I.P. 101

FOCUS ON COPYRIGHT

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A bit about me

- I've been practicing law for 40 years
- Unlike *some* famous people, I did pass the bar exam on the first try
- I've worked in the professional sports industry since 1979
- My BA is from Yale and my JD is from Fordham
- I'm admitted to the bar in New York, Oregon, and at the Supreme Court of the United States
- I'm now semi-retired and work with about 6-8 clients and a couple of not-for-profit organizations

Forms of intellectual property

- Utility patents – protect inventions
- Design patents – protect decorative elements of useful objects
- Plant patents – protect new and distinct varieties
- Trademarks – act as source identifiers for goods and services (words, logos, colors, sounds, smells)
- Trade secrets
- And our favorite…. COPYRIGHTS

What it means

Literally, COPYRIGHT is the legal RIGHT TO COPY**

** includes: right to reproduce, adapt, distribute, publicly display, publicly perform

US Constitution
Article 1, Section 8

Enumerated powers of Congress

- ...To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries...

1710 – Statute of Anne, England

- "*A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the rightful Owners thereof*"
- Did not apply in any British colonies, including North America
- Provided for an initial copyright term of 14 years for new works, renewable for another 14 years (21 years for existing works)
- Only the author and their authorized printer(s) could publish the author's creations
- Copyright Act 1814 updated the statute but could not prevent reprints in the now-independent US and other countries (like the 1816 Philadelphia edition of *Emma*)

More recent UK copyright

- Imperial Copyright Act 1911
  - Repealed all previous copyright laws in the UK
  - Added copyright for sound recordings
  - Publication permitted under compulsory licensing during final 25 years @ 10% royalty
- Largely repealed by Copyright Act 1956
- In turn, CA 1956 was largely repealed by the Copyright, Designs and Patents Act 1988
  - Amended effective January 1996, it codifies duration of copyright at author's life plus 70 years (or 50 years from the year of creation for works created by a computer**)
  - Limits copyright protection to literary work, dramatic work, musical work, artistic work, films, sound recordings, broadcasts, and typographical arrangement of published editions

** It's unclear how this applies to works of generative AI resulting from collaboration between a computer and a human being

Copyright in Canada

- Life of the author plus 70 years
- No registration required for any purpose
- Registration is available and automatic (no human review)
- Copyright attaches at the moment of creation/fixation
- Member of Berne Convention

Australian copyright

- Copyright Act 1968
  - Author's life plus 50 years
  - Effective January 2005: changed to life plus 70 years, but not retroactive for copyrights already expired
  - Publishers must lodge copies of their works in the National Library of Australia, but copyright protection is not contingent on deposit of the works

US Copyright Acts

- Copyright Act of 1790
  - Federal law protected published works
  - State law had to protect unpublished works
  - Applied only to US citizens and residents (Charles Dickens complained about this)
- International Copyright Act of 1891
  - Extended possibility of protection to works of non-US citizens and those writing outside the US, subject to conditions including reciprocity
- Copyright Act of 1976
  - Extended protection from the moment of creation/fixation (registration required for enforcement, human review required for registration)
  - 1976 Act: Life of the author plus 50 years;
  - For works made for hire: 75 years from first publication or 100 years from creation, whichever expires first
- Sonny Bono Copyright Term Extension Act of 1998**
  - 1998 extension: Life of the author plus 70 years; for works made for hire, 95 years from first publication or 120 years from creation, whichever expires first
- Digital Millennium Copyright Act 1998 – prohibits circumvention of technological access controls, subject to exceptions; provides conditional safe harbors limiting online service providers' liability for certain third-party infringement

** AKA the Mickey Mouse Protection Act

EU Copyright Laws

- Copyright Term Directive 1993
- Copyright Term Directive 2006
- Information Society Directive
- Directive on Copyright in the Digital Single Market
- Protection extends for author's life plus 70 years
- Copyright attaches at the moment of creation/fixation

Feature	🇺🇸 The Gatekeeper System (United States)	🇨🇦 The Notary System (Canada)	🇬🇧🇪🇺🇦🇺 The Invisible System (UK, EU, Australia)
Official Registry	**Yes** (US Copyright Office)	**Yes** (CIPO)	**No** (None exists for copyright)
Government Cost	Paid (~$45 - $125+ USD)	Paid (~$50 - $65 CAD)	**Free** ($0)
Submission Model	**Mandatory Deposit Copy**	Metadata/Form Only	**Automatic** (No filing allowed)
Human Review?	**Yes** (Evaluated for creativity)	**No** (Automated administrative logging)	**No** (No office to review content)
Prerequisite to Sue?	**Yes** (Barred from federal court without it)	**No** (Optional shield; can sue without it)	**No** (Rights enforced purely via evidence)
How to Prove Ownership	Present your formal USCO Certificate	Present CIPO Certificate *(Shifts burden of proof)*	Present internal audit trails *(Drafts, emails, source code)*

Berne Convention

- Convention was originally held in 1886
- USA acceded only in 1989!
- Has been ratified by 182 countries
- Berne protects economic rights and requires protection of certain moral rights, including attribution and integrity; national implementation varies
- Moral rights, where they exist, still vary from country to country
- Protection generally does not depend on registration or other formalities
- Introduced the principle of author control of derivative works based on the author's original work
- Foreign authors have the same rights as domestic authors in all signatory countries

What about generative AI?

From the US Copyright Office:

The Copyright Office confirms that the use of AI to assist in the process of creation or the inclusion of AI-generated material in a larger human-generated work does not bar copyrightability. It also finds that the case has not been made for changes to existing law to provide additional protection for AI-generated outputs.

"After considering the extensive public comments and the current state of technological development, our conclusions turn on the centrality of human creativity to copyright," said Shira Perlmutter, Register of Copyrights and Director of the U.S. Copyright Office. "Where that creativity is expressed through the use of AI systems, it continues to enjoy protection. Extending protection to material whose expressive elements are determined by a machine, however, would undermine rather than further the constitutional goals of copyright."

Bottom line: human-written text and sufficiently creative human revisions or arrangements may be protected; purely AI-generated expression is not

Jurisdiction	Can you copyright *pure* AI output?	The Legal Standard
🇺🇸 United States	**No** ❌	**Human Authorship Requirement:** Bedrock rule. A prompt is an unprotectable "idea," not an expression.
🇪🇺 European Union	**No** ❌	**Anthropocentric Standard:** Work must reflect the author's "own intellectual creation" and personal creative choices.
🇨🇦 Canada	**No** ❌	**Skill & Judgment Standard:** Requires an exercise of human talent and intellect. Autonomous AI content falls into the public domain.
🇦🇺 Australia	**No** ❌	**Independent Effort:** Rejects protection unless an identifiable human author directed the specific expression.
🇬🇧 United Kingdom	**Potentially Yes** ⚠️	**Computer-Generated Works (CDPA Section 9(3)):** Protects works with *no human author*, granting rights to the person who set up the system.

But I'm a human!

- Yes, you are
- You are a human and your original creative expression generally receives copyright protection automatically when you write it down or otherwise fix it in a tangible form
- Thanks to the Berne Convention, copyright protection is generally automatic, and international treaties provide protection in other member countries under their respective national laws
- But you'd like a certificate?

Info to assemble when preparing to file copyright application (US)

- Type of work
- Title of work, and any other titles it might have had previously
- Year of completion
- Publication status and date of first publication, if applicable
- Author's name and citizenship or domicile
- Was the author's work a work made for hire?
- Is the author anonymous?
- Is the author using a pseudonym? What is it?
- Author's year of birth (and death, if known)
- Who is claiming ownership of the copyright? Plus mailing address and if not the author, how did this person or entity gain ownership?
- Plus additional questions that will affect revised editions of existing works
- All of this will become public record
- https://www.copyright.gov/intellectual-property-toolkits/copyright-registration-toolkit.pdf

What is a work for hire?

- A work made for hire is just that:
  - A work created by an employee within the scope of employment; or
  - Certain specially commissioned works that the parties expressly agree in a signed writing will be works made for hire
- Remember the original rule: copyright attaches at the moment of creation and fixation
- If I'm a writer at an ad agency, and I'm a W-2 employee paid to write, the agency owns my work automatically (it's considered a work for hire)
- If I'm a doctor employed by a hospital, and I paint or sculpt in my free time, that is outside the realm of my employment, and the hospital has no ownership of my artworks unless I have made a written assignment of them to the hospital
- If I hire a freelancer, payment alone does not give me copyright ownership; I can obtain ownership through a signed copyright assignment, even if the work does not qualify as a work made for hire

What's a derivative work?

- All of JAFF is derivative works!
- A derivative work is a work adapted from, based or predicated on a previously existing work
- Jane died in 1817, so her works are no longer subject to copyright (this is called "the public domain")
- Our original contributions can be protected by copyright, but Austen's underlying material remains free for everyone to use
- We generally need permission to adapt another JAFF author's protected original contributions
- General ideas, premises, and tropes are not protected by copyright, but fully developed characters are
- So Lord Saye is 100% off limits!

What about fair use? (US)

- Fair use is an affirmative defense to a claim of copyright infringement; that means you can try to cite it as a defense when you get sued
- It is not a "Get Out of Jail Free" card!
- Some qualifying purposes are: criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research
- Here are the four factors to consider:
  - the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - the nature of the copyrighted work;
  - the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - the effect of the use upon the potential market for or value of the copyrighted work
- "I'm not making any money from this" is not sufficient
- "I'm a nonprofit" is also not sufficient

Is the downloading of books and training of AI models on book content considered fair use (US)?

- In *Bartz v. Anthropic*** the answer is both yes and no
  - Using books (even without paying for them) to train Claude and its predecessors? YES, the court found this use to be transformative
  - Buying physical books, scanning them, and destroying the physical originals? YES, on the theory that the scanned books replaced the legally acquired physical books
  - Downloading and retaining pirated books to build a permanent, general-purpose central library? NO, the possibility of future training on those books was not sufficient to satisfy the requirements of fair use

** A district court decision, subject to appeal

Canada, EU, UK don't necessarily agree

- "Fair dealing" is much less flexible and more prescriptive in those jurisdictions
- Accepted categories are: research, education, parody, or news reporting
- Canadian judges tend to be more flexible than UK judges
- EU: member states enact their own definitions but also tend to be more strict

What does “transformative” mean?

- A use is transformative when it puts someone else’s copyrighted material to a meaningfully different purpose – not just offering another version of the same thing
- Quoting a passage to analyze the author’s argument, for example, uses the passage as something to examine, rather than simply giving readers a bit of the story to enjoy
- Courts also consider what kind of work was copied, how much was taken, and the effect on the market for the original
  - Reproducing a novel’s climactic scene so readers can enjoy the scene again serves essentially the original storytelling purpose.
  - Quoting portions of that scene in an essay explaining how the author manipulates the reader’s sympathies gives the quotations a different job: they become evidence for criticism.
- Transformative use asks: ‘What different job is the borrowed material doing here?’ A genuinely different purpose can support fair use—but changing the material is not enough, and transformation is only part of the test.

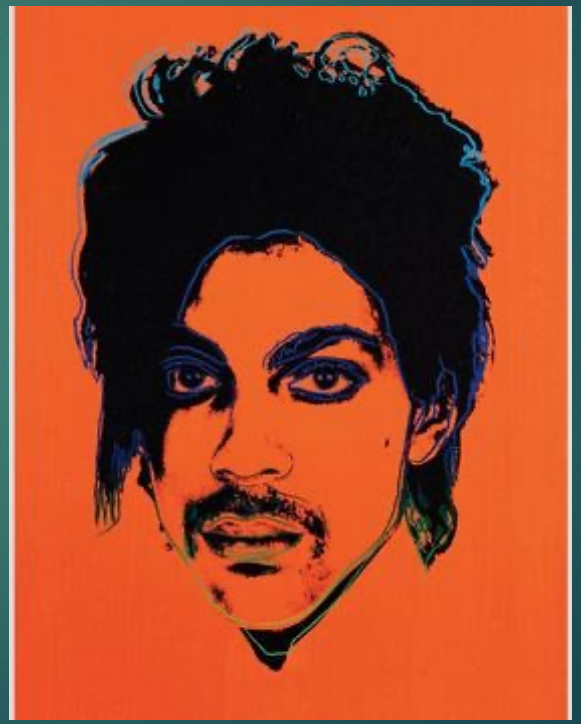
Not fair use





A new artistic treatment is not automatically fair use





Questions?