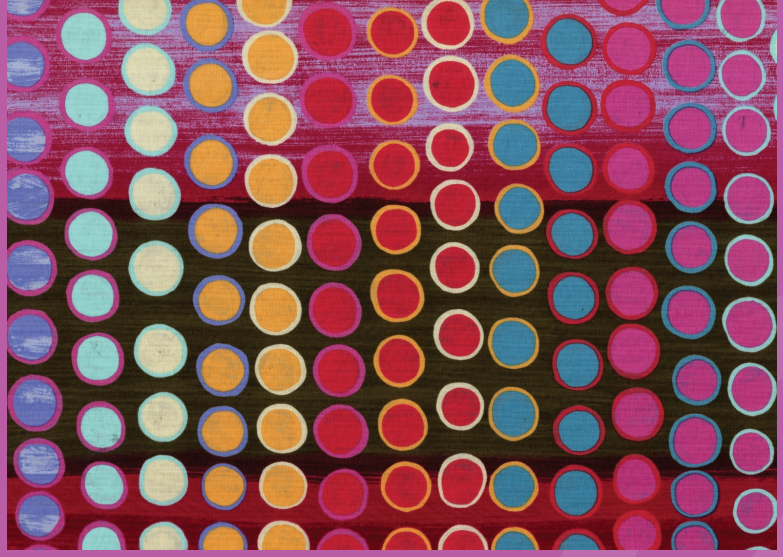

# COPYRIGHT



**PART ONE:**
## Copyright – What is It?

**PART TWO:**
## What's in the Copyright?

**PART THREE:**
## Copyright Infringement

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PART ONE:

# Copyright – What is It?

"What is a copyright and what protection does it offer?" Although this question is generally not the first question that comes to mind, it usually follows the first cry of indignation that "They copied my pattern and infringed my copyright." Whether someone has copied a pattern or actually infringed on a copyright depends entirely on the circumstances.

Copyright infringement is not as black and white as many people assume. Before deciding if there really is a case of infringement, it is important to understand key definitions.

## Copyright Defined

Copyright is a form of protection provided by the laws of the United States under Title 17, of the United States Code. It is a *federal statute*, which means copyright protection and enforcement is not subject to state laws. Copyright is a form of protection to authors of "original works of authorship," including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available for both published and unpublished works. There are very specific terms regarding publishing and not publishing. For example, look at the copyright page of a book and you may note that the copyright date and publication date differ.

What protection does a copyright afford the copyright owner? Section 106 of the 1976 Copyright Act generally gives the owner the *exclusive* right to or authorizes others to do the following:

- Reproduce the work in copies or phonorecords;
- Prepare derivative works based upon the work;
- Distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- Perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- Display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work.

In addition, certain authors of works of visual art have the rights of attribution and integrity as described in section 106A of the 1976 Copyright Act.

Copyright protection exists from the time the work is created in fixed form. The copyright in the work of authorship ***immediately*** becomes the property of the author who created the work. Only the author or those deriving their rights through the author can rightfully claim copyright.

The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary. It is important to understand that unless there is an agreement to the contrary, copyright in each separate contribution to a periodical or other collective work is distinct from copyright in the collective work as a whole and vests initially with the author of the contribution.

An issue that many people misunderstand is that mere ownership of a book or manuscript, for example, does not give the possessor the copyright. Transfer of ownership of any material object that embodies a protected work **does not** of itself convey any rights in the copyright. Copyright protection is available for all unpublished works, regardless of the nationality or domicile of the author.

## What is and is Not Protected?

Copyright protects "*original works of authorship*" that are fixed in a tangible form of expression. The fixation need not be directly perceptible as long as it may be communicated with the aid of a machine or device. Copyrightable works include the following categories:

- Literary works;
- Musical works, including any accompanying words;
- Dramatic works, including any accompanying music;
- Pantomimes and choreographic works;
- Pictorial, graphic, and sculptural works;
- Motion pictures and other audiovisual works;
- Sound recordings;
- Architectural works.

These categories should be viewed broadly. For example, computer programs and most "compilations" may be registered as "literary works"; and maps and architectural plans may be registered as "pictorial, graphic, and sculptural works."

Have you ever visited a quilt show or seen a copy of a quilt in a magazine or on the cover of a pattern, wherein there is a copyright notice (©) following the title of the quilt? This falls within one of the several categories of material that are generally *not* eligible for federal copyright protection.

### *Material Not Eligible for Copyright Protection*

- Works that have ***not*** been fixed in a tangible form of expression (for example, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded);
- Titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents (some items might be protected under the federal trademark laws). In the context of a quilt pattern, a title is not subject to copyright protection, so if more than one quilt has the same title, the title of the second quilt does not infringe on the first. However, the title may be subject to federal trademark protection.
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration (might be eligible for protection under the patent laws). How to make a half-square triangle for a quilt is a procedure; therefore, it cannot be copyrighted. However, the description of the procedure may be subject to copyright protection. This gets complicated because if there is only one (or a very limited) way to describe something, the expression (the words describing the procedure) of this procedure may be subject to copyright protection.
- Works consisting ***entirely*** of information that is common property and containing no original authorship (for example: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources).

## Securing Copyright

Securing copyright protection is frequently misunderstood. *No publication or registration or other action in the Copyright Office is required to secure copyright.* Although copyright registration is not required, there are other advantages.

Copyright is secured ***automatically*** when the work is created, and a work is "created" when it is fixed in a copy or phonorecord for the first time. "Copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm.

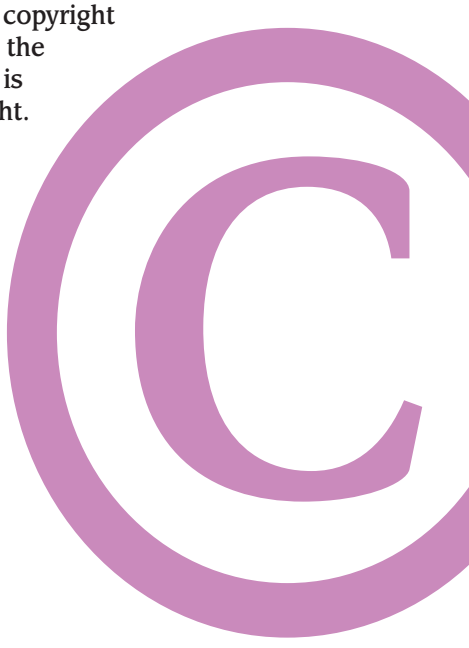
It is interesting to note that if a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date.

Although publication is no longer the key to obtaining federal copyright as it was in earlier versions of the Copyright Act, it remains important to copyright owners.

"Publication" is the distribution of copies of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. **A public performance or display of a work does not of itself constitute publication.** For example, teaching a class on a specific quilting technique (a process) does not constitute publication or grant automatic copyright. However, teaching a class would be subject to copyright protection if the class were videotaped.

Publication is an important concept in the copyright law for several reasons:

- Works that are published in the United States are subject to mandatory deposit with the Library of Congress. That means published books should be sent to the Library of Congress and catalogued.
- Publication of a work can affect the limitations on the exclusive rights of the copyright owner that are set forth in the copyright law.
- The year of publication may determine the duration of copyright protection for anonymous and pseudonymous works (when the author's identity is not revealed in the records of the Copyright Office) and for works made for hire.
- Deposit requirements for registration of published works differ from those for registration of unpublished works.
- When a work is published, it may bear a notice of copyright to identify the year of publication and the name of the copyright owner and to inform the public that the work is protected by copyright. Copies of works published before March 1, 1989, must bear the notice or risk loss of copyright protection.



The use of a copyright notice is no longer required under U. S. law, although it is often beneficial. Because prior law did contain such a requirement, however, the use of notice is still relevant to the copyright status of older works.

Notice was required under the 1976 Copyright Act. However, this requirement was eliminated when the United States adhered to the Berne Convention, effective March 1, 1989. Use of the notice may be important because it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication. *The use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office.*

In the event that a work is infringed, if a proper notice of copyright appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's defense based on innocent infringement in mitigation of actual or statutory damages. Innocent infringement occurs when the infringer did not realize that the work was protected. (In other words, "not knowing" is *not* a legitimate defense.)

## Elements of a Copyright Notice

If you are going to use a copyright notice, it should contain three elements. These three elements should ordinarily appear together on the copies or on a label:

1. The symbol © (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr.;
2. The year of first publication of the work. In the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying textual matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful article.
3. The name of the owner of copyright in the work, or abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

   Note: If you have a business set up, wherein the intellectual property assets belong to the business, they may be the owner of the copyright.

   © 2003 Carolyn V. Peters

The "C in a circle" notice is used only on "visually perceptible copies." In other words, the copyright notice should be visible upon inspection.

The copyright notice should be affixed to copies in such a way as to "give reasonable notice of the claim of copyright." There are specific regulations concerning the form and position of the copyright notice in the Code of Federal Regulations (37 CFR Section 201.20). For more information, you can obtain Circular 3, "Copyright Notice" from the U.S. Copyright Office.

## Transfer of Copyright Owner's Rights

Another important issue for many pattern designs and authors is the transfer of their copyright owner's rights. When dealing with book publishers, note that any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred to the publisher. However, the transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. **Transfer of a right on a *nonexclusive* basis does not require a written agreement.** Transfers of copyright are normally made by contract.

Copyright is a personal property right, and it is subject to the various state laws and regulations that govern the ownership, inheritance, or transfer of personal property as well as terms of contracts or conduct of business. However, the interpretation of the copyright owner's rights are subject only to the federal laws. When you look at the copyright page and find the copyright in the author's name, it means the author is the owner of the exclusive rights. Without an agreement in place, the author has the right to all of the exclusive rights to which they are entitled. Whether or not an author can publish the same information in another book or pattern depends on the agreement the author has with the publisher of the original book. For example, when an originally designed quilt is sold, the "author" may transfer the ownership of the quilt and may also transfer some of the rights, such as the right for public display. In most cases, the quilt designer retains the rights to have the quilt photographed or displayed in a book or in a compilation.

## Copyright Registration

In general, copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. However, *registration is not a condition of copyright protection.* Even though registration is not a requirement for protection, the copyright law provides several inducements or advantages to encourage copyright owners to make registration.

PART TWO:

# What's in the Copyright?

In general, copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. It is important to remember that registration is *not* a condition of copyright protection.

## Why Register Your Work?

Although the Copyright Act affords you protection for creating your work and reducing it to a tangible form, it is desirable in many cases to officially register your works with the U.S. Copyright Office. The registration process is fairly straightforward and the fees are reasonable. The following are not eligible for copyright protection: ideas, facts, titles (including quilt titles), names, short phrases ("Just Do It" is a trademark of Nike but it is not protected by copyright), and blank forms.

Since copyright protection attaches immediately and automatically upon fixation (reduction to a tangible form) of the work in question, why should you go to the trouble and expense of filing a federal copyright registration? Even though registration is not a requirement for protection, the copyright law provides several inducements or advantages to encourage copyright owners to make registration, as follows:

- Registration establishes a public record of the copyright claim.
- Registration is necessary for works of U.S. origin before an infringement suit may be filed in court.
- Registration made before or within five years of publication establishes prima facie evidence in court of the copyright's validity and of the facts stated in the certificate.
- If registration is made within three months after publication of the work or before an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, an award only of actual damages and profits is available to the copyright owner.
- Registration allows the copyright owner to record the registration with the U.S. Customs Service for protection against the importation of infringing copies.

Registration may be made at any time within the life of the copyright. Before the law was changed in 1978, it was necessary to register unpublished works and then reregister when the work was published. That is no longer the case, but the copyright owner may register the published edition if desired.

There are some dangers inherent in not registering your copyright. To understand them, let's assume that you are a designer and you have not registered your newest pattern. It exists in tangible form (for example, files saved to a disk or paper copies of your designs and directions). It is, therefore, protected by copyright. If someone sees the resulting pattern in a classroom setting and copies it verbatim by taking it to a copy shop and having copies made for all members of a guild, your copyright has been infringed.

To sue this "classroom copier" for copyright infringement, you would have to register your pattern with the copyright office. If you were in a hurry to file the lawsuit, you could pay an additional $580 fee to expedite the application. Assuming that the classroom copier did not have any valid defense such as fair use (see below), you would be able to collect losses, plus any profits that the classroom copier accrued from the infringement. Your losses would be based only on how many copies the classroom copier produced. Most likely, however, you would not collect lost profits since the classroom copier did not sell the copied patterns but rather gave them away. Plus, you could end up paying attorneys' fees for your trouble.

If your pattern had been registered within three months of its first publication, however, you would be able to recover *statutory* damages in lieu of the virtually nonexistent *actual* damages. Statutory damages can be awarded up to $100,000, plus attorneys' fees and court costs, depending on the nature and malevolence of the infringement. As you can see, this would certainly affect your decision about whether to sue someone for copyright infringement.

## Registering a Copyright

To register your copyright, you must first classify the work that you want to register. Remember, copyright only protects expression. The Copyright Act of 1976 states that items of expression can include:

- Literary, dramatic, and musical works
- Pantomimes and choreography
- Pictorial, graphic, and sculptural works
- Audiovisual works
- Sound recordings
- Architectural works

An original expression is eligible for copyright protection as soon as it is fixed in a tangible form. Consequently, almost any original expression that is fixed in a tangible form is protected as soon as it is expressed.

**Statutory Decree §107. Limitations on exclusive rights: Fair Use**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies

or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The next step is to determine who owns the work that you want to register. This is not always as easy as it may appear. Copyright ownership initially resides with the author of creations meeting the requirements of copyrightable subject matter. Under copyright law, however, the creator of the subject matter is not always the author. The copyright law designates the *employing party* as the author and therefore the owner of a work developed under the work-for-hire doctrine. Two types of employment qualify as work for hire: the typical employee/employer relationship and the independent contractor relationship. For the independent contractor, there are two specific criteria and only nine categories that are subject to work-for-hire "rules." (Note: These criteria and categories will be outlined in the next installment.)

Once you have classified the work, you can determine which Copyright Registration Form to use. The two you would most likely choose from are Form VA (visual arts) or Form TX (literary works). The classification is not necessarily determinative, and you may need to make a judgment call. For assistance on the appropriate form, you can find information at the copyright Website, www.copyright.gov.

The classification of the work generally determines the deposit you will need to include with your registration form. The current Copyright Office filing fee is $30. Once you have completed the proper determination and filled out the forms, you send the complete package, including the completed and executed Copyright Registration Form, deposit, and registration fee, to the U.S. Copyright Office, 101 Independence Ave., SE, Washington, DC 20559 (202-707-3000).

## Copyright Defenses

*Fair use* and *public domain* are two commonly employed defenses to copyright infringement. They are frequently misused, perhaps because their definitions are a bit vague.

### Fair Use

Although the Fair Use provision is in the Copyright Act, before the 1990s it was seldom invoked outside of academic circles. But the Fair Use provision and the four factors to be considered in a fair use analysis were dramatically set forth in the 2 Live Crew court case (see sidebar).

To put the Fair Use provision of the Copyright Act into a perspective that relates to your business, consider that a quilt shop makes copies of a pattern for use in the classroom. Unless the quilt shop has received permission from the copyright owner, making these copies is a copyright infringement because a class conducted in a quilt shop would not be defined as a "nonprofit educational purpose." Making copies of an out-of-print pattern or book is *not* considered fair use. Many factors are considered under the Fair Use Doctrine, such as commercial nature or nonprofit educational purposes, preamble purposes, criticism, comment, news reporting, teaching, scholarship, and research.

**The first factor**—purpose and character of the work—looks at the new work and also takes into account the following three sub-factors:

- The first sub-factor simply looks at the new work and determines whether it was created primarily as a for-profit venture or whether it was created for a nonprofit educational purpose. Although not at all determinative, this test indicates that preference will be granted to works that were created for nonprofit educational purposes.

- The second sub-factor looks to see if the new work is for one of the purposes mentioned in the preamble of the fair use provision. It should be noted that this list is not restrictive. But the burden of showing fair use is somewhat easier if the work is for one of these purposes.
- The third sub-factor looks at the degree of transformation accomplished by the new work. In other words, this sub-factor seeks to determine whether the new work merely supplants the original, or whether it adds something new, with a further purpose or different character, thereby altering the first with new expression, meaning, or message.

**The second factor** acknowledges that some works are simply more deserving of copyright protection than others. Consequently, this portion of the test looks at the original work and attempts to determine where that work is in the spectrum of worthiness for copyright protection.

**The third factor** looks at the amount and substantiality of the copying in relation to the work as a whole. The critical determination, however, is whether the quality and value of the materials used are reasonable in relation to the purpose of copying. This is not a pure ratio test in that using a whole work may be fair use in some circumstances, but using a tiny fraction of a work does not qualify for fair use in other circumstances. Therefore, the quantity as well as the quality and importance of the copied material must be considered.

**The fourth factor** considers the extent of harm to the market or potential market of the original ork caused by the infringement. This test takes into account harm to the original, as well as harm to derivative works.

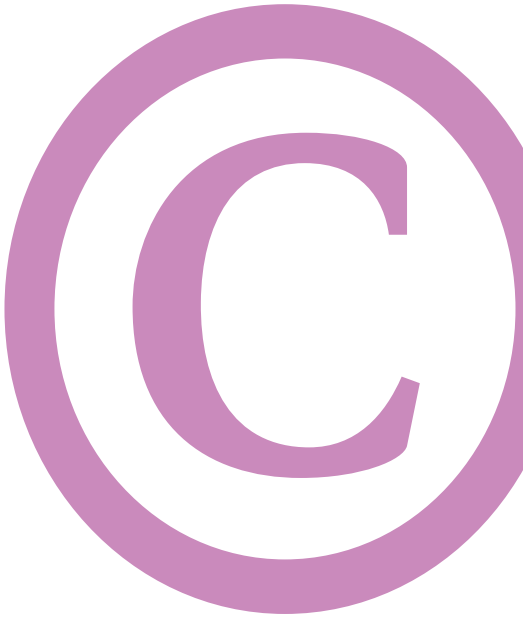
## Public Domain

It is not uncommon to hear quilters invoke public domain when it comes to copyright issues, as in, "No problem; it's in the public domain." The public domain is that repository of all works that for whatever reason are *not* protected by copyright. NOTE: *Out of print* does not mean *in the public domain.*

Works that are in the public domain are free for all use *without* permission. It is important to understand that once a work has entered the public domain, it is no longer copyrightable subject matter. For example, no matter what you do, the Log Cabin quilt block cannot be subject to copyright protection. Various instructions to make the Log Cabin block may be copyrightable subject matter, however.

The public domain contains all works that previously had copyright protection, but that subsequently lost that protection due to some error by the copyright owner. Although it is all but impossible to lose copyright protection under today's laws, previous statutory schemes were not so generous. For example, *all works published before January 1, 1978, that did not contain a valid copyright notice may be considered to be in the public domain.*

The public domain contains all works for which the statutory copyright period has expired. Additionally, you are free to copy any work published before 1964 in which the copyright owner failed to renew his copyright. Federal documents and publications are not copyrighted and therefore are considered to be in the public domain. Consequently, if you obtain a government document from the Internet, such as a law, statute, agency circular, federal report, or any other document published or generated by the federal government, you are free to copy or distribute the document. Copyrightable works may also enter the public domain if the copyright owner grants the work to the public domain.



PART THREE:

# Copyright Infringement

When discussing copyright infringement, it is important to recall the rights recognized by the United States Copyright Statute as outlined previously, which include:

- Reproductive rights: the right to reproduce the work in copies;
- Adaptive rights: the right to produce derivative works based on the copyrighted work;
- Distribution rights: the right to distribute copies of the work;
- Performance rights: the right to perform the copyrighted work publicly;
- Display rights: the right to display the copyrighted work publicly;
- Attribution rights (also known as Paternity right): the rights of the author to claim authorship of the work and to prevent the use of his or her name as the author of a work he or she did not create;
- Integrity rights: the right of an author to prevent the use of his or her name as the author of a distorted version of the work; to prevent intentional distortion of the work; and to prevent destruction of the work.

Not all of these rights apply to every type of work. For example, display rights apply to literary, musical, dramatic and choreographic works, pantomimes, motion pictures, and other audiovisual works. They do not apply to sound recordings or architectural works. Attribution rights and integrity rights apply only to works of visual art.

## What is Copyright Infringement?

Copyright infringement involves whether or not copying is taking or has taken place. The copyright owner must prove copyright ownership and copying by the alleged infringer. The copyright owner must show that the alleged infringer had access to the work and copied it.

Proof of copying is crucial to any claim of copyright infringement. No matter how similar two works may be (even to the point of identity), if the alleged infringer did not copy the accused work, there is no infringement. Because proof of direct copying is rarely available, the copyright owner is allowed to rely on circumstantial evidence to prove this essential element. The most important component is proof of access. Such proof can be, for example, that the work was sent directly to the alleged infringer or that the copyright owner can show that the work has been widely disseminated.

If the copyright owner does not have direct proof of access, then an inference of access may still be established by proof of similarity that is so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.

Similarity tends to prove access in light of the nature of the work, the particular genre involved, and other circumstantial evidence of access. Striking similarity is only one piece of evidence to be considered.

One example is the following. A few years back a woman posted a photo of her Hoffman challenge quilt to a website and mentioned it on an e-mail discussion list. Another woman viewed the quilt and proclaimed that this was a copy of her own original work. She was angry that someone dared to copy her quilt; however, the woman claiming copyright infringement could not prove that the other woman had ever seen her work as that quilt had never been posted or shown to others on the discussion list. Having had no access to the claimant's work, it could not be proved that the work was copied. All circumstantial evidence led to the conclusion that the quilt design was an individual expression and not a copy of the first work. It was appropriately concluded that there was independent creation by both parties since there was no access to the first piece.

This illustrates the true task in copyright infringement: determining whether or not there has been copying of the expression of an idea rather than the idea itself. It is important to remember that *an idea is not protected by copyright.* Only expression may be protected or infringed.

Another example is the cosmetic bag offered as a free pattern at the Marcus Brothers website. The bag looks like the Humbug Bag designed by Nancy Restuccia. Her copyright protects the instructions for making the bag, but not the shape of the bag. The shape itself is not protected.

Humbug bag

Marcus Brothers cosmetic bag

## Fashion Design and Copyright

A copyright is a bundle of rights that provides the owner with exclusive rights to exploit their artwork. This includes the right to display or perform the work, the right to reproduce the work, or to authorize others to do so. In the United States, these rights are protected by The Copyright Act of 1976. Internationally, the Berne Convention affords copyright protection. Conversely,

there is no protection under The Copyright Act for designs of utilitarian items such as cars or furniture. If these items incorporate elements with artistic merit, the elements are entitled to copyright protection as separate works of art.

Copyright protection is available for printed designs on fabric, as well as for sketches of a garment created by a designer. The garment, itself, is not protected. Protection is of limited use to a designer who can protect her patterns, but the garment can be freely copied by anyone. In fact, copying designs is customary in the fashion industry. Larger design houses create new designs, which they exhibit and sell for high prices. Over time, other manufacturers copy those designs, creating less-expensive knock-offs, while the major designers create newer designs and fashions. Supposedly, the knock-offs sell at a much lower price than the originals to a different market where they have little economic effect upon the original designers.

It may seem unfair that fashion design is not protected in the same manner that copyright law protects other forms of artistic expression. Most artists have the right to sell licenses to others for the use of their artwork in various markets. The fashion designer has no such right. There has also been discussion that quilts, including table runners, table toppers, and the like are also utilitarian items.

## Suing for Infringement

In order to sue for infringement, your work must be registered with the Copyright Office; however, you may register after the infringement occurs, as long as registration occurs before you file your lawsuit.

The advantage to registering prior to infringement is that it allows you additional remedies that are not available if you register after infringement. This includes statutory damages and attorney's fees. [17 U.S.C. 412]

Statutory damages are damages specified in the United States statutes of law, as opposed to actual damages that you can clearly demonstrate to the court. If you registered your work prior to infringement, you can skip the necessity of actual damage, and simply elect to receive statutory damages. [7 U.S.C. 504(a)]

Statutory damages for copyright infringement range from $500 to $20,000, as determined by the judge. If the infringer proves that he or she was not aware and had no reason to believe that his or her acts constituted infringement, the court may lower damages to as little as $200 per infringement. On the other hand, if the plaintiff proves that the defendant's infringement was committed willfully, the judge may award damages as high as $100,000 per infringement. [17 U.S.C.504(c)]

In deciding whether to register your work, you must weigh the probability of an infringement action (and the advantages of attorney's fees and statutory damages in such an action) against the $30 cost of registration. You could file your suit and obtain a decision in your favor but be awarded low damages or no damages at all. (See for example the case brought by the designer of the quilt from "How to Make an American Quilt." In Brown v. McCormick, 87 F. Supp 467, designer Barbara Brown was awarded $14,053 for the unauthorized use of one of her designs in connection with the above-named film.)

## Defenses to a Claim of Copyright Infringement

Common legal defenses to copyright infringement include:

- There was no copyrightable matter and therefore no copyright protection.
- Too much time has elapsed between the infringing act and the lawsuit (the statute of limitations defense).
- The infringement is allowed under the fair use doctrine (see below).
- The infringement was innocent (the infringer had no reason to know the work was protected by copyright).
- The infringing work was independently created (that is, it was not copied from the original).
- The copyright owner authorized the use in a license. (See Brown v McCormick, 87 F.Supp 467 and Ringgold v. Black Entertainment Television Inc., 126 F.3d 70 wherein both defendants were operating under a limited license and their activity went beyond the scope of that license.)

## What Constitutes "Fair Use?"

There are five basic rules to consider when deciding whether or not a particular use of an author's work is a fair use.

### RULE 1: Are You Creating Something New or Copying?

The purpose and character of your intended use of the material involved is the single most important factor in determining whether a use is a fair use. The question to ask here is whether you are merely copying someone else's work verbatim or instead using it to help create something new. The Supreme Court calls a new work transformative. The more transformative your work, the more likely your use is a fair use.

## RULE 2:
## Are You Competing With the Source From Which You're Copying?

Without consent, you ordinarily cannot use another person's protected expression in a way that impairs (even potentially) the market for his or her work. Thus, if you want to use an author's protected expression in a work of your own that is similar to the prior work and aimed at the same market, your intended use isn't likely a fair use.

For example, a golf pro may write a book on how to play golf. Not a good putter himself, he copies several brilliant paragraphs on putting from a book by Lee Trevino, one of the greatest putters in golf history. Because the golf pro intends his book to compete with or supplant Trevino's book, this use is not a fair use. In effect, the golf pro is trying to use Trevino's protected expression to eat into the sales of Trevino's own book.

Another example is when a teacher copies parts of books for students to use is class. In a recent case, a group of seven major publishers went to court and stopped a duplicating business from copying excerpts from books without permission for the purpose of compiling them into "course packets" and selling them to college students.

## RULE 3:
## Giving the Author Credit Doesn't Let You Off the Hook

Some people mistakenly believe that they can use any material as long as they properly give the author credit. This is simply not true. Giving credit and fair use are completely separate concepts. Either you have the right to use another author's material under the fair use rule or you don't. The fact that you attribute the material to the other author does not change that rule.

## RULE 4:
## The More You Take, the Less Fair Your Use Is Likely to Be

As a general rule, never quote more than a few successive paragraphs from a book or article, or take more than one chart or diagram. It is never proper to include an illustration or other artwork in a book or newsletter without the artist's permission. Do not quote more than one or two lines from a poem. Many publishers require their authors to obtain permission from an author to quote more then a specified number of words, ranging in size from 100 to 1000 words.

Contrary to what many people believe, there is no absolute word limit on fair use. For example, it is not always permissible to use one paragraph of less than 200 words. Copying 200 words from a work of 300 words is not a fair use. Copying 12 words from a 14-word haiku poem is not fair use. Copying 2000 words from a work of 500,000 words might be a fair use. It all depends on the circumstances.

To preserve the free flow of information, authors have more leeway in using material from factual works (scholarly, technical, and scientific works) than from "works of fancy" such as novels, poems, and plays. This is especially true when it is necessary to use extensive quotations to ensure the accuracy of the information conveyed.

## RULE 5:
## The Quality of the Material Used Is as Important as the Quantity

The more important the material is to the original work, the less likely your use of it will be considered a fair use.

In one famous case, "The Nation" magazine obtained a copy of Gerald Ford's memoirs before publication. In the magazine's article about the memoirs, only 300 words from Ford's 200,000-word manuscript were quoted verbatim. The Supreme Court ruled that this was not fair use. They stated that the material quoted (dealing with the Nixon pardon) was the "heart of the book...the most interesting and moving parts of the entire manuscript" and that pre-publication disclosure of this material would cut into the value or sales of the book.

Determining whether your intended use of another author's protected work constitutes a fair use is usually not difficult. It's just a matter of common sense.

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