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1. Introduction

There are many types of Intellectual Property, but the principal categories include patents, trademarks, copyrights and trade secrets. While an intangible may be protected under more than one type of Intellectual Property, it is very important not to confuse the different categories; the laws governing them are vastly different. Often the owner of the intellectual property has a choice of protection strategies. As you might well imagine, the more complex and expensive strategies typically provide the greatest protection.

2. Copyright Protection in General

Copyright pertains to an original work of authorship. Copyright is the exclusive right of the copyright owner to copy, distribute and perform the work. All copyright law is federal---there are no state statutes or common law copyright provisions. Once an original work of authorship is fixed in a tangible medium, copyright protection attaches. Although federal registration¹ is not mandatory, it is required to bring suit in the United States and may entitle the author to attorney fees and statutory damages. Unique to copyright law is the potential for the defendant to obtain attorney fees in certain frivolous actions.

Copyright endures for a term consisting of the life of the author, plus 70 years after the author's death. In the case of joint works, the term consists of the life of the last surviving author plus 70 years. In the case of an anonymous, pseudonymous or work made for hire, the term is 95 years from the date of its first publication, or a term of 120 years from the date of its creation, whichever expires first. As uniqueness is not a prerequisite of copyright, it is hypothetically possible for two authors to obtain separate copyright registrations on an identical work. For this reason, the Copyright Office does not search an application for registration against existing registered works. This keeps the cost of copyright registration much lower than the cost of patent or trademark registration.

Copyright covers works in numerous fields, including literature, music, drama, choreography, pictorial, graphic and sculptural, motion picture, sound recordings, and architectural works. Copyright does not protect pure ideas, procedures, processes, methods of operation, concepts, principals or the functional aspect of any work or device. Proof of infringement of a copyrighted work requires proof of ownership of the copyright, and evidence of copying.

¹ United States Code Title 17

Since direct evidence of copying is rarely available, courts will accept evidence of the accused infringer's access to the copyrighted work, and a substantial similarity between the two works as rebuttable proof of copying. Obviously, the more similar the two works, the lower the requirement for proof of access and vice versa. Once infringement is shown, damages may include an injunction, as well as the copyright owner's damages or the infringer's profits. Additionally, federal copyright laws provide for statutory damages of five hundred to two thousand dollars for infringement, and up to one hundred thousand dollars in the case of willful and malicious infringement. As with patents and trademarks, attorney fees are available, but unlike patents and trademarks, the statute provides for the defendant to recoup attorney fees if the copyright owner brings an action that is frivolous or unreasonable.

A work is afforded copyright protection just by being published. A 1989 federal statute lifted the prerequisite to register a copyrighted work prior to its publication, to prevent it from moving into the public domain. The U.S., however, does require the copyrighted work to be registered prior to instigation of infringement litigation, and does limit damages associated with acts undertaken prior to the registration. Although copyright registration may take eight to ten months, the Copyright Office provides expedited service for an increased fee in the situation when an infringement has already occurred.

Although there is a "fair use" exception tempering copyright enforcement, this exception is very narrow and should not be relied upon without a prior written opinion as to the applicability to a particular situation. In determining whether a particular use constitutes "fair use" under the United States copyright laws, the court examines the purpose and character of the work, the nature of the copyrighted work, the amount of the work taken, and the economic impact of the particular taking. Obviously, courts will view non-commercial usage, form book usage, de minimis takings, and takings of low economic impact as more of a fair use than commercial takings extracting the heart of a copyrightable work to usurp the profits and royalties associated therewith. As a general rule, parody and critical commentary are given a wider berth than commercial usage.

Some special copyright issues associated with the Internet include the activity known as deep linking. "Deep linking" occurs when a party publishes a hypertext link on its site, not to the "home page" of an alternate site, but to a more deeply imbedded page of that site. While this would not normally appear to be a problem, in situations where web sites drive revenue based upon page views, by bypassing several layers of web pages the web site operator may lose substantial revenue. Such deep linking should be done only with the express permission of the web site owner.

Another activity associated with web sites includes "framing," whereby a web site includes a link to an alternate web site. Instead of merely displaying the alternate web site, the web site "frames" the alternate website with banner advertising or the original web site's marks or logos, thereby giving the impression that the content is associated with or provided by the original site. Such activity could subject the purveyor to substantial liability including, but not limited to, copyright and/or trademark infringement.

3. Copyright Law and the Internet

Although the Internet is full of valuable information, it also spawns an incredible amount of inaccurate information. Unfortunately, much of the information relating to copyright law on the Internet is inaccurate. Visit any "open source" chat room and you will read armchair lawyers detailing their version of copyright "fair use," that can lead the unwary toward civil liability and even criminal sanctions.

As noted above, copyright is the *exclusive* right of the owner to use or modify a copyrighted work. Just because a particular graphic or article does not contain a copyright notice, just because you may only intend to use a small amount of the material, or just because you modify the work, you do not avoid infringing the author's copyright. Giving credit to the author, offering the material for free, or providing exposure to the author, does not overcome copyright infringement. You must obtain written permission from the copyright owner to use the work.

A major problem associated with the Internet is the inability to positively identify authorship and/or ownership of a particular copyrighted work. Just because an individual posts a work on a website, stating that it is free to use, does not necessarily make it so. Many times the website owner, in good faith, believes that the work is in the public domain, or is available for distribution, when in fact it is not. Sometimes, a party may even create a particularly valuable work and "allow" it to fall onto the Internet, where it gets widely distributed. At this point, the copyright owner does an Internet search for the work, and begins filing lawsuits to obtain statutory damages for each infringement. As the poster of the infringing work cannot produce any contractual right to post the material, and as the poster cannot prove that the author indeed disseminated the material, the poster typically must pay damages and remove the material from the website. It is, therefore, imperative that you do not copy, post or transmit any material from the Internet unless you are absolutely sure as to its authorship, and have a written license from the copyright owner to do so.

4. Digital Millennium Copyright Act (DMCA)

Intellectual property laws are akin to living organisms. Although laws are enacted to address current issues and anticipate future problems, new issues arise which no one could have anticipated. In the field of the Internet and new technology, these issues arise much faster, necessitating a constantly evolving legal framework. On October 28, 1998, the Digital Millennium Copyright Act ("DMCA") was signed into law to address the impact of electronic commerce on the existing legal framework. This Act addresses issues of copyright and new technology, and implements international treaties into United States law.

The Act specifically states that it does not affect the rights, remedies, limitations or defenses to copyright infringement, including fair use. Although the Act contains many provisions affecting broad areas of copyright on the Internet, the three principal aspects of the DMCA are (a) the limitations on liability for Internet Service Providers (ISPs); (b) the prohibition on circumventing anti-piracy software; and (c) the requirement that rebroadcasters of copyrighted material on the web pay royalties. As the third requirement is rather straight forward, without many exceptions, only the first two provisions are discussed in detail below.

a. Internet Service Provider Liability

Before enactment of the DMCA, ISPs were in limbo as to how to handle copyright infringement by their users. Obviously, ISPs are much easier to identify and have much deeper pockets than the average end user. ISPs, therefore, became the target of many copyright infringement suits. The Catch-22 placed upon the ISPs was that without self-policing, their services became a haven for copyright infringers. Alternatively, if they invoked self-policing measures to weed out infringers, plaintiff's often held them to a higher standard in infringement suits, invoking the ISP's actual knowledge of the infringement as evidence of willfully infringing behavior. Accordingly, Congress enacted provisions into the DMCA which shield ISPs from liability arising out of copyright infringement, provided the ISP:

- (a) Does not have actual knowledge of information from which it would be apparent that the material or an activity using the material on their system or network is infringing;
- (b) Does not receive any financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(c) Upon notification of claimed infringement as provided under the DMCA, the ISP responds expeditiously to remove, or disable access to, the material that is claimed to be infringing, or to be the subject of infringing activity.²

To avail itself of the safe havens provided under the DMCA, an ISP must adopt measures prescribed under the DMCA, including: (a) adopting, reasonably implementing, and informing subscribers and account holders of the ISP's policy; and (b) providing for the termination in appropriate circumstances of subscribers and account holders accounts in the event of repeat infringement. The ISP policy, however, must accommodate, and must not interfere with, standard technical measures.³

Hand in hand with the foregoing safe haven provisions, the DMCA provides the elimination of ISP liability for removal of allegedly infringing items in certain circumstances, regardless of whether the material or activity is ultimately determined to be infringing.⁴ If the removal is based upon a notification of infringement, as identified above, the ISP may avoid liability by: (a) taking reasonable steps to promptly notify the subscriber that it has removed or disabled access to the material; (b) upon receipt of a counter notification of non-infringement by the alleged infringer, forwarding the counter notification to the original complainant; (c) informing the complainant that the material will be replaced in 10 business days, and (d) replacing the material in ten days unless it receives notification from the original complainant that the original complainant has filed a lawsuit on the matter.

² 17 USC Section 512(c)(1)

³ 17 USC Section 512(i)

⁴ 15 USC Section 512(g)(1)

b. Anti-Circumvention

Under Section 1201 of the DMCA, no person shall circumvent a technological measure that effectively controls access to a copyrighted work.⁵ This typically relates to special software used to "crack" copyright protections on software, DVDs, and the like. The Act also prohibits trafficking in any technology product, service, device, component or part thereof, that: (a) is primarily designed to circumvent a technological measure that effectively controls access to a copyrighted work; (b) has only limited commercially significant purpose or use, other than to circumvent a technological measure that effectively controls access to a copyrighted work, or (c) is marketed by an entity with that entity's knowledge for use in circumventing a technological measure that effectively controls access to a copyrighted work.⁶

The term "traffic", as used in the Act, is very important, as courts have interpreted this term to include merely linking to a website containing anti-circumvention technology, if there is clear and convincing evidence that the entity: (a) knew at the relevant time the offending material was on the website; (b) knew the circumvention technology could not be lawfully offered; and (c) created or maintained the link for the purpose of disseminating circumvention technology.⁷ While at first blush this ruling may appear to be Orwellian in its scope, the requirement of a finding of clear and convincing evidence that the entity knew that the circumvention technology could not lawfully be offered may be very difficult to prove.

In Universal Studios v. Reimerdes, the court found liability because the entity had previously been enjoined from directly distributing the circumvention software itself, and subsequently began linking to similar sites. Indeed, the court distinguished cases where the entity did not intentionally link to sites containing the circumvention technology. Although the holding of Reimerdes may indeed be rather narrow, if you become aware that your website links to another website containing such circumvention software, you may wish to seriously consider linking to an alternative site which does not.

⁵ 17 USC Section 1201(a)(1)

⁶ 17 USC Section 1201(a)(2)

⁷ Universal Studios v. Reimerdes, 111 F.Supp.2d 294 (SDNY 2000)