the impression that you produced the work to which you're linking. More important, do not practice "deep linking," which sends the user directly to the image or material, as this may constitute infringement. Better practices might be to link to the home or index page that provides access to the material, to obtain permission from the Web site owner to link to his or her page, or both. Above all, do not link to the work in a way that has people paying you for access to the linked-to work. Benefiting financially from another's work is a very bad position to try to defend.

Are there exceptions that allow me to use parts of protected works?

In the U.S. and some other countries, the doctrine of fair use provides that parts of protected works may be used for specific purposes. In the States, these purposes include reporting, parody, criticism, research, and education (especially nonprofit). As with every aspect of the law, what constitutes fair use is a matter of degree. One can, for example, generally excerpt a small portion of a large work for use in a review without running into trouble, but only if the excerpt does not impinge on the

commercial value of the work being excerpted. An excerpt from Gerald R. Ford's memoir was held to not be fair use, despite its obvious and compelling newsworthiness. The excerpt was the 300-word passage in which the former president explained why he pardoned Richard Nixon—arguably the most important part of this 200,000-word book.

Closing Thoughts

Multivolume publications are devoted to the illumination of copyright law. This short article can do nothing more than make a few broad and general statements, and is clearly not a detailed or comprehensive description of copyright. Be sure to consult legal counsel in your jurisdiction for advice on your specific situation. 

SUGGESTED READINGS

Harper & Row v. Nation Enters, 471 U.S. 539 (1985), available at www.studentweb.law.ttu.edu/cochran/cochran/Cases%20&%20Readings/Copyright-UNT/harper&row.htm.

"International Copyright," available at www.copyright.gov/fls/fl100.html.

"International Protection of Copyright and Related Rights," available at www.wipo.int/edocs/mdocs/arab/en/wipo_cr_dam_05/wipo_cr_dam_05_8.pdf.

An STC fellow, Christopher Juillet is an attorney based in Ann Arbor, Michigan, where he practices small business, Internet, intellectual property, and estate planning law. Prior to entering the legal profession in 1999, he was a technical writer (since 1979) and private consultant (since 1984). He served as STC assistant to the president for special interest groups and is the founding manager of the Consulting and Independent Contracting Special Interest Group. Chris can be reached at chris@juilletlaw.com or at +1 (734) 827-9450.

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