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ANSI Legal Issues Forum 2008



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EVERYTHING YOU KNOW ABOUT U.S. COPYRIGHT IS RIGHT! (OR WRONG.)

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Everything You Know About U.S. Copyright Is Right! (Or Wrong.)

In fact, what you know about all these items is right! (Or wrong.)

- Item 1: U.S. Copyright ownership
- Item 2: Infringement
- Item 3: Fair Use Defense
- Item 4: Contributory Infringement



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.

United States Constitution, Article 1, Section 8, Clause 8.



Item 1: U.S. Copyright Ownership

Do I own U.S. copyright rights to my website at roseauslander.com?

1. I designed and posted it all by myself, from scratch, right here in the U.S.A. No one helped. (Really. I'm not exaggerating.)



First Hint: 17 U.S.C. § 201(a): Initial Ownership.

“Copyright in a work protected under this title vests **initially** in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.” (Emphasis added.)

Second Hint: “Author” is not defined in the statute. Under the case law, the author is the originator of a work that is sufficiently **original** to be protected. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).



Item 1: U.S. Copyright Ownership

2. Even though she was already awfully busy, my full-time employee, Rosita, designed and posted the roseauslander.com site from scratch, as part of her job:



First Hint: 17 U.S.C. §201(b). Works Made for Hire. “In the case of a work made for hire, the **employer or other person for whom the work was prepared** is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, **owns all of the rights comprised in the copyright.**”

Second Hint: 17 U.S.C. §101. Definitions. “A ‘work made for hire’ is -- (1) a work prepared by an employee within the scope of his or her employment;”



Item 1: U.S. Copyright Ownership

3 (a). Wendy Website, Inc. told me they could take care of everything. I gave them a check, and they designed the roseauslander.com site:



Handy Reminder: 17 U.S.C. § 201(a). Initial Ownership (“Copyright in a work protected under this title vests **initially** in the author or authors of the work”).

First Hint: 17 U.S.C. § 204(a). “A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”

Second Hint: Wendy Website and I didn’t bother with a written agreement.



Item 1: U.S. Copyright Ownership

3(b). Can I tell Wendy Website, Inc. that I own copyright rights to my website, and their contribution was work for hire?



First Hint: 17 U.S.C. §201(b). Works Made for Hire. “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”

Second Hint: 17 U.S.C. §101. Definitions. “A ‘work made for hire’ is --

1. a work prepared by an employee within the scope of his or her employment;”

2. a work specially ordered or commissions for use as a contribution to a collective work, as part of a motion picture or other audiovisual work . . . [and ONLY for certain other kinds of works], **if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.**

Handy Reminder: Wendy Website and I didn’t bother with a written agreement.



Item 1: U.S. Copyright Ownership

4. I worked on designing the roseauslander.com website with my cousin, Rosette, but I did most of the work. We never had a written agreement.



Reminder: 17 U.S.C. § 201(a): Initial Ownership.

“Copyright in a work protected under this title vests initially in the author or authors of the work. **The authors of a joint work are co-owners of copyright in the work.**” (Emphasis added.)

First Hint: Thomson v. Larson, 147 F.3d 195 (2d Cir 1998). (co-authorship claimant must show (a) independently copyrightable contribution, and (b) intent, at time of creation, to be co-authors).

Second Hint: The statutory default is that co-owners share royalties 50-50, either can license the work without the other’s consent provided that they account for the royalties owed, but neither can transfer their share without the other’s consent. *Id.* at 200-201.

Item 2: Infringement

Do I own U.S. copyright rights to my website at roseauslander.com -- or is it infringing?

5. I started with something I found on the internet but I didn't mean to infringe anyone, and I changed it a lot. (Really. I'm not exaggerating.)



First Hint: The “something” may be **public domain**.

Second Hint: It may not.

Third Hint: Standards for Infringement. Proof of defendant's access to plaintiff's work AND substantial similarity of protectable material. See, e.g., *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986). Standards vary by federal circuit.

Fourth Hint: I can be liable for infringement even if my **intent** was innocent, and statutory damages for willful infringement may be higher. 17 U.S.C. § 504. Subconscious copying is no defense. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 429 F. Supp. 177 (S.D.N.Y. 1976) (holding that George Harrison's song “My Sweet Lord” infringed the Chiffons' “He's So Fine”).

Item 2: Infringement

6. I gave goniffauslander.com all my ideas (without a written agreement), and they used them in their site before I actually got around to designing and posting mine -- and now that I have, my site is substantially similar to theirs.



Handy Reminder: 17 U.S.C. § 201(a). Initial Ownership (“Copyright in a work protected under this title vests initially in the author or authors of the work”).

First Hint: 17 U.S.C. §102 (a). “Copyright protection subsists . . . in original works of authorship **fixed in any tangible medium of expression** . . .

Second Hint: 17 U.S.C. § 1012(b). “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

Item 3: Fair Use Defense

The Public Good.

Is it better to allow me to use the copyright as I did than for the owner to stop me by enforcing copyright rights?

7. To be or not to be (do-be-do-be-do-be) an infringer.

Fair use?

First Hint: 17 U.S.C. § 107. “. . . in determining whether the use made of a work . . . is a fair use the factors to be considered shall include --

- (1) the purpose and character of the use, including whether [it] is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work [factual vs. creative]
- (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.”



Item 4: Contributory Infringement

9. Desperate to get money to help third-world internet users (and to get rights to use my original web concepts), I throw up my hands and become a majority investor in goniffauslander.com. After making the investment, I don't get involved in any way, or change anything goniffauslander.com does -- even though I know they are infringing the copyright in *Steal This Book!* by posting it online without permission.



Am I liable for **inducing infringement** even though my only involvement with the site is as a majority investor?

Hint: See A&M Records Inc. v. Napster Inc., 239 F.3d 1004 (9th Cir. 2001) (finding Napster liable where it had “actual knowledge of specific infringements” and the capability to stop those infringements).

Final Exam:

10. Did I infringe copyright by quoting verbatim from 17 U.S.C. extensively throughout this presentation?



First Hint: 17 U.S.C. § 105. “Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise.”

Second Hint: 17 U.S.C. §101. Definitions. “A ‘work of the United States Government’ is a work prepared by an officer or employee of the United States Government as part of that person’s official duties.”

Third Hint: 17 U.S.C. §101 et seq. was written by Congress.

Fourth Hint: If the statute were protected by copyright, would you want to have to litigate fair use?