

IM 450-01
Intellectual Property Law and New Media
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Copyright Pt. 1

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Notes on the reading, esp. the opening examples

- Some in the content industries believe we should not be able to move even non-protected material, say, music on a CD, onto another platform, like an iPod, without violating copyright.
- Fair use defenses don't follow a fixed calculus so we wrote “usually” legal or not legal.
- Some authors produce MUCH MORE EXTREME examples (as plausible hypotheticals). For example, Tehranian, in [*Infringement Nation*](#) discusses the copyrights in email and singing in the shower (usually treated as “legal/ok” based on fair use).
 - In general, singing in the shower is fine.
 - Copyrights to materials in email are highly contested and more depend on who sponsors the server and their terms of service than on who created the e-mail content.

What IP rights are implicated in/for these images?



Keelan Rodgers Self-Portrait



Birth Father

Whose rights?
How to secure them?

Introduction to Copyright Basics

- **In order to be copyrighted**
 - **The work must be “original”**
 - **“originality” is complex.**
 - **For the purpose of legal proceedings, originality means that the work has not been previously copyright protected.**
 - **In earlier historic stages, originality might have had more direct reference to “first to think of it and put it down.”**

Introduction to Copyright Basics

- In order to be copyrighted**
 - The work must “fixed”**
 - The expression of the idea that is copyrighted, not the idea itself, so the work has to “come out.”**
 - “publication” is not limited to “professional distribution.”**
 - electronic/digital means of production/distribution makes this problematic as “everyone” is now a potential producer and distributor.**

Equivocation over web posting and publication

- **Lack of clarity**
- **Lack of case law**
- **Much of what we have is based on whether making media files available “counts” as distribution (so violates the distribution right)**
 - **[Nimmer Changes His Tune: “Making Available” is Distribution](#)**

(at least if/when the distribution is giving something to a peer-to-peer network that then infringes a lot)
- **Courts are still examining the issue, but in general have moved toward recognizing web posting as a form of publication.**
- **Site terms of service often modify the law.**

Equivocation over web posting and publication

- **In general, one can say that fixing in form (even on the Internet) establishes the basic right**
 - **Online terms of use/service limit & determine rights.**
 - **REGISTRATION IS CRUCIAL FOR RIGHTS PROTECTION!**

Protecting Your Copyright: Three Levels of Protection

- **Level One: You put the work to form.**
- **Level Two: You use proper symbolization.**
- **Level Three: You register the work (and display the proper symbolization).**

Protecting Your Copyright

Level One: You put the work to form

Once “fixed”: “THIS IS MINE AND YOU ARE INFRINGING” !

You (generally) cannot get into court (for anything) with merely this.

But you can notify, beg, bluster, & threaten.

Protecting Your Copyright

Level Two: You use proper symbolization/notification.

“Copyright and Fair Use: Protecting and Sharing Your Work and Classroom.” © Edward Lee Lamoureux, 2021

Maybe you can get an injunction ... maybe not.

But now the accused is willfully informed.

Protecting Your Copyright
Level Three: You register the work
(and have displayed the symbolization)

<http://copyright.gov/>

If online, \$35.00 per item.

**After registration takes effect, you can
SUE infringers for an injunction, damages
AND court/legal fees.**

**But only for infringements that happen
AFTER your registration.**

Protecting Visual works of Art (physical stuff like paintings/sculpture)

- **The Visual Artists Rights Act (within the Copyright Act), codifies what has been called an artist's moral rights (to attribution and to maintain the integrity of the work).**
- **An artist who has rights under VARA can enforce them without having registered the works.**
- **This applies to artists who make physical stuff that doesn't easily accommodate symbolization and/or appeared (and was copied in an infringing way) before (or in the absence of) registration.**
- **Not usually appropriate for digital products.**

Who owns/controls the copyright?

- **The author (you).**
- **Multiple authors of “the whole” or of “parts”**
 - **Get a contract!**
- **Others: Authors may assign rights.**

Who owns/controls the copyright?

Employers (usually)

- **Work output belongs to the employer.**
 - **BU modifies this for professors by transferring copyrights to faculty and specifying patent terms, but student rights (copyright, patent, trademark) are ambiguous and undefined.**
- **Work for hire=Special project and pay, by contract.**
 - **Rights to employer, unless specified in the contract.**
- **Grant-supported/externally funded work.**
 - **Rights to the funding agency, unless specified in the contract.**

A wide range of rights are protected

- 1. Reproduction Right: all copying**
- 2. Modification/Derivative Right: the derivative works right to modify the work to create a new work.**
 - a. The derivative right is HOTLY contested.**
 - b. Courts have often recognized *transformative fair use* that compromises derivative rights.**
- 4. Distribution Right: sale, rental, lease, or lend.**
- 5. Public Performance Right.**
- 6. Public Display Right.**

Duration

- **Life of the author plus 70 years.**
- **Corporate or “works for hire”: 95 years from “publication” or 120 years from creation, whichever expires first.**
- **No registration renewal in the US now**
 - **There used to be**
- **Is it in the public domain? (copyright expiration).**
- **Helpful public domain chart:**
 - <https://guides.library.cornell.edu/copyright/publicdomain>

Exceptions

- **Ideas (can't copyright protect ideas).**
- **Federal (and some state) materials.**
 - Subcontractors might retain rights over portions of their work.
- **Facts cannot be copyrighted--unique ways they are arrayed can be (phone books).**
- **Independent/Same-time creation.**
- **Timely registration is key and might sort out “independent/same time” creation.**

More Exceptions

- **First Sale Doctrine (before digital and mostly about non-digital material):**
 - **Once I buy it, I can rent it, display it, resell it. (could NOT copy it for distribution)**
 - **First sale is largely overturned in digital by the *DMCA*, TOS, and EULAs.**
- **Copying for licensed broadcast/transmission.**
- **Fair Use (we shall return to Fair Use in Chapter Two).**

More Exceptions

Want to “share”? Believe in open publishing? Want to participate in the “cut and paste” culture.

Creative Commons enables the rights owner to indicate which uses are allowed and with what (if any) required remunerations/considerations/notifications.

Copyrights (and laws) stay in place: You just make a contractual indication of exceptions.

There are a wide variety of CC licenses, found here:

<https://creativecommons.org/licenses/>

Infringement and Punishment

- **After (claimed) infringement:**
 - **Only courts can issue valid Cease and Desist orders (injunctions).**
 - **Copyright holders with claims can issue C&D threats**
 - **These joined to proper symbolization make the infringement “willful” and raise the penalties.**
 - **Courts can issue C&D orders (injunctions), levy fines, recover damages, impound illegal copies, imprison violators.**

DMCA Take Downs and Safe Harbor

- **Procedures, external to courts (initially) for infringements on WWW.**
- **Rights owner files proper paperwork with ISP/host.**
- **Site operator MUST take the material down (for up to 10 days) while the matter is adjudicated.**
- **The poster can complain; the ISP decides. Then litigation might occur.**
- **If one hosts 3rd party content: FOLLOWING THE DMCA PROCEDURES PROVIDES SAFE HARBOR.**
 - **Don't follow the procedures--the protections don't apply.**

***DMCA* Take Downs and Safe Harbor**

- **If one accepts 3rd party content, one has to designate and train a *DMCA* agent and follow the take down protocols or there's no *DMCA* “safe harbor.”**
- **Under the safe harbor, if the protocols are followed, ISPs/web services providers are not liable for infringements by 3rd parties (those posters might still be liable).**

Liabilities for Infringement

– Penalties could include:

- Fines not less than \$750 or more than \$30,000 for each infringement (checked your iPhone/laptop lately?).**
- Fines up to \$150,000 for willful infringement (checked your iPhone/laptop lately?).**
- Actual damages and any profits made by infringement.**

An Alternative System: Compulsory Licensing for Music

- **Music combines copyright and a licensing/royalty systems**
 - **All copying (sampling) requires permission and (usually) royalty.**
 - **Recording (a cover song) doesn't require permission**
 - **Once creator publishes/records/performs it, others may also record or perform it, eventually paying royalties based on sales. Notification required.**
 - **“Public” performances require royalties, usually paid by venues.**

An Alternative System: Compulsory Licensing for Music

- Generally personal/private (in the shower, car, at home or in a private office) performances don't require payment or permission.**
 - However, seemingly trivial performances can (a waiter in a restaurant, for example).**
- Inclusion in mediated instances requires special clearances and royalties.**
- There are multiple rights: licenses must be obtained for EACH of the rights used.**

An Alternative System: Compulsory Licensing for Music

- **Public Performing Right** (including waiter in public)
- **Reproduction Right**
- **Mechanical License:** On top of the right to copy the record the right to reproduce and distribute a specific composition at an agreed upon fee per unit manufactured and sold.
- **Digital Performance Right in Sound Recordings Act of 1995:** authorized a compensatory system for digital sound recordings.

Compulsory Licensing for Music

Let's be EXTRA careful with this part:

— **Synchronization License:** Music Publishers issue licenses as copyright owner or his agent, usually to a producer, granting the right to synchronize the musical composition in timed relation with audio-visual images on film or videotape. **There is NO blanket sync license agency/agent/process.**

A place may have one or the other sort of “blanket” license. For example, BU pays so that the band can play songs on the quad or at a game or graduation, teachers can play songs in class, the clarion can toll, etc.

But the license that allows all that does NOT allow putting a song to a video and posting it to the web or putting a song into a video game, movie, or TV show, even if the song is covered under the blanket license.

Sync licenses are sold in one way: From/by the publisher, per use.

Exception to Sync. License restrictions/arrangements

- **Broadcast stations/cable outlets can negotiate multiple uses.**
- **“Media Libraries”**
 - **Media professionals have them for production.**
 - **We have collections in library & GCC servers**
- **TOS specify acceptable uses.**
- **Students need to remember that just because one employer/school paid a blanket fee or acquired rights to a media library, the next one might not have---free/unlimited use might be curtailed.**
- **Don’t use material until you are sure what you have and what rights you’ve acquired.**

Recent advances in music licensing

- Vydia <https://vydia.com>
- Mixbank <https://www.mixbank.com>
- exploration.io <https://exploration.io>
- Song Trader.com <http://songtradr.com/>
 - Can work for professional and prosumer production purposes.
 - None cover all of the cases/content.
 - Still a little out of reach for your neighbor's wedding mix-tape.

Orrin G. Hatch–Bob Goodlatte

Music Modernization Act, 2018

- **Closes the pre-72 loophole by establishing federal copyright protection that will guarantee compensation for artists who recorded music before February 15, 1972;**
- **Codify SoundExchange’s longtime practice of honoring “Letters of Direction” from artists who want to share royalties with studio producers and other creative participants who work with them;**
- **Create a new process that will allow eligible participants in recordings made before the digital performance right was enacted in 1995 to share in digital royalties for those recordings; and**
- **Establish a “willing buyer, willing seller” rate standard that will require all digital platforms to pay fair market value for music.**
 - <https://www.soundexchange.com/advocacy/music-modernization-act/>

Orrin G. Hatch–Bob Goodlatte Music Modernization Act, 2018

- Title 1: Music Modernization Act
 - Sets up a non-profit governing agency that would create a database related to the owners of the [mechanical license](#) of musical works - the copyright that covers the composition and lyrics of a song...This musical works database would be completed with help of the major music publishers. The new agency would establish blanket royalty rates that would be used to pay the composers and songwriters when used by streaming services using this database
 - https://en.wikipedia.org/wiki/Music_Modernization_Act

Orrin G. Hatch–Bob Goodlatte Music Modernization Act, 2018

- **Title 1: Music Modernization Act**
 - **The Music Licensing Modernization Act creates a blanket license for interactive streaming services. It also establishes a mechanical licensing collective (MLC) as well as a digital licensee coordinator (DLC), making it easier for services to obtain licenses and for creators to collect royalties.**
 - <https://musicwithflavor.com/2020/05/31/the-music-modernization-act-mma-explained-in-less-than-2-minutes/>
 - https://en.wikipedia.org/wiki/Music_Modernization_Act

Orrin G. Hatch–Bob Goodlatte Music Modernization Act, 2018

- **Title II: CLASSICS Act**
 - **The CLASSICS Act established that sound recordings before 1972 are covered by copyright until February 15, 2067, with additional language to grandfather older songs into the public domain at an earlier time. Recordings prior to 1923 will enter the public domain three years from passage (January 1, 2022, as all U.S. copyright terms end on December 31), with recordings between 1923 and 1956 being phased into the public domain over the next few decades.**
 - https://en.wikipedia.org/wiki/Music_Modernization_Act

Orrin G. Hatch–Bob Goodlatte Music Modernization Act, 2018

- Title III: Allocation for Music Producers Act
 - The bill designates that SoundExchange, the non-profit organization established by Congress to distribute royalties on sound recordings, will also distribute part of those royalties to “a producer, mixer, or sound engineer who was part of the creative process that created [the] sound recording.”
 - https://en.wikipedia.org/wiki/Music_Modernization_Act

Termination Rights

- Apply to copyrights of all sorts, but most of the recent litigation/action surrounds recorded music
- “The termination right creates a method for authors to recapture valuable copyrights in both musical compositions (songwriting) and sound recordings (recordings of performances of compositions). Congress created the termination right to safeguard authors against “unremunerative transfers . . . resulting in part from the impossibility of determining a work’s value until it has been exploited.” The termination right is absolute and inalienable. It empowers recording artists and songwriters to regain control of their works and either renegotiate agreements on more equitable terms or enter into new agreements.”
 - https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/november-december/termination-music-copyright-transfers/

Termination Rights

- Rights are being claimed, especially by:
 - Artists (or their estates) who gave up rights in order to get early cooperation from recording company/publishers
 - Artists who were part of groups particularly when a given artist made a special contribution but the songwriter (or publisher) got all the \$/credit.
 - Artists who lost control over their material due to corporate take overs (usually of publishers or recording companies)
 - Artists who did not get good (or any) legal advice when signing (esp. early) contracts.

Case Act of 2019

- **Shoved into a COVID relief bill**
 - **Establishes a small claims-type system within the Copyright Office for rights holders to seek damages under \$30,000 for copyright violations.**
 - **5 person panel (3 judges, 2 IP lawyers)**
 - **Parties can opt-out of the option to use the system within 60 days. If they opt-out, regular civil courts are used.**

Emerging Trends

(updates/comments in red)

(1) Expiration of the term extension in 2019-20.

- a) Unanticipated by the book, the extension was NOT further extended.
- b) The Extension Act expired; oldest materials begin entering the public domain

(2) Potential widening of the “copyright termination” practice begun over popular music. Action in this area is increasing.

(3) Conflicts between the derivative right of copyright holders and the fair use exemption based on transformative use.

(4) Continued reliance on international trade negotiations as leverage for domestic lawmaking.

(5) Relief from the DMCA’s anti-circumvention limitations in situations of private use (some progress for unlocking phones, rumblings about “right to repair [which is also a patent issue], courts are now generally ok with reverse engineering that violates the DMCA only for that purpose).

Emerging Trends

(updates/comments in red)

(6) Relationships between copyright and copies “in the cloud”—that is—how will the various ways to manage files in cloud storage relate to copyright law

(7) Re-examination of what counts as “fair use.” **The SCOTUS ruled in favor of fair use in Google v Oracle, BUT did not clarify the nature of fair use itself.**

(8) Relationships among Internet service and copyright enforcement (X strikes and you are disconnected). **American ISPs have given up, for now, on this approach.**

(9) Struggles over the differences between the initial intentions for the safe harbor compared to the realities of how those protections often manifest.

- ISPs now manage content and are no longer simple “pass-throughs”)
- Implications of YouTube prevailing in court.
- **The HUGE fuss over section 230 is about the TORT safe harbor not about the copyright safe harbor.**

Emerging Trends

(updates/comments in red)

(10) scraping and aggregating content. There are recent court decisions about scraping. Generally, if the material is publically available, scraping is ok.

(11) The consequences of Google's court victories over, and moving forward with, the Google Books/Search/Universal Library project. After winning, Google tabled the project (dropped?) the project (Other fish to fry? Too hard? Already "the" portal?).

What IP rights are implicated in/for these images?



Keelan Rodgers Self-Portrait



Birth Father

Whose rights?
How to secure them?