

Copyright Law for Brand Managers

C.J. Rosenbaum, Esq., Anthony Famularo, Esq.
& Robert Segall, Esq.

Edited by: Declan Levine Cover Art by: Temerlyn Boyle



**Rosenbaum
Famularo, P.C.**

RosenbaumFamularo.com

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COPYRIGHT LAW FOR BRAND MANAGERS

<u>Chapter 1: A Brief History of Copyright Law</u>	1
I. The Development of the Printing Press	1
II. Statute of Anne	4
III. 1909 and 1912 Copyright Act	6
IV. Sound Recording Amendment of 1971	8
V. Copyright Act of 1976	8
VI. Berne Implementation Act of 1988	10
VII. Copyright Renewal Act of 1992	12
VIII. Copyright Term Extension Act (CTEA) of 1998	15
IX. Digital Millennium Copyright Act of 1998	17
 <u>Chapter 2: Outline of Copyright Law</u>	 20
I. Legal Framework	21
II. Works Eligible for Copyright Protection	22
III. Copyright Ownership	23
IV. Copyright Formalities	23
V. Copyright Duration	30
VI. Licensing Requirements	32
VII. Exclusive Rights	33
V. Statutory Exceptions	38

Chapter 3: Digital Marketing Copyright Act and Online Copyright Issues in General.....40

I. History of the DMCA Enactment.....40

II. Purpose of the DMCA.....42

III. Title II: Online Copyright Infringement

 Liability Limitation Act44

IV. Impact of DMCA.....54

Chapter 4: Copyrightable Subject Matter on Amazon56

I. What Types of Works of Authorship are Copyrightable on Amazon?56

II. How Do I Know if I Own the Copyright for the Product I Am Selling?57

III. What Types of Copyright Claims are Typically Brought Against Amazon Sellers?.....59

IV. Conclusion59

Chapter 5: Protecting Your Product and Fighting Infringers.....61

I. Why File for Copyright?.....61

II. What Work Products Should be Copyright Protected?63

III. How to Secure a Copyright with the USPTO64

IV. The Application.....65

V. Mandatory Deposit Requirements67

Chapter 6: Defenses to Copyright Infringement
on the Amazon Platform72

I. Copyright Infringement72

II. The Doctrine of Fair Use.....74

III. The Doctrine of *De Minimis* Use77

IV. The First Sale Doctrine78

V. Conclusion80

Chapter 7: Copyright Claims and Suspensions:
a/k/a “Rights Owner” Complaints & Suspensions82

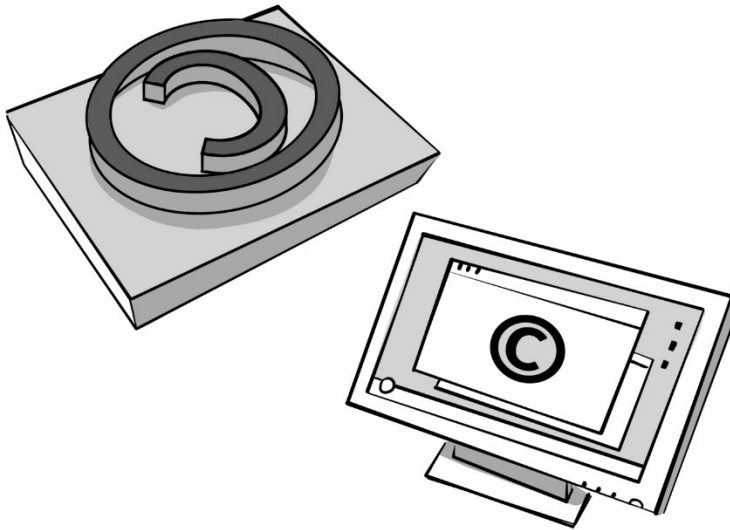
I. Operating on Amazon.....82

II. Receiving Intellectual Property Rights Complaints83

Chapter 8: Conclusion.....87

Table of Authorities89

Chapter 1: A Brief History of Copyright Law



In the 21st century global marketplace, Brand Managers employ cutting-edge technologies and initiatives in order to maintain a reputable brand with a lasting image to consumers. Amazon.com offers unprecedented opportunities for brands to thrive, and it holds a high standard for those taking advantage of the platform. In order to protect the integrity of their products, Brand Managers must garner as much knowledge as they can about these standards. Copyright law is a crucial part of successful brand management. This book explores what material is copyrightable, when a brand may allege copyright infringement, and the best approaches an Amazon Seller can take to defend him or herself against copyright claims. First, in order for the Brand Manager to better grasp how copyright

protections can be used to their benefit, it is useful to understand the origins of this key-intellectual property concept.

I. The Development of The Printing Press

The evolution of U.S. copyright law can be traced back to the development of the printing press in Europe during the fifteenth century. In 1436, Johannes Gutenberg revolutionized the printing industry with the introduction of his moveable type machine in Germany. He replaced the previously used woodblock letters with moveable metal letters, which dramatically improved the speed at which ink could be transferred to paper. Utilizing his invention, Gutenberg printed 180 copies of the Gutenberg Bible, which is now considered to be the first mass-produced book ever.¹ Following its launch in Germany, Gutenberg's press began to spread throughout Europe.

The mass production of books was not immediately appreciated by the noble class, as they viewed hand-inked books as a symbol of status, indicating high class and luxury.² As one might expect however, commoners were drawn to works that

¹ *The history of print from 1400 to 1499*, PREPRESSURE (Feb. 11, 2018), <https://www.prepressure.com/printing/history/1400-1499>.

² *The Invention and History of the Printing Press*, PSPRINT (last visited June 4, 2018), <https://www.psp rint.com/resources/printing-press/>.

were press-printed, as they offered a much more reasonable price. With the spread of the Gutenberg's press, the market for books expanded, new shops opened, and a much larger audience gained access to previously unattainable content.

The value in propagating knowledge at unprecedented levels quickly began to be recognized by people irrespective of class. Press-printing eventually became popular among scholars and politicians. Scholars found the ability to spread their ideas quickly and inexpensively to be particularly advantageous. Political figures used the new technology to print pamphlets in order to attract public interest.³ People now had access to a platform that enabled the acquisition of knowledge, ideas, and new ways of thinking. This proliferation of public knowledge, dialogue, and new ideas following the inception of Gutenberg's press had a revolutionary effect worldwide.

Mass-publication also set the stage for the establishment of copyright law. Prior to the advancement of press-printing technology, copyists were employed by authors to manually produce copies of their works.⁴ Manual copying was incredibly labor intensive and time consuming, so the threat of plagiarism was seen as a non-issue. The printing press certainly enabled

³ *Id.*

⁴ Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 Cal. L. Rev. 323, 325-26 (2003).

authors to print, and ultimately sell many more copies of their works, drastically increasing the profitability of a publication. However, copying an author's work was also much easier with a printing press, so authors quickly realized that they needed a way to protect their works from plagiarists seeking to capitalize on the new market for books and other publications.

Church and state interests in censorship and an interest among publishers in limiting competition simultaneously grew and developed, ultimately leading to the establishment a quasi-copyright regime lasting until the eighteenth century. In a 1529 proclamation, Henry VIII issued a prohibition on the possession of "heretical" works.⁵ In the following years, many other publication guidelines were put in place, and the publication of books without prior approval by a government panel or ecclesiastical officials was also prohibited.⁶ Ultimately, a guild of bookbinders, booksellers, and printers, called the Stationer's Company, was given the duty to ensure that publishers adhere to the Crown's licensing laws.

II. Statute of Anne

The licensing laws granting the Stationer's Company its authority to oversee the Crown's publishing guidelines were eventually invalidated, and the Company entered into

⁵ *Id.* at 326-327.

⁶ *Id.* at 327.

negotiations with Congress to establish a new statute to maintain their right to regulate publishers. After a lengthy process of negotiations and many failed attempts to come to an agreement with lawmakers, the Stationer's Company eventually saw success with Parliament enacting the Statute of Anne in 1710. The new statute was called "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the times therein mentioned."⁷ The Statute of Anne was the first piece of statutorily upheld copyright law in the Western World, protecting the copyright of authors for fourteen years for any new works and twenty-one years for previously published works.⁸ The statute would also grant another fourteen years of protection to the works of any author still alive at the expiration of the first fourteen years of the term. Works had to be registered in the Stationer's Company register book in order to be granted protection under the Statute of Anne. This registration process has evolved into the requirements necessary for Brand Managers to gain copyright protection today.

The Statute of Anne is significant not only because it was the first copyright law. The passing of the statute marked a shift in legal philosophy. For the first time in history, copyright was

⁷ THE AVALON PROJECT, *The Statute of Anne; April 10, 1710*, Yale Law School (last visited July 26, 2018), http://avalon.law.yale.edu/18th_century/anne_1710.asp.

⁸ *Id.*

statutorily deemed a right belonging to the author and shifted the copyright of publishers from public to private law.⁹ The statute had a global influence, its legal principles being applied in many countries including the United States, and it is still referenced by judges and scholars in reference to the foundational philosophies on which modern copyright law is built.

III. 1909 and 1912 Copyright Acts

On March 4, 1909, President Theodore Roosevelt signed The Copyright Act of 1909 which established many desired changes to copyright law in the United States.¹⁰ Copyright law was in serious need of updating prior to the 1909 Copyright Act, as U.S. copyright law had remained largely the same since the late 1700s, and the country needed to adapt to the increasingly reproductive landscape.¹¹ Upon its ratification in July of 1909, changes to copyright law in the United States included: (1) owners of musical compositions were granted mechanical recording rights; (2) 14 years were added to the copyright protection renewal period which provided a maximum period of 56 years and mandated a newspaper copyright notice prior to renewal; (3) the exemption of foreign works in foreign languages from having to undergo publication; (4) unpublished works such as performance, exhibitions, and oral deliveries were

⁹ *Id.*

¹⁰ COPYRIGHT ACT OF 1909.

¹¹ *Id.*

granted the availability of copyright protection; (5) and publications became secured by copyright with a copyright notice.

The Copyright Act of 1912 amended the 1909 Copyright Act, adding motion pictures to the ever-growing list of copyrightable works.¹² Before the passing of the 1912 Copyright Act, also referred to as the Townsend Amendment, motion pictures were classified as photographs for the purposes of copyright.¹³ The two categories to section 5 of the 1909 Copyright Act that the Townsend Amendment added were entitled “motion picture photoplays” and “motion pictures other than photoplays.”¹⁴ Newsreels, travelogues, and movies gained protection under the amendment. The Townsend Amendment was passed just three years after the initial 1909 Copyright Act was signed into law, which speaks to the efforts of Congress to keep up with the rapid technological innovation during the 20th Century.

IV. Sound Recording Amendment of 1971

¹² *Copyright Timeline: A History of Copyright in The United States*, ASSOCIATION OF RESEARCH LIBRARIES (last visited July 27, 2018), <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.W1tKQhpKg8Y>.

¹³ *Id.*

¹⁴ WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 61 (1994).

In an effort to protect sound recordings, the 1971 Sound Recording Amendment was passed in Congress on October 15, 1971 and took effect in February of the following year.¹⁵ There were growing concerns in the United States about piracy following the invention of the audio tape recorder, and the passing of this amendment directly sought to mitigate these concerns. The amendment gives owners the exclusive right to “duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording.”¹⁶ The semantics found in the 1971 amendment speak to the challenging role that lawmakers had in amending copyright laws dating back to the early 20th century for applications in the booming music scene over half a century later.

V. Copyright Act of 1976

The 1976 Copyright Act was passed to give Congress the ability to update American copyright law appropriately in order to address the rapid advancement of technology after the enactment of the Copyright Act of 1909. The 1976 Act integrated many copyrightable works that needed updated legislation for adequate protection such as commercial radio and television, the development of motion pictures, sound recordings, and new ways to reproduce printed materials and recorded sounds. Lawmakers also constructed the Act with

¹⁵ *Id.* at 73.

¹⁶ 17 U.S.C. § 1(f).

hopes to encourage intellectual and artistic creation, ultimately benefiting society. In order to capture a broad range of creative activity that could be copyrightable, the Copyright Act of 1976 provides that any work expressed through “any tangible medium of expression” and that is an “original work of authorship” qualifies for copyright protection.¹⁷ The Act also ended the necessity for works to be federally registered in order to exit the public domain. Instead of federal registration, the Act just required that works be accessible through a permitted media channel, making them “fixed” in the legislative language. To address the public suggestions found in reports from the Register of Copyrights and the House and Senate Judiciary Committees, the 1976 Copyright Act also lengthened the term of an author’s copyright protection to their lifetime plus a posthumous period of 70-years.¹⁸ The Act also clarified that the length of fee payment required to qualified heirs after an author’s death would last 19 years.

VI. Berne Implementation Act of 1988

The United States saw a dramatic escalation in technology during the concluding half of the 20th century that had to be addressed by the evolving copyright laws. Along with technology, world trade and globalization were on the rise, which led to the organization of the Berne Convention in 1986.

¹⁷ 17 U.S.C. § 101.

¹⁸ *Id.*

The document was aimed at bringing global uniformity in copyright protections.¹⁹ When it was initially enacted, just ten nations adopted the resolution. Notably, the United States abstained from the agreement. At the time, foreigners were unable to litigate their copyrights in a United States tribunal, effectively negating the primary goal of the Berne Convention to eliminate bias that disfavors foreign artists.

The Berne Implementation Act was eventually signed by Ronald Reagan in 1988.²⁰ Noting the benefits of signing the Act and becoming a member of the Berne Union, Reagan stated:

With 77 countries as members, including most of our trading partners, the Berne Convention features the highest internationally recognized standards for the protection of works of authorship. Our membership will automatically grant the United States copyright relations with 24 new countries and will secure the highest available level of international copyright protection of U.S. artists, authors and copyright holders.²¹

To highlight the economic impact of the implementation of the Berne Convention, Reagan went on to remark:

¹⁹ Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 174 (1989) (discussing the five goals of the Berne Convention).

²⁰ *Id.* at 171.

²¹ *Id.*

[T]he cost to Americans [of not joining the Berne Convention] has been substantial not only in terms of the violation of the property rights of Americans but in terms of our trade balance as well. We've been running a trade surplus of over \$1 billion annually in copyrighted books, and it would have been much larger had it not been for the pirating of American copyright work. In 1986 alone, the entertainment industry may have lost more than \$2 billion in potential revenue, and our computer and software industries more than \$4 billion in potential revenue.²²

Reagan was an actor and the leader of an actor's union before he entered politics. He likely understood the financial misfortunes of being in the entertainment industry to a greater extent than most other politicians did prior to the Berne Implementation Act. Reagan's successful advocacy for the Act was a crucial step for United States lawmakers coming to grips with the technological and globalized reality of the modern world.

Additionally, the Berne Implementation Act of 1988 simplified some required procedures, eliminating a notice requirement, as well as certain filing and registration requirements needed to bring an infringement claim.²³ The absence of the United States from the Berne Union posed

²² *Id.*

²³ ASSOCIATION OF RESEARCH LIBRARIES, *supra* note **Error!**
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significant potential losses of revenue. The implementation of U.S. copyright agreements among over twenty other nations, effectively preventing these potential losses, sets apart the Berne Implementation Act of 1988 as one of the most significant advancements in the landscape of intellectual property law in the United States.²⁴

VII. Copyright Renewal Act of 1992

Several key changes were brought to copyright law in the United States with the passing of the 1992 Copyright Renewal Act. It provided works in their first term of copyright protections as of January 1, 1978 with an automatic extension.²⁵ The Act also ended the mandate requiring copyright renewal for works in the 28th year of protections, adding 47 years to the length of the first term, for a total of 75 years without the need to renew. The 1992 Act annulled the renewal requirements established in the 1976 Copyright Act, drastically limiting the chances for works to enter the public domain due to a failure to apply for renewal, which could have potentially led to significant losses for original creators.²⁶

²⁴ *Id.* at 172.

²⁵ Richard R. Hammar, *The “Copyright Renewal Act of 1992,”* CHURCHLAW&TAX (Nov. 2, 1992), <https://www.churchlawandtax.com/cltr/1992/november-december/copyright-renewal-act-of-1992.html>.

²⁶ ASSOCIATION OF RESEARCH LIBRARIES, *supra* note **Error!**
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The Copyright Renewal Act of 1992 was met with considerable discord. The Act's controversy was centered around the removal of the mandatory renewal application. As



one may expect, proponents for the legislation included authors, publishers, and the Copyright Office. These groups made compelling points, arguing that the renewal requirement inflicted an undue burden on all participants of the copyright process.

Members of Congress supporting the 1992 Act argued that an author's unintentional failure to act in accordance with procedural requirements should not contribute to an enlarged public domain. Oftentimes, these authors and other rights owners subject to copyright renewal requirements will often be financially dependent on their protected works, and their inadvertent oversight should not cost them their economic stability. Referencing copyright procedures in other countries

led many lawmakers to further believe that a successful copyright system did not depend on similar renewal requirements. It was also realized in Congress that the current renewal system was not consistent with the goal of the Berne Convention signed four years prior.²⁷

Given the aforementioned arguments, Congress ultimately found that the opposing viewpoints surrounding the Act were not enough to justify keeping the renewal requirements in place. The purpose of intellectual property law is to grant authors and other rights owners the exclusive rights to their creations in order to encourage the creation of works that benefit the public, and Congress determined the renewal requirements failed to align with this purpose.²⁸

VIII. Copyright Term Extension Act (CTEA) of 1998

President Bill Clinton signed The Copyright Term Extension Act of 1998 (henceforth referred to as “CTEA”) into law on October 28, 1998. The CTEA is also referred to as the Sonny Bono Copyright Term Extension Act of 1998. The Act was intended to lengthen the period of time that copyrighted works would remain outside of the public domain, increasing

²⁷ *Id.*

²⁸ *Id.*

the copyright extension period by two decades.²⁹ However, protections were not reinstated for previously copyrighted works that were already considered part of the public domain.

There were several other changes to U.S. copyright law legislated in the CTEA. The Act prohibits the sale of foreign characters or other works based off of those already protected under copyright law within the United States. The CTEA famously preserved the protection of the renowned Disney character Micky Mouse. The Act has been dubbed the “Mickey Mouse Act” having saved Disney’s rights character.

While Disney undoubtedly benefitted from CTEA’s implementation, it still was mired in controversies upon its implementation.³⁰ Libraries disapproved of the Act due to the unforeseen delay they had to endure before books that gained decades of copyright protection were accessible. Musicians and publishers working within the public domain were prevented from accessing works that they could have otherwise, which likely limited their income significantly.

²⁹ *What is the Sonny Bono Copyright Term Extension Act of 1998 (CTEA)?*, WISEGEEK (last modified July 2, 2018), <http://www.wisegeek.com/what-is-the-sonny-bono-copyright-term-extension-act-of-1998-ctea.htm>.

³⁰ ASSOCIATION OF RESEARCH LIBRARIES, *supra* note **Error!**
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Perhaps the most convincing argument made against the CTEA came from a statement filed with Congress by a group of distinguished professors of law. Their argument was simply that the legislation offered inadequate levels of public benefit to offset the burden it places on those reliant on the public domain. They went on to mention that hampering the growth of the public domain would limit the information and materials that could be utilized by creators, effectively slowing the speed of innovation and improvements to public good. In spite of their credible dissent, the Senate Judiciary Committee ultimately rejected the opposition. They explained that the extensions established in the CTEA were meant to apply a fixed term of protection after the rights owner's death in order to protect at least one generation of their heirs. Having found no opposition to the CTEA that outweighed the anticipated public benefit, the Committee went on to enact the Act.

IX. Digital Millennium Copyright Act of 1998

The Digital Millennium Copyright Act of 1998 ("DMCA") was signed by President Clinton along with the CTEA in October of 1998 and is the final important piece of copyright law discussed in this chapter.³¹ The DMCA was the government's legislative response to the emerging digital age

³¹ U.S. COPYRIGHT OFFICE, *The Digital Millennium Copyright Act Of 1998 U.S. Copyright Office Summary*, COPYRIGHT.GOV (Dec. 1998), <https://www.copyright.gov/legislation/dmca.pdf>.

while upholding United States treaty obligations.³² Technology once again can be seen as a primary force in the evolution of the law.

CJ's Note: Because of the importance of the DMCA to Amazon Sellers, Chapter 3 delves deeper into the history of the law's enactment and some of its most notable features including the anti-circumvention provisions and the safe harbor provisions.

The DMCA tackles many of the copyright infringement challenges faced online by establishing a strict relationship between internet providers and copyright owners.³³ The DMCA institutes statutory requirements for internet service providers to combat potential copyright infringements on their networks. If followed, the DMCA protects the providers from liability for copyright infringements committed by their internet users. Included in the statutory requirements is the necessity to take action should any infringements occur on their network and a

³² *Executive Summary Digital Millennium Copyright Act Section 104 Report*, COPYRIGHT.GOV (last visited July 26, 2018), https://www.copyright.gov/reports/studies/dmca/dmca_executive.html.

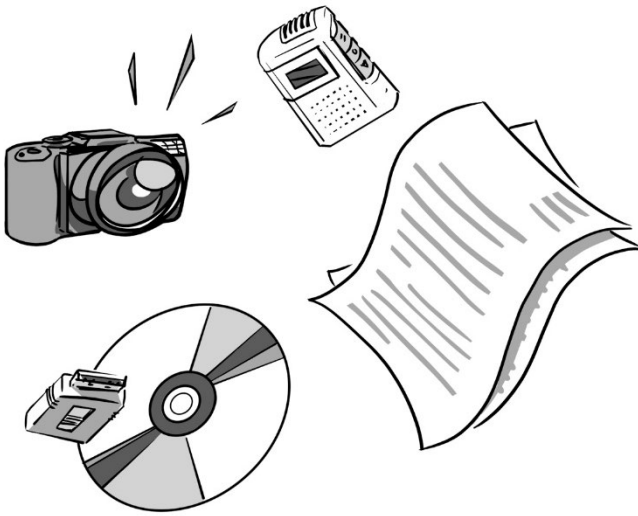
³³ *Digital Millennium Copyright Act*, HARVARD UNIVERSITY (last visited July 26, 2018), <https://dmca.harvard.edu/pages/overview>.

zero-tolerance policy to terminate users actively carrying out copyright infringements. These requirements necessary for internet providers to qualify for liability protection are referred to as “take down” procedures. It is important to note that the DMCA offers no protection for internet users. The protection is only applicable to the network they are using. Put simply, the DMCA is why AOL was protected and Napster was not.

Copyright law as it is today can be seen as an amalgam of these crucial pieces of legislation. Acts and statutes have been created, amended, and abolished in order to keep pace with technological advancement. In conjunction with the rest of the world’s intellectual property rights, these laws are the tools used by Brand Managers to protect their products... and protect their products they must, as Amazon and other platforms won’t be held liable for the copyright infringements of their users.

Chapter 2: Outline of Copyright Law

The main copyright infringements that Brand Managers have to keep a close eye on generally involve the images and verbiage on another seller's listing. Amazon sellers are not allowed to use images or text that are protected under copyright in order to describe, and to ultimately sell their product. Before



we cover the ins and outs of key copyright laws for Brand Managers, we will take look at copyright from a broader perspective.

Fundamentally, a copyright infringement is any unauthorized use of an owner's protected work. This chapter covers the U.S. copyright law and U.S. Copyright Office registration that is applicable to a wide range of both online and offline works. We examine the legal framework in which copyright law operates, the eligibility requirements for the works of an author seeking protection, moral rights, the Visual

Artists Rights Act of 1990, and copyright ownership, duration, and formalities.

I. Legal Framework

Federal statutes are primarily what govern U.S. copyright law. As explained in Chapter 1: *A Brief History of Copyright Law*, the 1976 Copyright Act is the current legislation dictating most copyright protections. Administrative rule making, reviewing, and processing applications all fall under the scope of the 1976 Act. The Act also enforces mandatory deposit requirements and the administration of statutory and compulsory licenses. All of these guidelines are overseen by the U.S. Copyright Office, which also provides limited procedural guidance and information about legal and regulatory policies on its website.

Article 1, Section 8 of the U.S.C. is what authorizes Congress to grant copyright protection. The clause gives Congress the power “[t]o 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.”³⁴ This small piece of legislation is where all those seeking copyright protection in the United States find their footing.

³⁴ U.S. Const. art. I § 8, cl. 8.

II. Works Eligible for Copyright Protection

Outlined in the United States Code, the eight “works of authorship” eligible to apply for copyright protection include:

- (1) “literary works;
- (2) musical works; including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.”³⁵

Having only eight categories of authorized works seems rather limiting. However, the interpretation of these categories can be very broad, enabling the protection of a much wider range of works. For instance, if a designer sought copyright protection for a fashion design, they can register their design under the "pictorial, graphic and sculptural works" category. It is necessary for the law to

³⁵ 17 U.S.C. § 102.

be interpreted in a way that will keep pace with the development of new technologies and innovations.

Rights owners can utilize their copyright in a number of ways. Copyright gives owners the exclusive ability to: (1) perform the work publicly if it is a literary, musical, dramatic or choreographic work; a pantomime; or a motion picture or other audiovisual work; (2) develop new works derived from their copyrighted work; (3) reproduce copies or phonorecords of their work; and (4) sell, transfer ownership, rent, lease, or lend copies of the work to the public.³⁶ Within the limits of certain statutory exceptions, copyright owners are also able to grant others the permission to use these rights.

III. Copyright Ownership

In the majority of cases, the author of a protected work is the original owner of the copyright. However, while a single author might be responsible for creating works for hire, the recognized author is the person responsible for the transformation and expression of the creation from an idea into an original and tangible form.

IV. Copyright Formalities

There are five main formalities in the process of obtaining a copyright: publication, notice, registration, deposit,

³⁶ *Id.*

and renewal. While the Copyright Act does not require any adherence to these formalities, with limited exceptions for works created prior to March 1, 1989, and failing to observe them cannot result in the loss of copyright, there are benefits associated with observing them:

- Registration and notice provide substantial benefits (see Registration and Notice).
- Failing to make any required deposits may result in fines (see Deposit).
- Renewal provides certain benefits for works that were copyrighted under the 1909 Copyright Act (see Renewal).

Publication

A work is considered published as per the Copyright Act through a process of either:

- Distributing copies or phonorecords of the work to the public by transfer of ownership, rental, lease or lending.

- Offering a group of persons to distribute copies or phonorecords of the work for further distribution, public performance, or public display.³⁷

While it is not a requirement for protection, the publication of a work can impact the duration of its copyright protections considerably. For instance, whether or not a work had been published before January 1, 1978 will significantly affect the duration of its copyright protection as per the terms enacted in the 1976 Copyright Act.

Notice

A copyright notice informs the users of a protected work of the owner's claim to copyright protection. For example, the recognizable symbol © is one common element of a proper notice, but we will cover all necessary elements in this chapter. Notice of copyright is no longer required for the protection of works published after March 1, 1989. The requirement was abandoned when the Berne Convention policies were implemented. However, providing a notice of copyright still can provide substantial benefits. A proper notice:

³⁷ 17 U.S.C. § 101.

- May disqualify an innocent copyright infringement defense.³⁸
- Notifies the public of the claim of ownership, which may prevent infringement.
- Can help others locate the copyright owner to obtain permission for reuse.

Prior to the Berne Convention Implementation, works were required to include a proper notice of copyright in order to be protected by federal statutory copyright.³⁹ Otherwise, they would be subject to the public domain as per the 1909 Copyright Act.

While the Copyright Act did recognize the requirement of a notice of copyright for works published prior to the Berne Convention Implementation Act, works first published between January 1, 1978 and February 28, 1989 were not necessarily liable to lose their copyright protection due to an omission of a proper notice. Works published during this period could retain their protection if the rights owner both:

³⁸ 17 U.S.C. §§ 401(d), 402(d).

³⁹ COPYRIGHT ACT OF 1909, *supra* 10.

- Registered the work before or within five years after publication without notice, and;
- Made reasonable efforts to add notice to all copies distributed after learning of the omission.⁴⁰

Copyright protections could also be retained if a publication without notice was made without the rights owner's authorization, or if the inclusion of a proper notice was neglected for only a small percentage of copies.⁴¹

Elements of Proper Notice

The Copyright Act requires all three of the following elements for a proper notice:

- Any of the following:
 - The symbol © for visual or observable copies, or the symbol ® for phonorecords of protected sound recordings
 - The abbreviation "Copr."; or
 - The word "Copyright."
- The year of first publication.

⁴⁰ PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, *supra* note 41 (quoting 17 U.S.C. § 405).

⁴¹ 17 U.S.C. § 405.

- The name of the copyright owner, which may include an abbreviation or alternate designation that is generally known.⁴²

An appropriate copyright notice must also take size and positioning into account. A viewer must be able to clearly see a notice of copyright on all works claiming copyright protection.⁴³

Effect of Defective Notice

When a notice of copyright does not adhere to the elements outlined above, it might be considered defective, invalidating it as a proper formality. A notice omitting the name of the rights owner or containing a false name or publication date is considered defective. Before March 1, 1989, a work might lose its copyright protection if its notice was defective. It may also shorten the period of copyright protection if the included date was earlier than its actual creation. However, for works created after March 1, 1989, a defective notice will have no effect on copyright protection or duration.⁴⁴

Registration

Copyright registration is the process of creating an official record of a protected work, making the specifics of its

⁴² *Id.*

⁴³ 17 U.S.C. §§ 401(c), 402(c).

⁴⁴ 17 U.S.C. §§ 402(b), 405.

content and publication easily verifiable by the United States Copyright Office. While registration is not required for copyright protections anymore, works published between January 1, 1978 and February 28, 1989 might have been required to do so in order to correct defective copyright notices, including works created but not registered or published before 1978.⁴⁵ Nevertheless, registering a protected work is still recommended, as it can provide registrants peace of mind and a number of other advantages, including:

- In most cases, registration is required before suing for infringement.⁴⁶
- A copyright owner may recover statutory damages and attorneys' fees in an infringement action, only if the work was registered prior to the start of the infringement action or within three months after first publication.⁴⁷
- A copyright that is registered within five years of the work's first publication is *prima facie* evidence of the copyright's legitimacy.⁴⁸
- Registration may disqualify an innocent infringement defense.

⁴⁵ 17 U.S.C. § 408(a).

⁴⁶ 17 U.S.C. § 411.

⁴⁷ 17 U.S.C. § 412.

⁴⁸ 17 U.S.C. § 410 (c).

- The copyright owner may record the registration with the U.S. Customs Service to prevent the importation of infringing copies.

Deposit

A copyright deposit refers to the requirement as per the Copyright Act, with limited exceptions, for works published in the United States to be submitted to the Library of Congress for record keeping. A deposit can be made without the registration of a work. However, in order to register a work with the United States Copyright Office, a deposit must be made. Fines may be issued to the rights owner if they fail to deposit a published work, but no deposit is necessary for unpublished works.⁴⁹

V. Copyright Duration

The copyright term for any work created post-1977 generally begins upon its creation and expires 70 years after the death of the author. For works that were jointly authored, copyright protections expire 70 years after the last living author passes away.

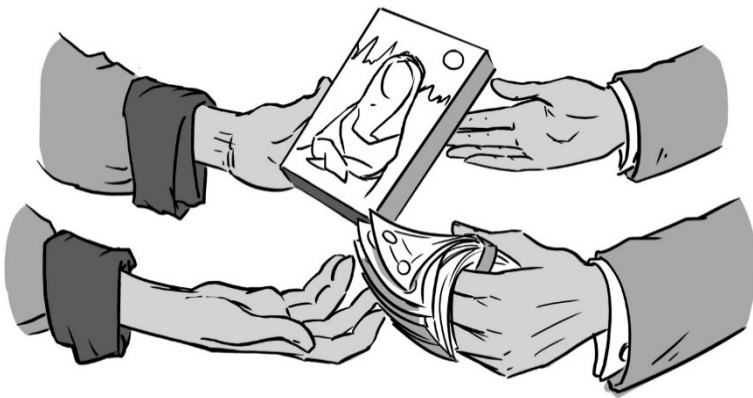
If a work is made for hire, created anonymously, or created under an assumed pen name, its copyright will expire 120 years after it was created or 95 years after its publication,

⁴⁹ 17 U.S.C. § 407.

whichever is earliest to come.⁵⁰ However, as mentioned previously, a work published without proper notice or registration before March 1, 1989 is subject to lose its copyright protection.⁵¹

CJ's Note: A “work made for hire” is a work created by an employee, or it is a commissioned work. A work by an employee must be created during the scope of her employment to be considered a work for hire. Whereas a commissioned work is often specified by a contract.

VI. Licensing Requirements



There are numerous voluntary and compulsory licensing requirements set out by the Copyright Act. A compulsory

⁵⁰ 17 U.S.C. § 302.

⁵¹ 17 U.S.C. § 405(a).

licensing requirement allows for anyone attempting to use a rights owner's intellectual property to do so without their express consent so long as they pay a predetermined licensing fee. A voluntary license can be granted by a rights owner to others wishing to use their intellectual property for a negotiated fee, generally pursuant to terms and conditions agreed upon between the parties, establishing the term of the license, any royalties to be paid to the owner, or other stipulations. All licenses ultimately guarantee payment for rights owners should their intellectual property be used by others, which can lead to mutually beneficial production. Among other requirements, some licensing guidelines set out by the Copyright Act include:

- Making and distributing phonorecords of any published, non-dramatic, musical work.⁵²
- Certain noncommercial broadcasts of non-dramatic, musical works and pictorial, graphic and sculptural works.⁵³
- Certain secondary transmissions of cable and television systems.⁵⁴

⁵² 17 U.S.C. § 115.

⁵³ 17 U.S.C. § 118.

⁵⁴ 17 U.S.C. § 119.

- Certain digital audio transmissions of sounds recordings.⁵⁵

All licensing requirements are enforced by the Copyright Office's Licensing Division.

VII. Exclusive Rights

A number of rights exclusive to the owner of a work comes with registering for copyright. A copyright holder is granted the benefits of reproduction, adaptation, distribution, public performance, and public display. We will delve into what each of these benefits allows a rights owner to do, and prevent others from doing, with their protected work.

Reproduction

A copyright holder is given the exclusive right to reproduce the work, and to block others from doing so. Others are prevented from copying a protected work through any format and by any means. In general, this exclusive right to reproduction applies to any fixed, tangible protected work.

Right to Create Derivative Works

A rights owner is also given the exclusive right to make adaptations and develop new works derived from their

⁵⁵ 17 U.S.C. § 114(d)(2).

previously copyrighted works.⁵⁶ A derivative work could be a translation, musical arrangement, dramatization, fictionalization, motion picture, sound recording, art reproduction, abridgement, or condensation. For instance, some of the most successful movies are derived from books, and before the creation of these movies, authors will oftentimes sell the rights to the book to the producer beforehand.

Distribution

The right to distribute copies or phonorecords of works to the public is exclusively held by the copyright owner. Distribution, as per the U.S. Copyright Code, is defined to include both:

- i. The transfer of ownership of tangible copies of the practiced work by any means, and;
- ii. the physical transfer of custody, but not ownership, of tangible copies, such as rental, lease, and lending.⁵⁷

In a transfer, no payment or other considerations are required for distribution to take place. A copyright holder's right to distribute to the public prevents others from doing so, irrespective of any

⁵⁶ PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, *supra* note 41 (quoting 17 U.S.C. § 106(3)).

⁵⁷ 17 U.S.C. § 106(3).

other considerations such as payment or quantity. Similar to reproduction rights, the right to distribute applies only to tangible copies of a work.

Delivering electronic copies online was ruled by the U.S. Supreme Court to constitute distribution.⁵⁸

The first sale doctrine limits the distribution right of copyright owners, and it is a crucial piece of legislation to anyone selling on a platform like Amazon.⁵⁹ Only the first sale of a protected work is controlled by the rights owner. However, once distributed lawfully, a person to whom the ownership of the copy was transferred has the right to sell, or otherwise distribute the work.

Public Performance

A copyright owner has the right to dictate whether to allow or prohibit the public performance of their protected work. A copy of a work that is obtained lawfully may be privately performed by the new owner of the copy. The Copyright Act defines performing a work as “to recite, render, play, dance or act it.” Public performances also include those performed on the

⁵⁸ New York Times Co. v. Tasini, 533 U.S. 482 (2001).

⁵⁹ The first sale doctrine permits people to buy and re-sell property without permission of the original owner as long as the consumer receives a product that is not materially different from the product delivered by the original owner.

radio, television, or on audio players. A performance is only public when it is made in person at, or transmitted to, a public area with a gathering of a substantial number of individuals of whom are not considered acquaintances or family members.⁶⁰

Likewise, a performance is considered to be public irrespective of the location of individuals to whom the work is being transmitted, or the time at which they receive it. For instance, on-demand video streaming is considered a public performance even though it is accessible by one person at a time at different times and locations.⁶¹ While the U.S. Court of Appeals held that downloads are not public performances, they can still constitute a method of reproduction and distribution.⁶²

Public Display

Included in an owner's exclusive right to public display are literary works, musical works, dramatic works, choreographic works and pantomimes and pictorial graphic and sculptural works.⁶³ Similar to public performance, only works that are accessible to the public would constitute an infringement of an owner's copyright. The classification of a

⁶⁰ 17 U.S.C. § 101.

⁶¹ PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, *supra* note **Error! Bookmark not defined.** (quoting U.S. v. Am. Soc. of Composers, Authors, & Publishers, 627 F.3d 64, 74 (2d. Cir. 2010)).

⁶² *Id.* (quoting *Am. Soc. of Composers*, 627 F.3d at 74-75).

⁶³ *Id.*

display as public follows the same criteria as a performance of a work. There must be a significant number of people to whom the display is accessible via most modes of transmission. However, the first sale doctrine does limit these rules, as certain aforementioned rights are given to the owner of a work that was legally obtained from the rights owner.

VII. Statutory Exceptions

There are limitations outlined in the Copyright Act that expressly limit an owner's exclusive rights. These exceptions include fair use, the first sale doctrine, archival reproductions and distributions, and statutory or compulsory licenses allowing others to make limited use of the work in exchange for royalty payments.

Fair Use

Fair use is one of the most widely used exceptions to the rights of a copyright owner. In the Copyright Act, many uses of a work are allowed as fair use, including criticism, commentary, news reporting, teaching, scholarship and research.⁶⁴ For instance, using a work for the purpose of criticizing it, even if the critic stands to gain from its use, is protected under fair use. If a rights owner claims infringement, the claimed infringer might argue that their use of the work falls under one of the aforementioned purposes, and their

⁶⁴ *Id.*

actions are protected under the fair use exception to the owners' copyright. The Copyright Act outlines four factors to be used in determining if one's use of a protected work is "fair." Fair use is a powerful tool for claimed infringers, so it is very important for Brand Managers to know exactly how and when fair use can be applied. For more details on fair use, see Chapter 6: Defenses to Copyright Infringement on the Amazon Platform.

Chapter 3: Digital Millennium Copyright

Act



I. History of DMCA Enactment

The “Information Infrastructure Task Force” was put into place in 1992 by then President Bill Clinton in order to address the issues with copyright brought about by the internet.⁶⁵ In creating this policy, the former Assistant Secretary of Commerce and U.S. Commissioner of Patents and Trademarks Bruce A. Lehman assisted in carrying out the task, as he was an attorney in the computer software space and had valuable

⁶⁵ *History of the DMCA*, DIGITAL MILLENNIUM COPYRIGHT ACT (last visited July 27, 2018), <https://bcgrouptwo.wordpress.com/about/>.

knowledge for this particular issue.⁶⁶ Lehman strongly believed that copyright holders should have a greater control over digital content, and wished to help create policies to protect rights holders on the internet. The World Intellectual Property Organization (“WIPO”) is an international institution with the main goal of protecting intellectual property on a global scale. WIPO helped Lehman implement his desired heightened legal control for copyright holders in the digital landscape. In 1993, the Administrative Working Group on Intellectual Property Rights joined the task force implemented by Bill Clinton, beginning to contribute to addressing copyright issues on the internet.

In response to the need for copyright law to change with the exponential increase in internet usage and other forms of new technology, the Working Group released a multitude of papers outlining their recommended adaptations. The WIPO also took action, and in 1996 released the WIPO copyright treaty mandating some European countries to implement legal protections and remedies to limit the sidestepping of technologies used to protect copyrighted works. Acknowledging the value of these suggested adaptations to copyright law,

⁶⁶ *IPPI Board of Directors*, INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE (May 2010), <https://iipi.org/2010/05/iipi-board-of-directors/>.

President Clinton signed into law the Digital Millennium Copyright Act (DMCA) on October 28, 1998.

II. Purpose of the DMCA

In the manner of revisions to intellectual property law that came before it, the DMCA sought to keep U.S. copyright law applicable to new technology that came about with the growing ubiquity of the internet that brought us into the digital age.⁶⁷

Contained in the DMCA were two 1996 WIPO treaties. The first was the WIPO Copyright Treaty which implemented additional copyright protections for new technologies that would not have been protected by prior acts. The second was the WIPO Performances and Phonograms Treaty, implementing additional protections for creators of phonograms.⁶⁸

The DMCA also makes the production and spread of any service, device, or other technology that would bypass protections that control access to copyrighted works unlawful.⁶⁹

⁶⁷ EXECUTIVE SUMMARY, *supra* note 32.

⁶⁸ U.S. COPYRIGHT OFFICE, *supra* note 31

⁶⁹ R. Elizabeth & C. Kitchen, *Understanding the Digital Millennium Copyright Act*, BRIGHT HUB (last updated Jan. 29, 2010), <https://www.brighthub.com/office/entrepreneurs/articles/62799.aspx>.

Sidestepping the policies that control access to copyrighted works is made unlawful in the DMCA whether or not the circumvention infringes on copyright. These access controls can be circumvented only for the purposes of encryption research, tests of computer security systems, or during the evaluation of interoperability. In some scenarios, certain groups such as academic institutions, archives, and non-profit libraries are exempt from the anti-circumvention rules set out in the DMCA.

The DMCA also protects Amazon and other online service providers from copyright infringement liability so long as the provider satisfies specified statutory requirements and implements “take down” methods to limit the instances of infringements by users.

Online service providers are defined to be “an entity offering the transmission, routing, or providing of connections for digital online communications.”⁷⁰

The DMCA is made up of 5 different titles. The most relevant section of the Act for Brand Managers seeking to protect and grow their brand online is Title II: The Online Copyright Infringement Limitation Act.

⁷⁰ *About the Digital Millennium Copyright Act*, INDIANA UNIVERSITY (last modified May 14, 2018, 11:47:38), <https://kb.iu.edu/d/alik>.

III. Title II: Online Copyright Infringement Liability Limitation Act

Title II in the DMCA adds limitations to the Copyright Act on copyright infringement liability for online service providers. These additions are found in section 512 of the Copyright Act, and the limitations outlined are often referred to as “safe harbors.”⁷¹ Title II of the DMCA defines four conduct categories in which Amazon and other platforms are to be protected from infringement liability, including:

- “transitory digital network communications,”
- “system caching,”
- “information residing on systems of networks at the direction of users,” and;
- “information location tools.”⁷²

With reference to the first safe harbor, “transitory digital network communications,” a “service provider” is defined as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received” according to section 512(k)(1)(A).⁷³

⁷¹ U.S. COPYRIGHT OFFICE, *supra* note 31.

⁷² *Id.*

⁷³ *Id.*

The standard for what constitutes a “service provider” classification is broad with respect to the other three safe harbors, being “a provider of online services or network access, or the operator of facilities therefor,” defined in section 512(k)(1)(A).⁷⁴

Take Down Policies and Methods

The DMCA also introduced two requirements that every online service provider must meet. These requirements obligate service providers to: (1) implement an effective policy to terminate users who repeatedly infringe, and: (2) to respect and accommodate the technological safeguards that protect copyrighted conduct, which section 512(i) of the Copyright Act refers to as “standard technical measures.”⁷⁵

The definition of “standard technical measures” found in section 512(i) goes beyond the simple description of copyright-protecting technological safeguards. “Standard technical measures” are defined to be “technical measures that are used by copyright owners to identify or protect copyrighted works and (a) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (b) are available to

⁷⁴ *Id.*

⁷⁵ 17 U.S.C. § 512 (i)(2).

any person on reasonable and nondiscriminatory terms; and (c) do not impose substantial costs on service providers or substantial burdens on their systems or networks.”⁷⁶

Transitory Digital Network Communications

The implementation of the first safe harbor addressing transitory digital network communications in section 512(a) pertains to service providers that allow users to transmit and route data or messages across the internet upon request.⁷⁷

This safe harbor also applies to intermediate and transient storage of material automatically generated in a service provider’s network operations.⁷⁸

Online service providers with an interest in protecting themselves from infringement liability within their transitory digital network communications must comply with a number of requirements in order to enjoy protections under the first safe harbor, including:

- (1) the information must be initiated or transmitted by or through the direction of someone who is not the service provider;

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ U.S. COPYRIGHT OFFICE, *supra* note 31.

- (2) the transmission, routing, provision of connections, or storage must be done by an automatic technical process in which the service provider does not select the material;
- (3) there must be no selection by the service provider as to who receives the material outside of the automatic response to the person who requested the material;
- (4) any intermediate or transient copies cannot be ordinarily accessible to anyone besides anticipated recipients and for a period that is not longer than reasonably necessary, and;
- (5) the content of the material cannot be modified as it is transmitted through the network or system.⁷⁹

System Caching

Certain liability limitations for service providers can be found in Section 512(b) that allow providers to retain copies of material introduced and transmitted by one user to another on the platform.⁸⁰ This safe harbor allows Amazon to save content in their network without facing liability.

⁷⁹ 17 U.S.C. § 512(a).

⁸⁰ U.S. COPYRIGHT OFFICE, *supra* note 31.

This safe harbor on system caching allows the provider to keep copies of material for future use, giving providers the ability to fulfill requests for previously introduced material by transmitting their cached copy without having to acquire the material from the original source.

This safe harbor allows providers to decrease the amount of bandwidth and time needed in order to fulfill requests.⁸¹ In order to avoid the costs associated with these inefficiencies, service providers need to meet five requirements for protection under the safe harbor on system caching, including:

- (1) the retained material's content cannot be changed,
- (2) the provider must adhere to rules about refreshing, reloading, or updating material when requested by the person who makes the material available online when specified in accordance with a generally accepted industry standard data communication protocol,
- (3) the provider cannot interfere with the technology that provides "hit" information to the person who posted the material when such technology fulfills specific requirements,

⁸¹ *Id.*

(4) the provider must restrict the access to information to comply with the access restrictions used by the person who posted the material (i.e.: password), and;

(5) the service provider must act swiftly in removing or blocking any material that is posted without the authorization of the copyright owner upon receiving notice that this unauthorized material has been blocked, removed or ordered to be blocked or removed at the originating site.⁸²

Information Residing on Systems or Networks at Direction of Users (Brand Managers)

Provided in section 512(c), there are protections in place for hosting platforms or companies like Amazon with system-hosted websites containing infringing materials. This limitation applies when the stored materials in question are generated at the request of the user. Similar to previously discussed safe harbors, in order to be protected under this limitation, there are several conditions that providers must satisfy, including:

(1) the service provider cannot have requisite knowledge that the material or activity utilizing the material is infringing;

⁸² *Id.* at 11.

(2) in addition to not having actual knowledge, they also must not be aware of facts or circumstances that would make it clear that infringing activity is clearly present;

(3) in the event that the provider were to have actual knowledge, they must act quickly to remove or prohibit access to the material;

(4) in a case where the provider has the ability to control such activity, they are not receiving any financial incentive pertaining to the infringing activity and;

(5) the service provider must act quickly to remove or block material that is the subject of a copyright infringement claim.⁸³

CJ's Tip: The safe harbor provisions are satisfied by the take-down mechanisms on Amazon and other similar platforms. Brand Managers must thoroughly understand the take-down mechanisms of the platforms on which they build and grow their brand and ensure that they are

⁸³ 17 U.S.C. § 512(c)(1).

aware of what is needed in order to address infringements.

Information Location Tools

Provided in Section 512(d), certain limitations can protect service providers from liabilities associated with directing users to websites that contain infringing material. Providers can enjoy these protections by employing information location tools such as an online directory, hyperlinks and search engines.⁸⁴ The requirements for protection under this safe harbor include:

(1A) the service provider must not possess actual knowledge that the material or activity is copyright infringing;

(2A) in the absence of actual knowledge, the service provider cannot have knowledge of facts or circumstances from which it would be apparent that infringing activity was present;

(3A) upon obtaining actual knowledge, the provider must act quickly to discontinue or prohibit access to the copyright infringing material;

⁸⁴ *Id.* at 12.

(B) the service provider cannot receive any financial compensation directly related to the infringing material in a case in which the provider has the option to control such activity, and;

(C) upon obtaining actual knowledge that the online location that the provider referred users to, has infringing material, the provider must also remove or prohibit access to the reference or link that is used to access this infringing material along with any information that is reasonably sufficient to allow the service provider to locate that reference or link.⁸⁵

⁸⁵ 17 U.S.C. § 512(d).

Special Rules Regarding Liability of Nonprofit Education Institutions



Section 512(e) sets out rules governing the circumstances in which faculty, graduate students, or other employees of a public or nonprofit institution of higher education conducting research or instruction can impact the institution's eligibility for the four safe harbors.⁸⁶

Provided in the transitory digital network communications and system caching safe harbors, the faculty member or student should be held as a person outside of the provider if the institution intends to maintain its eligibility for these liability protections. Regarding the information residing on systems or networks at the direction of users and the information location tools safe harbors, the awareness of

⁸⁶ *Id.* at 13.

students and faculty members will not be ascribed to the institution.

The following conditions must be met by a public or nonprofit institution of higher education in order to maintain its eligibility for one of the four safe harbors:

(1) the infringing activity of the faculty member or student cannot involve giving online access to course materials that were required or recommended within the past three years for a course that the faculty member or student taught at their institution;

(2) the institution must not have received more than two alerts within the past three years that the faculty member or student was infringing, and;

(3) the institution must give informational materials that inform and encourage compliance with copyright law to all of its users.

IV. Impact of DMCA

The addition of the DMCA to United States copyright law brought about significant changes, and it is often considered to be one of the most important moments in copyright law since

the Copyright Act of 1976.⁸⁷ Despite its aim to protect rights holders as we entered the digital age, the enactment of the DMCA was controversial among members of the public.

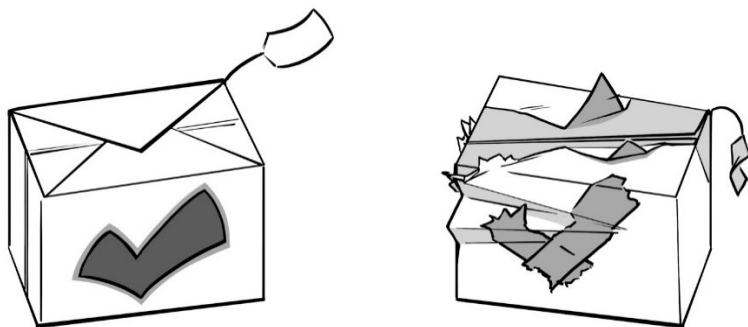
Proponents of the DMCA argue that the Act was a necessary addition to U.S. copyright law, as it closed loopholes and unchecked avenues for new forms of infringement that came about with the technological advances of the 21st century. That it gave copyright holders the protection they should reasonably expect.

Those opposing the DMCA argue that the Act gives rights holders an unfair level of control over the use of their work. Critics of the DMCA assert that first amendment rights like free speech could be threatened by this increased control over copyrighted works, and that U.S. copyright law without the enactment of the Act would have been adequate in protecting rights owners.

⁸⁷ Mark Heaphy, *The Impact of The Digital Millennium Copyright Act*, WIGGIN & DANA, LLP, <http://www.wiggin.com/files/m%20heaphy%20impact%205-5-2003.pdf>.

Chapter 4: Copyrightable Subject

Matter on Amazon



I. What Types of Works of Authorship Are Copyrightable on Amazon's Detail Pages?

The most common copyrightable works of authorship found on Amazon are images and text. In general, a person would have copyright protection over a product image if they originally took, or otherwise created the image, allowing them to use the image to sell the product on his or her detail page. However, images found on someone else's website should not be used to sell a product on a person's detail page without express permission from the website owner.

Timex, for instance, has photos taken of all its watches. These images are all protected under copyright, so Timex controls the use of all their product images. Any person selling

on Amazon who takes one of Timex's images without their permission would be infringing on Timex's copyright.

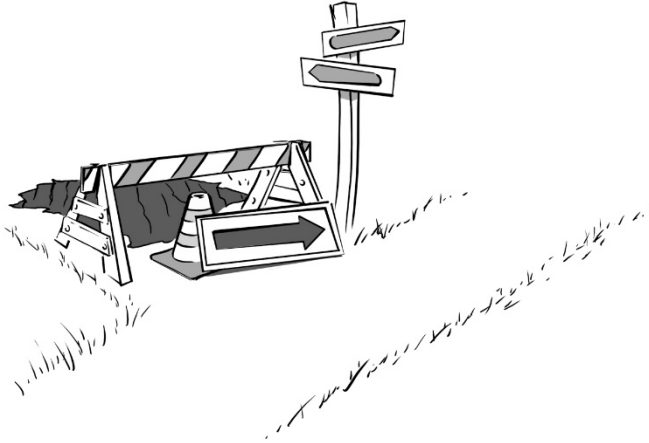
Like product images, a person who drafts an original description for a product has copyright protection over the verbiage. Product descriptions or other text created by a person or company should not be used by anyone else without permission. For instance, Cannon creates text and uses specific verbiage in describing the features of its cameras and other products. Since Cannon has copyright interest to their description of the cameras, any seller would be infringing on Cannon's intellectual property rights were they to copy Cannon's verbiage.

The best way that one can avoid infringing on anyone else's copyright is to only use images and text that has unquestionably been created by him or herself, or with the express permission of the rights holder to use their images and/or verbiage.

II. How Do I Know if I Own the Copyright for the Product I am Selling?

The products themselves being sold on Amazon can also be copyrighted, with the creator of the work often owning the rights, enabling them to dictate, to a limited extent, the sale of their creation. However, the first sale doctrine limits the scope

of the rights given to copyright holders. This exception is often utilized by Amazon Sellers.



First Sale Doctrine Exception

As with images and text, a Seller can list a copyrighted work on Amazon if they have the rights owner's permission. However, the first sale doctrine allows Amazon Sellers to list copyrighted works for resale without permission so long as the works are genuine and lawfully obtained. The crucial distinction here is that the protected works are being resold, having been originally obtained from the rights owner or another lawful source. For instance, if someone lawfully purchased a genuine CD and wanted to sell it on Amazon, maybe they were dissatisfied with the music, it is completely within their rights to do so, as the resale of copyrighted works is permitted under the first sale doctrine.

III. What Type of Copyright Claims are Typically Brought Against Amazon Sellers?

The copyright claims most frequently brought against Amazon Sellers are:

1. The Seller used images that had not been authorized for Seller's use by the rights owner.
2. The Seller used text that had not been authorized for Seller's use by the rights owner.

In the process of creating a detail page for products, the Seller wants to use descriptions and images that will attract potential buyers as effectively as possible. Sellers listing similar products are naturally in competition. To achieve an edge among their e-commerce competitors, some Sellers are led, often inadvertently, to infringe on the intellectual property of others. For instance, Seller listing brand-name watches may understandably be inclined to use product images from that brand's website. They would likely be of the highest quality and near the top of image search results. However, without the brand owner's permission, a Seller who uses images from the brand's website is usually liable to a copyright infringement claim.

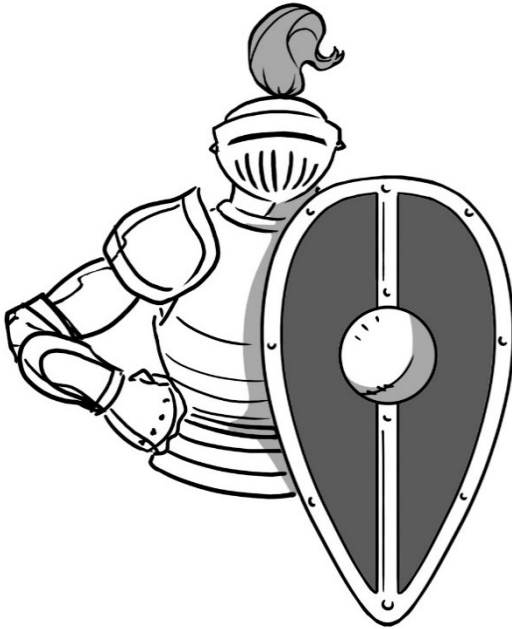
IV. Conclusion

Brand Managers should have a thorough understanding of the copyright law allowing them to effectively monitor and protect their brand. In most cases, the high-quality images and

verbiage Brand Managers employ to help their brand to flourish in the online marketplace will be the most common source of infringement to mitigate and resolve. Brand Managers should also be aware of exceptions like the first sale doctrine that may or may not protect unauthorized sellers from claims of infringement.

Chapter 5: Protecting Your Product and

Fighting Infringers



I. Why File for Copyright?

Any work fixed in a tangible form, filed or not, and observable either directly or through a machine or device, is covered by copyright protection. However, there are considerable benefits to filing for copyright that creators should be aware of.

To file for copyright, the appropriate form and registration fee must be submitted to the Copyright Office in Washington D.C. The submission must also include one comprehensive copy of the work. Two copies are required if the work has not been published.

Upon submission, the work undergoes a review by the Register of Copyrights to determine its eligibility for copyright protection. Unless the work is not copyrightable or its submission is deemed invalid, a certificate of registration will be issued for the work following its review.

The first significant benefit provided by copyright registration is an entry into the public record. To mitigate infringement, and to readily exercise copyright protections, establishing a public record of a brand's original work is an important first step Brand Managers should take.

The registration of a work with the U.S. Copyright Office within five years of publication serves as valid evidence of copyright.⁸⁸ Brand Managers can use this evidence to assert the exclusive copyright ownership and the associated protections for their brand. Additionally, filing for copyright gives notice to third parties of the transferee's interest and all facts stated in the certificate.⁸⁹

Another major benefit that comes with copyright registration is the ability to take legal action against alleged

⁸⁸ 17 U.S.C. § 410(c).

⁸⁹ WILLIAM C. HOLMES, 1 INTELLECTUAL PROPERTY & ANTITRUST LAW § 4:7 (2018).

infringers.⁹⁰ The threat of court can serve as a major deterrent for anyone who may be infringing on protected a work. For instance, a fashion designer who designed a dress has every right to bring a claim of copyright infringement against another designer who sells a similar design. However, if the designer has no copyright registration on file for the dress, a claim of infringement is much more likely to be barred, and the infringing designer is less likely to stop selling the dress.

Courts in the U.S. differ region to region as to what they require for a work to be “registered.” In some parts of the U.S., it is sufficient to have a pending copyright application, while others require an approved application from the Register of Copyrights before a copyright infringement claim can be brought.

In order to recoup statutory damages and attorney’s fees for acts of infringement, registering for copyright protections is generally required. This applies to infringements that took place before registration unless registration was completed within three months of the first publication of the disputed work.

II. What Work Products Should be Copyright Protected?

⁹⁰ Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010) (quoting 17 U.S.C. § 411(a)).

Images and verbiage are the works most commonly copyright protected by e-commerce sellers. As outlined by the U.S. Copyright Office, pictorial and graphic images, among other things, fall under the umbrella of copyrightable visual art works.⁹¹ Photographic images are also considered pictorial works as per U.S. copyright law.

As with any copyrightable work, a photograph must be an original creative work to be eligible for copyright protection. This photographic creativity could include:

the photographer's artistic choices in creating the image, such as selection of the subject matter, the lighting, any positioning of subjects, the selection of camera lens, the placement of the camera, the angle of the image, and the timing of the image.⁹²

III. How to Secure a Copyright with the USPTO

⁹¹ U.S. COPYRIGHT OFFICE, VISUAL ART WORKS 2 (2017), <https://www.copyright.gov/comp3/chap900/ch900-visual-art.pdf>.

⁹² *Id.*

Copyright registrations can only be filed by the author of an exclusive work, the owner of all exclusive rights to a work, or an agent filing on behalf of the author or owner.⁹³

The three primary elements of an application include: a completed application form, a nonrefundable filing fee, and a nonreturnable deposit. The nonreturnable deposit is one or more copies of the work being registered with the Copyright Office.

IV. The Application

An application for copyright is a disclosure of the relevant facts of the claim. The author of the work, the claimant or owner's name and address, the year of creation, whether the work is published, and if it contains any pre-existing material. Upon submission to the Copyright Office, the application becomes viewable by anyone as part of the public record.

Providing clear and accurate information is crucial in registering a claim for copyright. Completely and accurately filing a claim serves public interest. Doing so can lower litigation costs and provide potential licensees and other authors with accurate information.

Applying Online

⁹³ Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

Rather than submitting a paper application by mail, many applicants prefer to submit online at www.copyright.gov. The Copyright Office encourages online applications for most registrations of individual works of authorship. Applicants can, in some cases, register multiple works with one online application. The online application system offers a number of benefits compared to submission by mail, including “lower filing fees, faster examination; status tracking, payment by credit card, debit card, or electronic check, and option deposit upload.”⁹⁴ More information about applying online can be found on Copyright.gov under *Copyright Registration* (Circular 2).

Applying by Mail

While the Copyright Office strongly encourages applicants to use the online system, copyrights can also be registered by mail. On www.copyright.gov, blank PDF application forms are available to be printed and completed by applicants. Along with a filing fee, the application can then be sent to the Copyright Office. More details about these forms can be found on the Office’s website at www.copyright.gov.

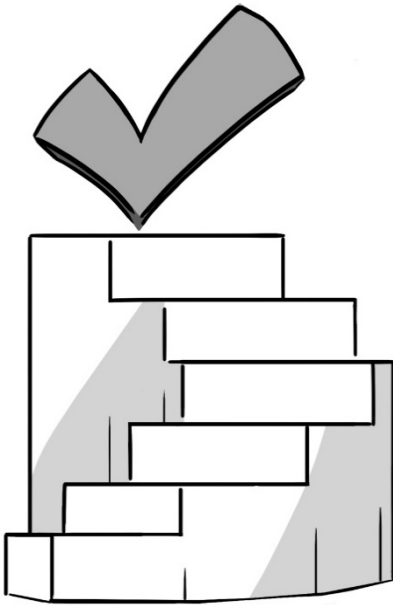
Filing Fee

A nonrefundable filing fee is required by the Copyright Office for each application. These fees are always subject to

⁹⁴ *Id.*

change. Current information about filing fees can be found on [copyright.gov](https://www.copyright.gov) under *Copyright Office Fees* (Circular 4).⁹⁵

A credit or debit card, electronic check, or deposit account with the Copyright Office are all acceptable methods of payment for online applications. Paper forms require a deposit account, check, or money order for payment. More information about deposit accounts can be found under *How to Open and Maintain a Copyright Office Deposit Account* (Circular 5) on [copyright.gov](https://www.copyright.gov).⁹⁶



⁹⁵ *Copyright Office Fees*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/circs/circ04.pdf>.

⁹⁶ *How to Open and Maintain a Copyright Office Deposit Account*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/circs/circ05.pdf>.

V. Mandatory Deposit Requirement

A deposit copy is also required with each application. A deposit, as it applies to copyright registration, refers to a finalized copy of one or more work to be included in the submission of an application to the Copyright Office. The application will enter the public record once a deposit, in addition to the filing fee, is submitted to the Copyright Office. The application will then be accessible to members of the public.

The deposit is used by the Copyright Office to examine the work and to update the public record. The nature of any given work will determine the deposit requirement. The variables that determine the deposit requirement include:

- Whether the work is published or unpublished;
- Whether the work is in physical or digital format;
- Whether the work was published in the United States or a foreign country.

Included below are several factors that Brand Managers should consider when submitting a deposit copy. *Copyright Registration (Circular 2)* and *Chapter 1500 of the Compendium*

on copyright.gov provide a thorough overview of the Copyright Office's deposit requirement.⁹⁷

Unpublished and Online Only Works –One Copy Needed

Applicants are only required to submit one complete copy of works that are unpublished or published exclusively online. The Copyright Office strongly suggests uploading digital copy of the work through its website to fulfill this requirement. While generally acceptable, the submission of flash drives or other physical storage devices containing a copy of the work is not preferred. A comprehensive list of acceptable file types that can simply be uploaded can be found on the Copyright Office's website.

Mandatory Deposit Requirement – Two Copies for Published Works

The Copyright Act gives the Library of Congress the authority, called the “mandatory deposit requirement,” to collect a copy of any work published in the United States on demand.

Upon the registration of a work that is subject to the mandatory deposit requirement, two complete copies of the “best edition” of the work must be submitted within three

⁹⁷ *Copyright Registration*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/comp3/chap1500/ch1500-deposits.pdf>.

months of first publication. The “best edition” of a work is defined to be “the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.”⁹⁸

Multiple editions of the same version of a work are sometimes published in the U.S. before the deposit date. In this case, the owner is responsible to determine the best edition to submit. In determining which edition is best, the owner will favor color rather than black and white, physical instead of digital copies, and archival quality paper as opposed to fragile paper. The Copyright Office’s website offers more information about what constitutes the best edition of a work, found under *Best Edition of Published Copyrighted Works for the Collections of the Library of Congress* (Circular 7B).⁹⁹

The deposit requirement included in the registration process is separate from the mandatory deposit requirement. The owner of a copyright, or of the exclusive right of publication, may fulfill the mandatory deposit requirement without seeking registration, but can certainly do so by submitting the best edition of the work when registering for copyright. The

⁹⁸ *Best Edition of Published Copyrighted works for the Collections of the Library of Congress*, COPYRIGHT.GOV (last visited July 27, 2018),

<https://www.copyright.gov/circs/circ07b.pdf>.

⁹⁹ *Id.*

mandatory deposit clause exists only to ensure that the Library of Congress has access to copies of every copyrightable work published in the United States for its records and for use in other libraries.

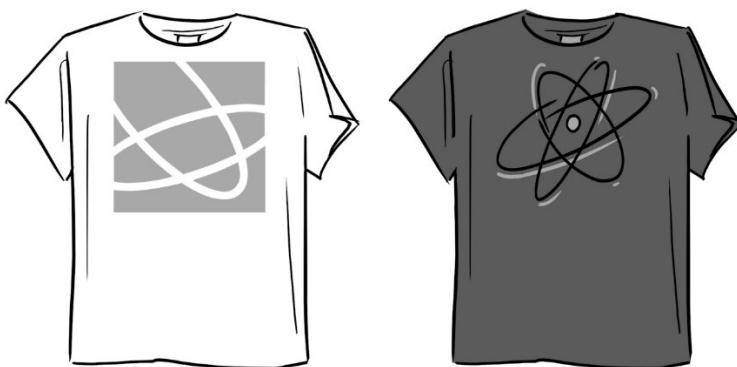
Works published outside of the United States, or not published at all, are not subject to the mandatory deposit requirement. The requirement only applies works that are published in the U.S.

In addition to works published abroad, there are several categories of published works that are also exempt from the mandatory deposit requirement, including: jewelry, dolls, toys, games, packaging materials and online only electronic works. However, electronic serials that have been demanded by the copyright office are still subject to the mandatory deposit requirement. A complete list of exemptions from the mandatory deposit requirement can be found under *Mandatory Deposit of Copies or Phonorecords for the Library of Congress* (Circular 7D) on www.copyright.gov.¹⁰⁰

¹⁰⁰ *Mandatory Deposit of Copies or Phonorecords for the Library of Congress*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/circs/circ07d.pdf>.

Chapter 6: Defenses to Copyright

Infringement



I. Copyright Infringement

A copyright infringement is an act that violates the exclusive rights held by the owner of a copyright under the Copyright Act of 1976.¹⁰¹

¹⁰¹ University Copyright Office, *Copyright Infringement Penalties*, PURDUE UNIVERSITY (last visited July 27, 2018),

As discussed in Chapter 2: *Outline of Copyright Law*, copyright holders are given the exclusive right to control who reproduces, distributes, performs, displays, and creates derivative copies of their protected work. If a party carries out any one of these actions without proper authorization, the copyright holder may be entitled to bring a claim of copyright infringement against the party in question.

All successful copyright infringement claims must prove two elements: proof that the claimant has “ownership of a valid copyright” and proof that there is “copying of constituent elements of the work that are original.”¹⁰²

A copyright certificate, or another form of proof that shows the date on which the copyrighted material was made, is necessary to prove ownership of a valid copyright.¹⁰³

To prove the second element of copyright infringement, the copyright holder must be able to show that the alleged

<https://www.lib.purdue.edu/uco/CopyrightBasics/penalties.html>
l.

¹⁰² Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 361 (1991).

¹⁰³ Louis Kroeck, *How to Prove Copyright Infringement*, CHRON (last visited July 27, 2018), <http://smallbusiness.chron.com/prove-copyright-infringement-60828.html>.

infringer was able to access the original work, copied the work, and that the copied work and the original protected work are substantially similar.¹⁰⁴

There is a variety of mediums through which infringement can occur, including films, books, and photographs. For instance, recording a movie at the theater, downloading movies, music, or e-books from the internet for free, and using pictures for a website without the authorization to do so are a few examples of common copyright infringements.¹⁰⁵

II. The Doctrine of Fair Use

The fair use doctrine is an exception to the rights granted to artists and authors under copyright that is often invoked to defend against copyright infringement claims.¹⁰⁶ This doctrine was implemented by courts in an attempt to limit the strict application of copyright law which had sometimes shown to limit creative ideas.

Four factors are considered when a court decides if the use of a copyrighted work is fair use:

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ University Marketing and Communications, *Fair Use Doctrine*, WASHINGTON STATE UNIVERSITY (last visited July 27, 2018), <https://ucomm.wsu.edu/fair-use/>.

- (1) the way and purpose for how the copyright protected work is used and whether it is used for a commercial or non-profit educational purpose;
- (2) the nature of the copyrighted work;
- (3) the proportionality between the amount and substance of the copyrighted work used and the copyrighted work as a whole, and;
- (4) the impact that this use has on the market value of the copyright protected work.¹⁰⁷

The first fair use factor is centered on the reasons for one's use of a copyrighted work, and particularly whether their use was motivated by a potential profit gained through the use. Using copyrighted material to make a profit generally works against a fair use defense but does not totally prevent a court's favorable consideration for the first factor.¹⁰⁸

The second factor is concerned with the level of creativity of the new work. In general, creativity and fair use are directly

¹⁰⁷ University Marketing and Communications, *supra* note 106.

¹⁰⁸ *Id.*

correlated, with courts being more likely to find fair use for more creative works.

The third factor is concerned with how much the new work utilizes the content of the protected work. The more one copies or uses the original work, and the more similarities there are between the works, the less likely it is that one can adequately show fair use. However, Brand Managers should keep in mind that one's inability to argue the third factor when they copy the brand's entire original work does not necessarily prevent a fair use ruling, as it is just one of the four main factors considered. This factor also takes the substantive value of the copyrighted work used into consideration. If one only used a few parts of the protected work, but those parts happened to be the most noteworthy or significant parts, they still might not be able to invoke fair use.

The fourth and final factor, and perhaps the most crucial to e-commerce sellers protecting their brand, is the commercial influence that the use of the original work would have on the rights owner, and by extension, the Brand Manager. Being largely hypothetical, this factor is one of the more difficult ones to gauge. The court must attempt to determine the potential harm that could result if the copied work was for sale, competing in the same market as the original copyrighted work.



III. The Doctrine of De Minimis Use

The *de minimis* doctrine is another way in which accused infringers may attempt to defend their use of copyrighted works. This doctrine holds that some copyright disputes are so minimal and insignificant that courts should not even spend their time and resources on them, but rather on more consequential issues.

109

¹⁰⁹ *The De Minimis Defense in Copyright Law. De Mini-What?*, UNT (Sept. 5, 2017), <https://blogs.library.unt.edu/copyright/2017/09/05/the-de-minimis-defense-in-copyright-law-de-mini-what>.

Stemming from the Latin phrase, “*de minimis non curat lex*,” which translates to “the law does not concern itself with trifles,” the *de minimis* defense to copyright infringement acknowledges that even if a work is infringing on the rights of a copyright holder, and defenses like fair use are not available, an insignificant copy should not be considered a copyright infringement.¹¹⁰

For instance, if a party copies a portion of a copyright protected work, but the portion used in the new work is so inconspicuous that is nearly invisible or likely to go unnoticed, a court will likely allow the party to successfully invoke the *de minimis* doctrine.

IV. The First Sale Doctrine

The first sale doctrine is a crucial legal concept that those who are hoping to build and grow a brand should be aware of. The doctrine states that “the owner of a particular copy or phonorecord lawfully made under the [Copyright Act], or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”¹¹¹ Put simply, when one buys a copy of a work protected under copyright from the copyright holder, the buyer then has the right to sell, display,

¹¹⁰ *Id.*

¹¹¹ 17 U.S.C. § 109(a).

distribute, or dispose of that particular copy with no requirement to consider the interests of the copyright holder.¹¹²

While its name may suggest otherwise, the first sale doctrine does not require a sale to take place in order for the doctrine to be invoked. The doctrine can apply in situations where a copy of a copyright protected work is given away or transferred permanently without any transfer of money between parties.¹¹³ The first sale doctrine is a statutory limitation that Congress felt was necessary to implement as a way to limit the exclusive rights held by copyright owners.¹¹⁴

The rights granted to the buyer by the first sale doctrine have a few restrictions. For instance, the buyer's right to distribute a copy of the copyrighted work that was legally obtained from the rights holder is terminated once he or she has sold the particular copy. Further, there is no protection for those who make or obtain unauthorized copies of a copyrighted work. Those who have rented, leased, or have come into possession of

¹¹² Offices of the United States Attorneys, *1854. Copyright Infringement*, UNITED STATES DEPARTMENT OF JUSTICE (last visited July 27, 2018), <https://www.justice.gov/usam/criminal-resource-manual-1854-copyright-infringement-first-sale-doctrine>.

¹¹³ WILLIAM F. PATRY, 4 PATRY ON COPYRIGHT § 13:15 (2018).

¹¹⁴ Offices of the United States Attorneys, *supra* note 112.

a protected work while not actually owning it do not hold any rights applicable to said work under the first sale doctrine.¹¹⁵

The first sale doctrine is another commonly invoked defense by parties accused of copyright infringement.

V. Conclusion

It is common for Brand Managers to bring claims against infringing Sellers. If a Brand Manager or rights owner submits a complaint about a listing that is infringing on the copyrighted works associated with the brand, Amazon will oftentimes remove the Seller from the listing or suspend their account until the complaint is resolved.

Brand Managers should also be aware that other Sellers are completely capable of submitting complaints against their listings too, and a copyright holder can elect to recover statutory damages, as opposed to actual damages due to lost profits, which can result in the infringer being liable for a payment ranging from \$750 to \$30,000.¹¹⁶

Brand Managers should always be on the lookout for serious infringements on their brand's copyright while also

¹¹⁵ 17 U.S.C. § 109(d).

¹¹⁶ 17 U.S.C.A. § 504 (c)(1).

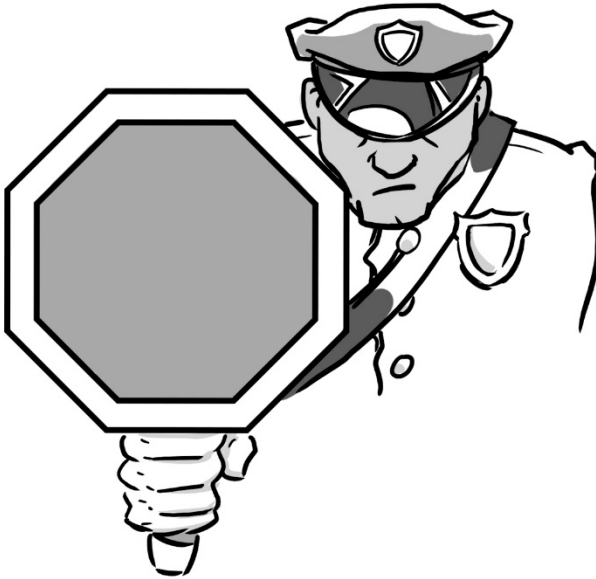
keeping in mind that infringements can happen by accident, and should always be avoided.

A party who knowingly infringes on the copyright of a work can be liable for up to \$150,000.¹¹⁷ The test to determine copyright infringements is can be vague, and a challenging issue for courts to address,¹¹⁸ leading to frequently erratic holdings by courts.

¹¹⁷ *Id.*

¹¹⁸ Jason E. Sloan, *An Overview of the Elements of a Copyright Infringement Cause of Action-Part I: Introduction and Copying*, AMERICAN BAR ASSOCIATION (last visited July 27, 2018), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/elements_of_a_copyright.html.

Chapter 7: Copyright Claims and
Suspensions: A.K.A “Rights Owner”
Complaints & Suspensions.



I. Operating on Amazon

Infringing on the copyrighted work of others should always be avoided by Sellers operating on Amazon. An Amazon Seller who receives a copyright infringement complaint from a rights owner will most likely lose their ability to sell their product, or in some cases, their entire account. Brand Managers are equipped with the necessary tools to enforce copyright protections for works used to build and grow their brand on Amazon, but they should always be judicious when submitting infringement complaints.

The suspension of an Amazon Seller's account is "Amazon's way of avoiding liability for the infringement."¹¹⁹ Unfortunately, baseless complaints are a common issue that many Amazon Sellers struggle with, and Amazon's policy places the burden on the Sellers to attempt to get the complaint retracted and, if they are unable to do so, to persuade Amazon's MPA team that the complaint was baseless.

II. Receiving Intellectual Property Rights Complaints

Upon the suspension of an Amazon listing or account due to an intellectual property rights complaint, the Amazon Seller will receive an email from Amazon informing them that a complaint was asserted and that the Seller should reach out to the complainant to attempt to resolve the issue. It is then up to the Seller to seek a retraction from the person who made the allegation against them.

When it is obvious that a complaint is baseless, and that there has been no violation whatsoever of anyone's intellectual property rights, retractions can be sought from a position of strength. However, whether or not a Seller is in fact infringing on another's rights, a retraction should always be sought.

¹¹⁹ CJ ROSENBAUM, *YOUR GUIDE TO AMAZON SUSPENSIONS* 54 (2017-2018 ed.).

Seeking a Retraction from Position of Strength: No Violation

When an Amazon Seller is not infringing on the complainant's rights, they will be in a position of strength when seeking a retraction. Not only can the accused Seller employ an attorney's opinion letter explaining the lack of any infringement, but they are able to explain the potential liability associated with the assertion and maintenance of a baseless infringement complaint.

Brand Managers should not hesitate to submit infringement complaints against other Sellers who are definitely infringing on their intellectual property rights. However, Brand managers should be aware that the submission of complaints that have very little or no basis may be deemed by Amazon as anti-competitive behavior, and that the maintenance of baseless complaints could cause the complainant's account to be suspended.

Since the first sale doctrine permits U.S. Sellers to buy and sell almost anything they want, most complaints asserted on Amazon among U.S. Sellers are baseless. Of course, the first sale doctrine is limited to genuine products, but if the consumer is receiving a product that is not "materially different" than what they could have bought from the brand itself, there is likely no intellectual property rights violation.

DMCA Counter Notices

Brand Managers are liable to face infringing Amazon Sellers who file a DMCA Counter Notice in response to their complaints.

Simply put, a DMCA Counter Notice is a “put up or shut up” mechanism that Sellers who think they received a baseless infringement complaint can employ. A Counter Notice is basically a challenge issued by a recipient of a complaint to the complainant maintaining the notice of infringement. The alleged infringer challenges the complaint in writing and agrees to be subjected to a federal court’s jurisdiction for the dispute.

Upon the proper drafting and issuance of a Counter Notice, the complainant has ten (10) business days to file an actual lawsuit. This is why Brand Managers should think twice before submitting infringement complaints when a Seller is only questionably violating the brand’s intellectual property. A DMCA Counter Notice forces the complainant to put their money where their mouth is. If they do not, and no lawsuit is filed, Amazon would then reinstate the listing and the complaint would be dismissed.

There are some oddities on Amazon:

1. In order to link the withdrawal with the suspended account, the Seller must ensure that the withdrawal comes from the same email from which the complaint was asserted;
2. Since Amazon seems to “lose” withdrawals, the Seller should be cc’d on the email withdrawing the complaint;
3. Even though there was never a violation of anyone’s intellectual property rights, the Amazon Seller should draft a concise POA explaining the issues in a positive manner;
4. If the account is not reinstated quickly, the Amazon Seller should contact Amazon’s notice-dispute team to assert that the complaint has been withdrawn and the Seller’s account should be reinstated.

Chapter 8: Conclusion



In the 21st century global marketplace, Brand Managers employ cutting-edge technologies and initiatives to maintain a reputable brand with a lasting image to consumers. Amazon.com offers unprecedented opportunities for brands to thrive, and it holds a high standard for those taking advantage of the platform. To protect the integrity of their products, Brand Managers must garner as much knowledge as they can about these standards.

Copyright law is a crucial part of successful brand management. We have covered the origins of intellectual property law and the evolution and implementation of and critical legislation that are incredibly relevant to the ways in which the copyright protections of brands can be upheld in the digital era.

Most importantly, we have discussed the ways in which Brand Managers can protect and grow their brands on major e-commerce platforms like Amazon with a deep understanding of

copyright. We have also identified the limitations of copyright protections of which Brand Managers must be cautious.

Ultimately, we hope that all brands and businesses on Amazon's platform have gained an essential understanding of copyright that will allow them to thrive on Amazon despite the complications born of the digital era.

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