

Copyright Law

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Topics:

- Copyright formalities
- Thinking like a copyright lawyer: Identify the “thing” at issue. How do you secure it? Protect it? Exploit it? Use it? When? How?
- Was: Open-ended, flexible concepts. Now: Detailed, complex, statutory rules.

What are they?

1. Publication 2. Notice 3. Registration 4. Deposit

Why have them (or not)?

Both author protective and public protective reasons:

- Evidentiary purposes
- Precautionary purposes
- Channelling purposes
- US policy v international policy (Berne)

How do they matter today?

Today's default rule:

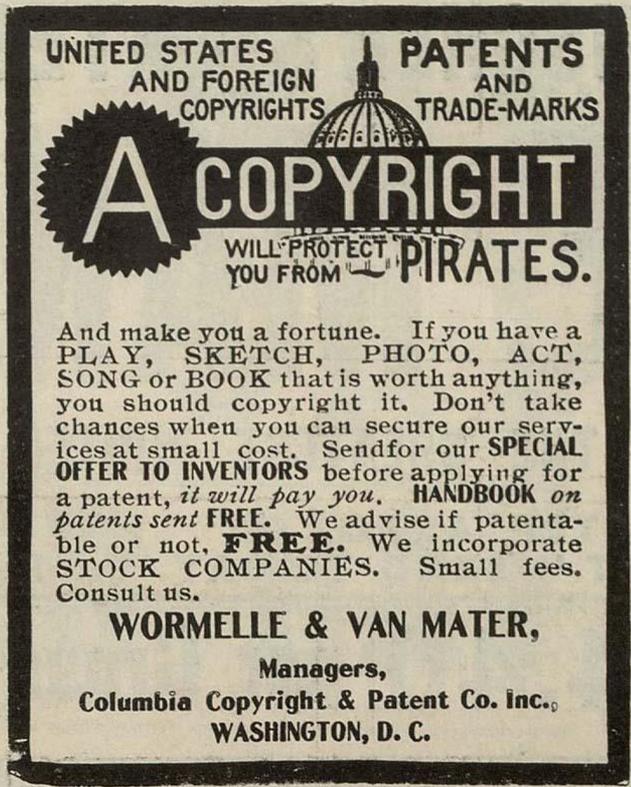
A copyrightable work of authorship is protected by copyright law immediately and automatically once it meets the requirements of § 102 of the Copyright Act.

How do you know? Read the statute!



How have they changed over time?

- Pre-1978: extensive, detailed formalities regarding © existence and duration.
- U.S. accession to Berne Convention 1988, effective March 1, 1989; Berne Art. 5(2): “The enjoyment and the exercise of these rights shall not be subject to any formality.”
- The Copyright Act is amended. U.S. © formalities now apply to U.S. works (works published in the U.S., or works w/U.S. nationals and residents as authors) but not to other works.



UNITED STATES AND FOREIGN PATENTS AND TRADE-MARKS

A COPYRIGHT WILL PROTECT YOU FROM PIRATES.

And make you a fortune. If you have a PLAY, SKETCH, PHOTO, ACT, SONG or BOOK that is worth anything, you should copyright it. Don't take chances when you can secure our services at small cost. Send for our **SPECIAL OFFER TO INVENTORS** before applying for a patent, *it will pay you.* **HANDBOOK on patents sent FREE.** We advise if patentable or not. **FREE.** We incorporate **STOCK COMPANIES.** Small fees. Consult us.

WORMELLE & VAN MATER,
Managers,
Columbia Copyright & Patent Co. inc.,
WASHINGTON, D. C.

Copyright Formalities: **Publication**, and when does copyright arise in a © work?

Nb. all rights are national in scope. U.S. copyright, even for works first published abroad, depends on compliance with U.S. law.

Rules on acquiring U.S. copyright change a/o 1/1/78, a/k/a effective date of the Copyright Act of 1976. Start with **originality**, then:

- **Created pre-1978?: (i) Publication with (ii) proper notice** and (iii) manufacture of copies in the US as the keys to copyright protection.
- **Created post-1978: (i) Fixation in (ii) a tangible medium of expression** as the key to copyright protection.
- And nb. § 301 (**preemption**): Abolishes rights “equivalent” to copyright w/r/t © subject matter, post-1978.



Copyright Formalities: Preemption – a side note

“Preemption” (section 301) means:

Congress intended to consolidate copyright in the federal statutory system

“Common law” copyright (copyright in most unpublished works, pre-1978) is abolished; any relevant legal rights are found in the federal Copyright Act

Other, related legal claims are prohibited relative to the “subject matter of copyright” (meaning: allegations that the defendant copied, distributed, publicly performed something that either is within the subject matter of © (“an original work of authorship,” etc) or is excluded from © (is in the public domain, such as an idea or system)

For example:

- Tort claims (misappropriation, “hot news” or otherwise, unfair competition)
- Some breach of contract claims
- Rights of publicity, sometimes

Copyright Formalities: **Publication**, and when does copyright arise in a © work?

For works created pre-1978: *publication matters – a lot.*

“Common law” copyright (state law) for unpublished works co-existed with “statutory” copyright (federal law) for published works.

For works created and “published” in the U.S. **before 1978**, courts often distinguish **general publication** from **limited publication**.

- **If general publication occurred**, ask: Was there strict compliance with 1909 Act **notice** rules? If so, then © applies, and calculate duration. If no, then the work is in the public domain.
- **If limited publication (or no publication) occurred**, ask: Was the work registered anyway (for certain kinds of works)? If it was, © applies, and calculate duration.

Publication and notice requirements excluded lots of older works from federal ©, especially music created by performers without access to © lawyers.

What is “publication”?



Estate of Martin Luther King, Jr. v. CBS (11th Cir. 1999)

For works **fixed after 1/1/78**, or **fixed before 1/1/78** but not published or registered before 1/1/78, ask:

Was the work disclosed to the public before 3/1/89? (Why? **3/1/89** = Effective date of the Berne Convention Implementation Act (BCIA)).

(a) If no, copyright applies; calculate duration.

(b) If yes, ask: Was **notice** included? If not, copyright applies if limited publication occurred; work is in the public domain if general publication occurred.

For works **fixed after 1/1/78**, or fixed before 1/1/78 but **not** published or registered before 1/1/78, ask:

Was the work disclosed to the public before 3/1/89?

For post-1978 & pre-1989 works, “looser” mandatory notice rules applied: If general publication occurred, need **notice** (§ 401) OR cure for omitted notice (§ 405)

Where notice was/is required (prior to 3/1/89), that means valid notice: proper form, content, placement.

Incorrect notice = no notice.

For works fixed after 3/1/89, notice is no longer required; publication status is irrelevant to existence of copyright protection. The statutory change reflects U.S. accession to Berne.

Notice still brings benefits (eliminates “innocent infringer” defense w/regard to damages). § 405(b)

Copyright Formalities: Do publication and notice formalities matter today?

Case: 16-56287, 08/15/2019, ID: 11398602, DktEntry: 125, Page 37 of 55

DEC 22 1967

2 1967

TAURUS

by RANDY EU 35222

CALIFORNIA

tr.

Da Capo CODA

Hollenbeck Music Co
1967

Skidmore v. Led Zeppelin (9th Cir. 2020) (en banc):

The scope of the plaintiff's copyright is limited to the musical composition fixed in the deposit copy.



Implications:

Originality that is manifested in the *performance* of the work is excluded from the scope of the plaintiff's right.

Plaintiff is prevented from playing a recording of the song for the jury, at trial.

(Going forward, note possible changes based on the Music Modernization Act (MMA) – to be discussed later!)

Forfeited copyrights may be restored, for non-U.S. works. Applies to Berne and WTO members. *See* § 104A

Relevant to lost U.S. copyright protection lost due to failure to comply with U.S. formalities, such as failure to provide correct © notice on a published work (which was common for works published outside the U.S.)

- **Nb. before applying § 104A, consider U.S. notice-and-publication rules to determine whether U.S. copyright was ever lost. Was the work published? If so, was notice included?**
- Work must still be subject to protection in its country of origin.
- If notice rules for restoration under § 104A are complied with, then restored © protection applies (for most countries) as of 1/1/96.
- Provisions in § 104A protect “reliance” parties.
- § 104A is constitutional, even though it has the effect of restoring copyright in the US to works that may have been in the public domain in the US. *See Golan v. Holder* (U.S. 2012)

Copyright Formalities: Registration and Deposit

Post-1909, pre-1/1/78, registration was optional for initial copyright protection, but required as a condition of filing an infringement suit, and for renewal

Post-1/1/78, registration is optional, but U.S. works must be registered as a condition of suit, under § 411 (*Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC* (U.S. 2019); but see *Reed Elsevier v. Muchnick* (U.S. 2010))

Certificate of Registration

 This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Registration Number
TXu 2-054-117
Effective Date of Registration:
April 05, 2017

Karen Leigh Uppett
Acting United States Register of Copyrights and Director

Title _____
Title of Work: Can Do Kosher

Completion/Publication _____
Year of Completion: 2016

Author _____
• Author: Chasya Katriela Eshkol
Author Created: text
Citizen of: United States
Domiciled in: United States
Year Born: 1964

Copyright Claimant _____
Copyright Claimant: Chasya Katriela Eshkol
7119 E Shea Blvd, Ste 109-170, Scottsdale, AZ, 85254, United States

Rights and Permissions _____
Name: Chasya Katriela Eshkol
Email: _____
Telephone: _____

Certification _____
Name: Chasya Katriela Eshkol
Date: April 05, 2017

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[Note that the Certificate of Registration tells you essentially nothing about the content(s) of the work, unlike an issued patent or a trademark registration.]

Post-1/1/78, benefits of registration:

Evidentiary benefits (registration must be w/in 5 years of first publication). § 410

Benefits of prompt registration:

Expanded remedial options--statutory damages and attorneys' fees are available **if** registration is effected prior to infringement commencing or within 3 months of initial publication, for newly published works. § 412

How to register: <https://www.copyright.gov/circs/circ02.pdf>

Inexpensive; usually possible to complete online; examination by the Copyright Office is limited & nonpublic (compared to examination of patent and trademark applications by USPTO); registration process is relatively fast (usually a matter of a few weeks).

Registration has been optional [who claims rights, in what, and when?]

There is no exhaustive, searchable database (in print or online) of copyrighted works, even registered copyrighted works [compare patents, registered trademarks]

Incomplete definitions of “the work of authorship” in the law leads to practical problems:

- Works within works: what to search for when “clearing” rights?
- What was published? Was notice attached correctly to “the work”?
- Copyright “trolls”; orphan copyrights/orphan works

Copyright Formalities: **Deposit**

Required, with Library of Congress: Two copies of published works. § 407

One copy of unpublished works
Special rules for certain kinds of works (nb. computer programs)
37 CFR § 202.20

LoC has the power to demand deposit; modest fines for noncompliance

LoC as depository institution dates from 1870



Deposit schemes go back to the original Statute of Anne.

Publishers hate them.

Is the deposit requirement an unconstitutional taking?



the end