

Protecting Your Work Against Copyright Infringement

What is Copyright Protection?

Copyright protection gives the creator/owner of an original work the exclusive right to:

- (1) reproduce the work;
- (2) create derivative work based upon the copyrighted work;
- (3) distribute copies of the work to the public;
- (4) perform the copyrighted work publicly (including through an audio transmission);
- (5) display the copyrighted work publicly.

A person infringes a copyright when he exercises one or more of the exclusive rights of the copyright owner without the owner's permission, or in other words, copies the work.

What is an "original work?"

An original work is created without copying from another work. A work doesn't have to be completely new to qualify as an original work. The creativity, ingenuity, and novelty of the work are not considered when determining whether it is an original work. This means that it doesn't matter if a similar work was created before your work. As long as you didn't know about the other work and weren't influenced by the other work, your work is an original work.

Are there times when a copyrighted work can be used without the owner's permission?

Yes, there is a "Fair Use Doctrine." This doctrine sometimes permits a limited use of the copyrighted work without the owner's permission.

An example of a "fair use" is taking a quote or excerpt from a work and commenting on or criticizing the work. This type of use is allowed because the purpose of the copying is to provide commentary of the work, which provides a benefit to the public. Another common example of "fair use" is a "parody." A parody is a work that ridicules another work (usually one that is well-known) by imitating it in a comedic way. Weird Al Yankovic is famous for creating parodies of well-known songs, for example "Fat," a parody of Michael Jackson's hit "Bad."

Four factors are considered to determine whether a use is a "fair use":

- (1) the purpose and character of the use,
- (2) the nature of the copyrighted work,
- (3) the amount and substantiality of the portion used, and
- (4) the effect of the use upon the market for the copyrighted work.

How do I protect my work?

For works created after March 1, 1989 in order to gain copyright protection; the work receives protection automatically upon creation.

How do I mark my work as copyrighted?

Marking your work is free and easy. You simply add “©,” the first year of publication, and your name to the work. This prevents a person from claiming that they didn’t know the work was copyrighted.

When should I register my work?

Registration of your work with the federal government entitles you to certain benefits and is a requirement to filing a lawsuit for copyright infringement. If you register your work within five years of publication, the registration is presumptive evidence that the copyright is valid.

If you register your work within three months of publication, you may be eligible to receive statutory damages of up to \$150,000 for each act of willful infringement, in addition to attorney’s fees. If you do not register your work within three months of publication, you are only entitled to actual damages caused by the infringement and the profits of the infringer.

How do I register my work?

There are three requirements to register your work:

- (1) a completed application;
- (2) a non-returnable copy of the work; and
- (3) the required filing fee.

You can submit an application online or by mail. Online registration is cheaper and faster than registering by mail, but it can only be used for basic registrations. A basic registration is:

- (1) any single work;
- (2) a collection of unpublished works by the same author and owned by the same person;
- (3) multiple published works contained in the same unit of publication and owned by the same person, (a CD containing 10 songs or a book of poems).

You can access the online application system or download copies of the mail-in form for a basic registration at <http://www.copyright.gov/forms/>. If your work doesn’t fit into one of those three categories then you must request the appropriate paper form from the Copyright Office at <http://www.copyright.gov/forms/formrequest.html>.

In addition to the completed application, you will have to submit a copy of the work. If the work is unpublished, then you only need to submit one copy. If the work has been published, then you must submit two copies of the work. If there is more than one published version of the work, such as hardback and paperback, then you must submit two copies of the “best edition”. The best edition is the edition that is highest in quality, for example a hardback version is better than a paperback version. You can find more specific information about how to determine the best edition of a work at <http://www.copyright.gov/circs/circ7b.html>.

Finally, the filing fee must accompany the application and deposit. Currently, the filing fee is \$35 for an online application and \$45 for a mail-in application. You can find current information on the registration process at <http://www.copyright.gov/>. You can contact the copyright office at: U.S. Copyright Office; 101 Independence Ave. S.E.; Washington D.C., 20559-6000; (202) 707-3000 .

What do I do if someone copies my work?

Send a cease and desist letter.

When someone (the infringer) has copied your work without your permission, your first course of action should be to send that person a cease and desist letter asking him to stop the infringement. A cease and desist letter not only informs the infringer that you intend to stop his use of the work, but also establishes your date of discovery of the infringement and gives the person a chance to explain the unauthorized use and possibly offer a compromise. The letter should include:

- (1) your name and address;
- (2) a clear identification or description of the work that is being copied;
- (3) the date the work was first published, if published;
- (4) evidence of notice of the copyright, such as a photocopy of the notice on the work;
- (5) the date the copyright was registered, if registered;
- (6) a statement that you didn't give permission for your work to be used;
- (7) a request that the infringer stop using your work;
- (8) a request that you be compensated for the use; and
- (9) a deadline for a response.

The cease and desist letter should be professional and not include threats or exaggerations because you may eventually want to use the letter in court. (See attached sample letter.) You should send the letter by certified mail, return receipt requested, so that you have proof that the person received the letter. If you do not have a mailing address for the person or if he refuses to accept the letter, you can have it hand-delivered by someone who is not involved in the dispute and can testify that the letter was delivered.

Reach a satisfactory compromise if possible.

After receiving your letter, the infringer may want to come to an agreement with you concerning the use of your work. You can offer to license the work to the person in exchange for a fee. The fee may be a fixed sum or a royalty (usage-based payment). You may wish to include a penalty for the past, unauthorized use of your work.

If you and the person are able to come to an agreement, you should put the agreement in writing and have it signed by both of you. It should include all the terms of the agreement, for example, whether the license is exclusive (you may not license your work to anyone else) or non-exclusive (you may license your work to other people), the fee that will be paid for past and future uses, and a promise from the person not to use any of your work in the future without your permission. Be sure to keep a copy of the agreement for your records. (See attached sample agreement.)

If you have to sue for copyright infringement.

If you are unable to reach a compromise with the infringer, you must determine whether you want to pursue an infringement claim in court. If you decide to sue for copyright infringement, you must file suit in federal court, and may need the help of an attorney. A suit for copyright infringement can be both timely and costly, and there is no guarantee that you will win. An experienced attorney can explain the process of an infringement suit and help you decide if you want to pursue the lawsuit.

SAMPLE CEASE AND DESIST LETTER

[Your Name]
[Your Address]

[Date]

[Infringer]
[Address of Alleged Infringer]

Dear [Infringer],

It has recently come to my attention that you have used my work entitled [name of work] (“my Work”) in [describe the unauthorized use]. I created my Work in [month and year] and I reserve all rights in my Work.

[Include the following if applicable: My Work was first published in [month and year] by [name of publisher] in [place it was published]. I registered my Work with the U.S. Copyright Office on [date]; the registration number is [registration number]. Please note the copyright notice in my name on the enclosed photocopy of my Work.]

Your work, [name of infringing work or description of infringing work], clearly uses my Work as its basis. [Describe how the infringing work used your work. For example, “My painting was used as the background for your work, a flyer promoting your nightclub.”] I never authorized you to use my Work, so your use of my Work infringed upon my copyright in my Work.

This letter is to demand that you immediately cease and desist from using, selling, or distributing any copies of [name of infringing work] [include only if applicable: and that you return all unused, undistributed copies of my Work to me or destroy them immediately.] Additionally, I demand that I be reasonably compensated for the use of my Work to date.

Please respond to this letter by [date – give him about two weeks].

Sincerely,

[Your Name]

SAMPLE SETTLEMENT AGREEMENT

[Your Name]
[Your Address]

[Date]

[Infringer]
[Address of Infringer]

Dear [Infringer],

This letter embodies the terms of our settlement agreement of the dispute arising out of your use of my work entitled [name of your work] (“the Work”) in [describe the unauthorized use]:

1. [Your Name] retroactively grants [Infringer’s Name] a [nonexclusive/exclusive] license to use the Work in [describe the use of the work].
2. Choose one:
 - (a) [Infringer’s Name] promises to pay [Your Name] a fixed fee of [amount].
 - (b) [Infringer’s Name] promises to pay [Your Name] a royalty of [amount] for each use of the Work.
3. [Infringer’s Name] promises to give credit to [Your Name] for the creation of the Work by [describe how credit will be given, for example, “placing the copyright notice in John Doe’s name on all future copies of the flyer.”]
4. [Infringer’s Name] promises not to use the Work, or any other works of [Your Name], in the future without [Your Name]’s permission. This includes reprintings of [describe the use, for example, "the flyer promoting your nightclub and any other promotional material for your nightclub, such as posters, banners, and signs."].
5. [Your Name] agrees that this completely settles the dispute between [Your Name] and [Infringer’s Name] and releases [Infringer’s Name] of further liability arising out this dispute.

Signed: _____
[Your Name]

Date: _____

Signed: _____
[Infringer’s Name]

Date: _____