

AN
ASSOCIATE'S
GUIDE TO
THE PRACTICE
OF COPYRIGHT
LAW

Meaghan Hemmings Kent
Joshua J. Kaufman

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An Associate's Guide to the
Practice of Copyright Law

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This book is a practical guide for lawyers new to the area of copyright law. It covers copyright acquisition, licensing, Digital Millennium Copyright Act notices, federal litigation, and alternatives to litigation.

Although law school provides legal education, it is up to an attorney to learn how to actually *practice* law. This book will speed along the often overwhelming process of learning to *practice*, help you avoid typical pitfalls, teach you some tricks of the practice, point out valuable resources, help you see the big picture, guide conversations with clients, and provide a jumping-off point from which you can become a better, more efficient, more resourceful, and more sought-after attorney. Remember that this book is your first step in practicing copyright law. It is certainly not the only step. There are multivolume treatises and thousands of cases that cover the intricacies of copyright law. This book could not hope to cover all of that material, although it will try to raise most of the issues and point you in the right direction to obtain additional information when you need it.

Each chapter of this book focuses on a different area of copyright law, from copyright acquisition to litigation and alternatives to litigation. While you are certainly welcome to do so, it is not necessary to read this book sequentially. Instead, you can read the sections of this book as you need them. For instance, when you are faced with a DMCA notice, turn to the DMCA chapter; when you are faced with a question on registering a copyright that is also a trade secret, turn to the chapter on copyright registration; when you are faced with searching for an expert, turn to the litigation chapter and section on experts. In this way, you will find the practical tips to save you time and resources in accomplishing the task at hand. The book is designed so that the chapters, and even sections within those chapters, stand alone. For that reason, you may notice that there is some repetition of important points in multiple chapters to ensure that a reader who reads only a certain chapter, or who reads the chapters out of order, will still have the necessary information.

Along with explanations, advice, and tips, throughout the chapters you will find brief examples and samples as well as references to secondary sources, including government sources, online sources, library resources, and treatises. In addition, at the end of the book there is an Appendix with full-length samples referenced within the book, including sample copyright forms, cease and desist letters, licenses, and complaints.

What follows in this introductory chapter is a brief overview of copyrights with a brief description of the elements for copyrights, an explanation of what copyrights protect, and the distinction between registered and unregistered copyrights.

I. Copyright Basics

A. A Copyright Is a Bundle of Exclusive Rights

Once someone acquires a “copyright” in a work, he or she acquires the right to prevent others from using that work. Often referred to as a “bundle of rights,” copyright comprises the *exclusive* rights:

- To reproduce the work
- To make derivative works of the work
- To distribute copies of the work to the public (sale, rental, lease, lending)
- To perform the work publicly
- To display the work publicly

17 U.S.C. § 106 (exclusive rights in copyrighted works).

According to this bundle of rights, only the copyright owner may reproduce or copy the work (a book, CD, or DVD); create a derivative (a movie from a book or a poster from a print), distribute copies of the work (CDs, posters of a painting, software in a company); perform the work publicly (dance choreography perform a copyrighted song); and display the work publicly (broadcast a sporting event, play a copyrighted song while a customer is on hold, post a photograph on a website). Doing any of these things without the copyright owner’s permission breaches the copyright owner’s right and infringes the copyright.

Practice Tip

Infringement does not occur when the expression is sufficiently different. The test used and discussed in more detail in the litigation chapter (Chapter 6) is whether the infringing work is “substantially similar.” You and your clients will hear such tall tales as “As long as the work is only 25 percent similar, then it does not infringe,” or “As long as I only copied 10 percent of the lines from the song, it does not infringe.” These are old wives’ tales and are simply false.

Of course, a copyright owner may allow, through a license, assignment, or other transfer, for others to use the copyrighted work in certain ways. (See Chapter 3 on licensing and assignments). For instance, songwriters and musicians license the right to play their songs on the radio, in gyms, or in elevators; photographers license or assign the rights to display their photographs in magazines; authors license or assign their rights to distributors to