

12/14

Copyright & Trademarks

Your work is copyrighted when you create it.

*Your work is under copyright protection the moment it is created and fixed in a tangible form that is perceptible either directly or with the aid of a machine or device. . . . No publication or registration or other action in the Copyright Office is required to secure copyright. . . . registration is voluntary. Copyright exists from the moment the work is created.*¹

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work. [CLUS §101]²

You do not need to do anything for the work to be copyrighted.

- *Registration is voluntary. . . . Registration is not a condition of copyright protection.*
- *The use of a copyright notice is no longer required under U.S. law, although it is often beneficial. Because prior law did contain such a requirement, however, the use of notice is still relevant to the copyright status of older works.*

Copyright notice contains: the symbol, word, or abbreviation of "Copyright," the year of publication and name of the copyright holder, for example: © 2012 John Doe.³

(a) General Provisions.—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) Form of Notice.—If a notice appears on the copies, it shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word "Copyright", or the abbreviation "Copr."; and

(2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

¹ Unless otherwise noted, all copyright related quotes are from "Copyright Basics," United States Copyright Office, 17 February 2012, <<http://www.copyright.gov/circs/circ01.pdf>>

² *Copyright Law of the United States, and Related Laws Contained in Title 17 of the United States Code.* United States Copyright Office. 17 February 2012 < <http://www.copyright.gov/title17/circ92.pdf>> Inline reference: CLUS.

³ For sound recordings the copyright symbol is ® (found in Webdings). *The notice for phonorecords embodying a sound recording should contain all the following three elements: 1 The symbol π (the letter P in a circle); and 2 The year of first publication of the sound recording; and 3 The name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. If the producer of the sound recording is named on the phonorecord label or container and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice. Example: ® 2011 A.B.C. Records Inc*

12on14.com

flush left

14/26 Times Justified

10/12 Times Justified

ctr

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

(c) *Position of Notice.*—The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive. [CLUS §401]

Although you don't need to include a notice for your work to be copyrighted, having the notice is advantageous.

(d) *Evidentiary Weight of Notice.*—If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c) (2). [CLUS §401]

Do not use the poor man's copyright: do not mail a copy of your work as a form of copyright protection.

The practice of sending a copy of your own work to yourself is sometimes called a "poor man's copyright." There is no provision in the copyright law regarding any such type of protection, and it is not a substitute for registration. [http://www.copyright.gov/help/faq/faq-general.html]

You can copyright a work with a pseudonym.

*An author of a copyrighted work can use a pseudonym or pen name. A work is pseudonymous if the author is identified on copies or phonorecords of the work by a fictitious name. Nicknames and other diminutive forms of legal names are not considered fictitious. Copyright does not protect pseudonyms or other names. . . . **If you write under a pseudonym but want to be identified by your legal name in the Copyright Office's records,** give your legal name and your pseudonym on your application for copyright registration. Check "pseudonymous" on the application if the author is identified on copies of the work only under a fictitious name and if the work is not made for hire. Give the pseudonym where indicated. . . . **If you write under a pseudonym and do not want to have your identity revealed in the Copyright Office's records,** give your pseudonym and identify it as such on your application. You can leave blank the space for the name of the author. If an author's name is given, it will become part of the Office's online public records, which are accessible by Internet. The information cannot later be removed from the public records. You must identify your citizenship or domicile. . . . In no case should you omit the name of the copyright claimant. **You can use a pseudonym for the claimant name. But be aware that if a copyright is held under a fictitious name, business dealings involving the copyrighted property may raise questions about its ownership.** Consult an attorney for legal advice on this matter. . . . ["Pseudonyms" United States Copyright Office, 17 February 2012 <<http://www.copyright.gov/fls/fl101.html>> emphasis added]*

Titles, names, short phrases, recipes, etc., cannot be copyrighted.

Several categories of material are generally not eligible for federal copyright protection. These include among others:

- *works that have not been fixed in a tangible form of expression (for example, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded)*

- titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents
- ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration
- works consisting entirely of information that is common property and containing no original authorship (for example: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources)

If you are not a US citizen, you can still register your copyright in the US.

Any work that is protected by U.S. copyright law can be registered. This includes many works of foreign origin. All works that are unpublished, regardless of the nationality of the author, are protected in the United States. Works that are first published in the United States or in a country with which we have a copyright treaty or that are created by a citizen or domiciliary of a country with which we have a copyright treaty are also protected and may therefore be registered with the U.S. Copyright Office. See Circular 38a, International Copyright Relations of the United States, for the status of specific countries.

You may use work that is in public domain without getting permission.

While you may use work that is in public domain, you may not use related copyrighted work, for example: an anthology of public domain stories can be copyrighted as a collection—you may not republish the collection—and it could have introductory material or notes that are new, which you may not republish.

Works in public domain, were: 1) published before 1923 are in public domain; or 2) unpublished by authors who died before 1942; or 3) unpublished anonymous, pseudonymous and works for hire, before 1892.

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. [CLUS §101]

See “Copyright Term and the Public Domain in the United States: 1 January 2012” 17 February 2012 <<http://copyright.cornell.edu/resources/publicdomain.cfm>> also CLUS §301-305.

A derivative work is a work that incorporates a preexisting work.

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work”. [CLUS §101]

You may not create a derivative work unless the original work is yours, or is in public domain, or you have permission from the copyright holder.

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully. [CLUS § 103]

Fair use is an exception to the exclusivity granted the author by the copyright, but it is quite limited: the general advice is if you don't have permission to use a copyrighted work, don't.

Notwithstanding the provisions of sections 106 and 106A, [exclusive rights in copyrighted work] the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. [CLUS §107]*

See Stanford University Libraries, “Measuring Fair Use” <http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html>

Work for hire is an exception to who holds the copyright for a work: the hiring party holds all the rights—including credit and control—of copyright ownership, not the work's creator.

A “work made for hire” is—

- (1) a work prepared by an employee within the scope of his or her employment;*
- or*
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities. [CLUS §107]*

You may use trademarks in writing: your hero may drink a Pepsi, drive a Cadillac, and work for McDonald's. These trademarks must be distinguished from ordinary words: capitalizing the first letter is considered sufficient.

A nonowner [of a trademark] may also use a trademark nominatively—to refer to the actual trademarked product or its source. [17 February 2012 < http://en.wikipedia.org/wiki/Fair_use_%28U.S._trademark_law%29 >]

Nominative use, also “nominative fair use”, is a legal doctrine that provides an affirmative defense to trademark infringement as enunciated by the United States Ninth Circuit,[1] by which a person may use the trademark of another as a reference to describe the other product, or to compare it to their own. Nominative use may be considered to be either related to, or a type of “trademark fair use” (sometimes called “classic fair use” or “statutory fair use”). All “trademark fair use” doctrines, however classified, are distinct from the fair use doctrine in copyright law.

The nominative use test essentially states that one party may use or refer to the trademark of another if:

- 1. The product or service cannot be readily identified without using the trademark (e.g. trademark is descriptive of a person, place, or product attribute).*
- 2. The user only uses as much of the mark as is necessary for the identification (e.g. the words but not the font or symbol).*
- 3. The user does nothing to suggest sponsorship or endorsement by the trademark holder. This applies even if the nominative use is commercial, and the same test applies for metatags.*

Furthermore, if a use is found to be nominative, then by the definition of non-trademark uses, it can not dilute the trademark [17 February 2012 <http://en.wikipedia.org/wiki/Nominative_use>]

Many issues, like fair use, are not clear and often require the courts to rule on specific cases. For any question regarding specific issues, contact a copyright or intellectual properties attorney.

Online Resources:

US Copyright Office home page: <http://www.copyright.gov/>

Copyright Basics: <http://www.copyright.gov/circs/circ01.pdf>

Copyright Law of the United States, and Related Laws Contained in Title 17 of the United States Code: <http://www.copyright.gov/title17/circ92.pdf>

Frequently Asked questions: <http://www.copyright.gov/help/faq/>

Public Domain Copyright Term: <http://copyright.cornell.edu/resources/publicdomain.cfm>

Public Domain: http://en.wikipedia.org/wiki/Public_domain

Frequently Asked questions: <http://www.copyright.gov/help/faq/>

