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ESSENTIALS OF COPYRIGHTS AND TRADEMARKS FOR CREATIVES

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INTRODUCTION

A. FUNDAMENTALS OF COPYRIGHT LAW

I. Copyright Statue
II. What is Copyrightable?
III. What is not Copyrightable?
IV. What Are the Rights of a Copyright Owner?
V. Who Owns the Copyright?
VI. Duration of Copyrights
VII. Registration
VIII. Notice
IX. Works in the Public Domain

B. FUNDAMENTALS OF TRADEMARK LAW

I. Trademark Statute
II. What Are Trademarks?
III. Name Selection and Clearance
IV. Identifying Trademark Classes
V. Filing Basis: In Use v. Intent to Use Applications
VI. Enforcement & Maintenance

C. APPLYING COPYRIGHT LAW TO THE PRACTICE OF ENTERTAINMENT LAW

I. Copyrights in the Music Industry
Types of Music Copyrights
Music Licenses
Album Artwork, Pictures, Videos and Other Content

II. Copyrights in the Film & Television Industry
Original Work or the Acquisition of Rights
Registration
Work Made for Hire: Scriptwriters
Characters and Titles
Licensing

III. Copyrights in Podcasting
Ownership
Music and Use of Other Works

IV. Influencers Use of Copyrights
Who Owns the Content Created for Brands
Who Owns the Materials Commissioned by the Influencer

D. APPLYING TRADEMARK LAW TO THE PRACTICE OF ENTERTAINMENT LAW

I. Trademark in the Music Industry
Artist and Label Names
Merchandise

II. Trademarks in the Television and Film Industry
Titles & Clearance Reports
Use of Famous Names and Trademarks
Creation of Merchandise

III. Use of Trademarks in Podcasting
Show Names
Merchandise

IV. Influencer's Use of Trademarks
YouTube Channel
Branding

INTRODUCTION

This paper discusses the copyright and trademark laws relevant to the entertainment industry and how you may encounter them within the legal practices of music, film and television, podcasting, and influencer dealmaking. Issues such as filing processes and procedures, registration, enforcement, infringement, and defenses are beyond the scope of this discussion.

FUNDAMENTALS OF COPYRIGHT LAW

I. Copyright Statue.

Title 17 of the United States Codes is the federal statute that governs copyright law and its amendments enacted by Congress.[1] As amended, the federal Copyright Act of 1976 and the 1909 Act provide the rules governing copyright law today. Like most areas of law, the statute sets out the rules and case law serves as the authority to interpret those rules. Since copyright is governed by federal law, cases must be prosecuted in federal court.

While the Copyright Act of 1976 is today's primary authority, the 1909 Act is often referred to not only because it was in effect until 1978 but also because many works created before its enactment are still governed by the laws applied to registration, notice, duration, and renewal. Most practitioners will focus on works created before 1978, so the application of the 1909 Act will be irrelevant. However, it's mentioned to make you fully aware that the date a work was created under copyright law matters in reference to the appropriate application of laws.

17 U.S.C. §102(a) defines what works qualify for copyright protection:

> *In accordance with this title, copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.* [2]

17 U.S.C. § 101 defines what qualifies as fixed:

> *"[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both that are transmitted is 'fixed' for the purposes of this title if a fixation of the work is being made simultaneously with its transmission."* [3]

The court in Feist Publications, Inc. v. Rural Telephone Service Co.,[4] established what qualifies as a work original to the author to qualify for copyright protection:

> *"To qualify for copyright protection, a work must be original to the author," which means that the work must be "independently created by the author" and it must possess "at least some minimal degree of creativity." The term "independent creation" means that the author created the work without copying from other works.*[5] *The copyright law protects "those components of a work that are original to the author," but "originality" does not require "novelty."*[6] *A work*

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[1] US Copyright Office. (n.d.). Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code. Retrieved October 12, 2023, from https://www.copyright.gov/title17/
[2] Id at 8.
[3] Id. at 3.
[4] Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991)
[5] Id. at 345.
[6] Id. at 348.

may satisfy the independent creation requirement "even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." [7]

I. What is Copyrightable?

17 U.S.C. §102(a) and 17 U.S.C. §103(a) list the following works of authorship as protectable under the statute:

a. Literary works;
b. Musical works, including any accompanying words;
c. Dramatic works, including any accompanying music;
d. Pantomimes and choreographic works;
e. Pictorial, graphic, and sculptural works;
f. Motion pictures and other audiovisual works;
g. Sound recordings;
h. Architectural works;
i. Compilations; and
j. Derivative works.

While most works fall under this list, it is worth noting that it was never intended to be exclusive or exhaustive. It only serves to illustrate what is protectable. The categories are also not mutually exclusive; therefore, a work can fall under more than one category.[8] In the practice of entertainment law, most works will be categorized as literary works (i.e., a young adult novel), musical works (i.e., a song joint authored by a client who composes the music or writes the lyrics), dramatic works (i.e., a movie script), motion pictures, sound recordings (i.e. a producer who makes a recording of an artist's vocal performance), compilations (i.e. best of albums) and derivative works (i.e. movie sequel).

II. What is not Copyrightable?

While the list of works in section 102(a) is not exhaustive, section 102(b)[9] does provide a list of things that cannot be copyrighted. They include:

a. Generic information, such as facts, numbers, and ideas;
b. Familiar symbols;
c. Procedures, methods, systems, processes, concepts, principals, discoveries, or devices; and
d. Common knowledge includes standard calendars, height and weight charts, tape measures, and rulers.

The biggest misconception amongst creatives is that copyright protection exists in their ideas. Copyright protects the creative expression of an idea but not the idea itself. Several people may have the same idea. How they uniquely express the idea in a fixed tangible medium of expression creates copyright protection. Even if the idea is fixed, only the expression of the idea is protectable. Another party can use the idea if their expression of the same idea differs. Thus, individuals looking to protect their idea for a movie should flush out the idea by writing the script or treatment and include as much detail as possible. Someone may come behind them and write a script using the same idea without infringing. However, infringement may be found if their script expresses the idea with a degree of similarity, among other factors. [10]

Although ideas are not protectable under copyright law, contract law may apply. If a studio or producer signs a non-disclosure agreement for disclosure of a movie pitch and then later produces a movie using the pitched idea, they may be subject to a breach of contract action under the terms of the non-disclosure agreement. Disclosure of the idea without a contract is non-actionable. To avoid the matter, most studios and producers will not sign a non-disclosure

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[7] Id. at 345.
[8] McJohn, S. M. (2019). Examples & Explanations: Copyright (6th ed., p. 32). Wolters Kluwer.

[9] 17 U.S.C. § 102 (b)

[10] McJohn, S. M. (2019). Examples & Explanations: Copyright (6th ed., p. 403). Wolters Kluwer.

Title search: Essentials of Copyrights and Trademarks for Creatives

Also available as part of the eCourse
eSupplement to the 29th Annual Advanced Patent Law Institute

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