

OVERVIEW OF TRADEMARK AND COPYRIGHT IN UNITED STATES

Jon O. Nelson

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Banner & Witcoff, Ltd.

10 South Wacker Drive

Chicago, IL 60606

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U.S. INTELLECTUAL PROPERTY LAWS

| TYPE | WORKS PROTECTED | TERM | AUTHORITY |
|---------------|---|------------------------------|--|
| Patent | New, useful, and non-obvious processes, articles of manufacture, compositions, machines, and improvements thereof | 20 years from date of filing | Express grant in U.S. Constitution |
| Design Patent | Ornamental Features | 14 Years from date of issue | Express grant in U.S. Constitution |
| Trade Secret | Secrets | No Limit | State Laws |
| Copyright | Authored works (expression of idea) | Life of author plus 70 years | Express grant in U.S. Constitution |
| Trademark | Word or logo indicating source of goods | Renewable 10 year periods | Indirect grant; Commerce Clause of U.S. Const. |

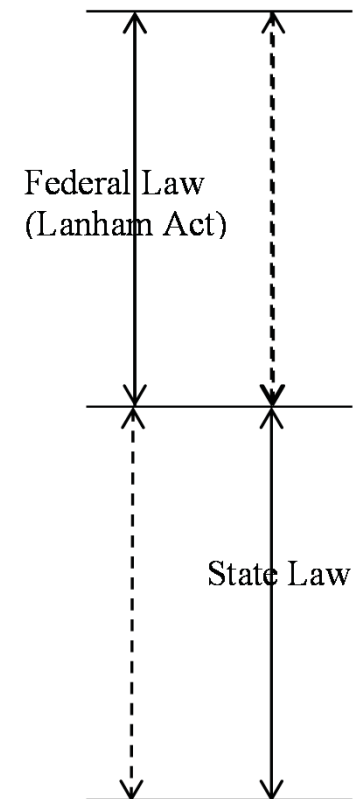


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TYPES OF MARKS

- TRADEMARK
- SERVICE MARK
- COLLECTIVE MARK
- CERTIFICATION MARK
- TRADE NAME
- TRADE DRESS



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TRADEMARK

A MARK USED TO IDENTIFY THE SOURCE OF
GOODS AND DISTINGUISH THEM FROM THE
GOODS OF OTHERS

Coca-Cola



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SERVICE MARK

A MARK USED IN THE ADVERTISING OR SALE OF SERVICES THAT IDENTIFIES THE SOURCE OF THOSE SERVICES AND DISTINGUISHES THEM FROM THE SERVICES OF ANOTHER

*Service*MASTER

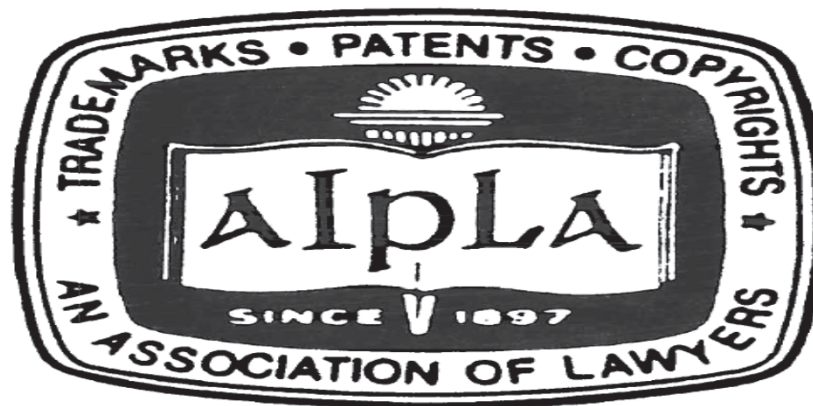


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COLLECTIVE MARK

A MARK USED BY THE MEMBERS OF A UNION, ASSOCIATION, OR OTHER TYPE OF COLLECTIVE GROUP

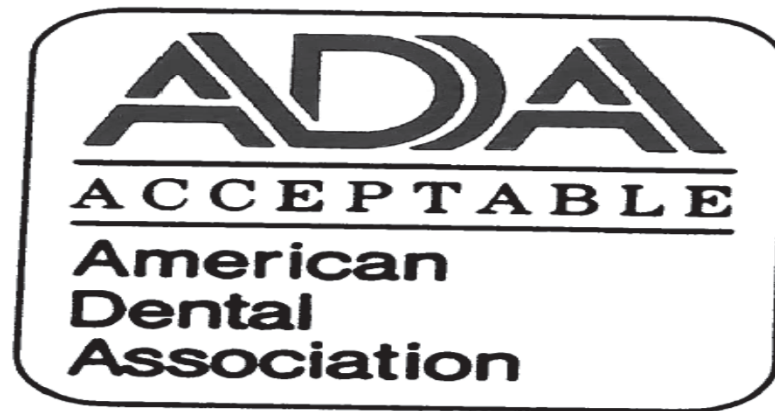


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CERTIFICATION MARK

A MARK USED IN CONJUNCTION WITH
GOODS OR SERVICES TO INDICATE REGIONAL
ORIGIN, MATERIAL OF CONSTRUCTION, OR
QUALITY



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TRADE NAME

A MARK USED TO IDENTIFY A BUSINESS OR PROFESSION

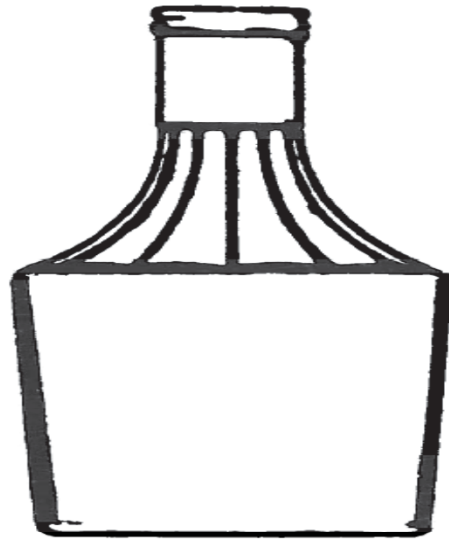


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TRADE DRESS

A SPECIFIC CONFIGURATION, SUCH AS THE SHAPE OR PACKAGING OF GOODS, WHICH IDENTIFIES THE GOODS AND DISTINGUISHES THEM FROM THE GOODS OF OTHERS



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CLASSIFICATION BASED ON STRENGTH OF DISTINCTIVENESS

Coined Word – has no ordinary meaning, invented for the purpose of functioning as a trademark

e.g. EXXON

Fanciful Word – similar to a coined word, but may be an obsolete word or bear a relationship to another word

e.g. FAB, a shortened version of “fabulous”, for laundry detergent

Arbitrary Word – has a common linguistic use, but that use does not normally apply to the goods

e.g. OLD CROW, for whiskey



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Suggestive Word – suggests what the product is, without being descriptive of it

e.g. STRONGHOLD for threaded nails, suggestive of their superior holding power

Descriptive Word – describes the characteristics, nature, qualities, or ingredients of the product

e.g. SHREDDED WHEAT for breakfast cereal

Generic Word – indicates the product itself, rather than the source of the product

e.g. ASPRIN, THERMOS



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XEROX

Once a trademark, not always a trademark.

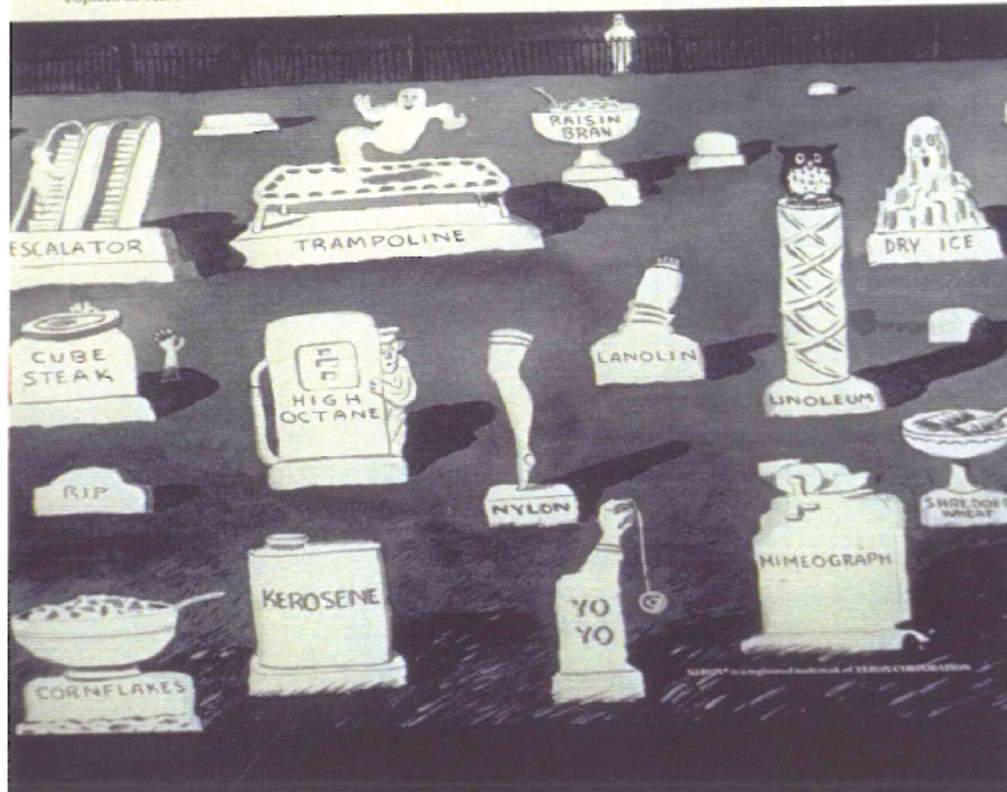
They were once proud trademarks, now they're just names. They failed to take precautions that would have helped them have a long and prosperous life.

We need your help to stay out of there. Whenever you use our name, please use it as a proper adjective in conjunction with our products and services: e.g., Xerox copiers or Xerox financial services. And never as a

verb: "to Xerox" in place of "to copy," or as a noun: "Xeroxes" in place of "copies."

With your help and a precaution or two on our part, it's "Once the Xerox trademark, always the Xerox trademark."

Team Xerox. We document the world.



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BENEFITS OF FEDERAL REGISTRATION

- 1) SERVES AS CONSTRUCTIVE NOTICE FO THE REGISTRANT'S CLAIM OF OWNERSHIP OF THE MARK.
- 2) SERVES AS PRIMA FACIE EVIDENCE OF
 - VALIDITY OF MARK
 - REGSITRANT'S OWNERSHIP
 - REGISTRANT'S EXCLUSIVE RIGHT TO USE FOR THE DESIGNATED CLASS OF GOODS OR SERVICES



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- 3) REGISTRATION BECOMES INCONTESTABLE AFTER 5 YEARS OF USE FOLLOWING REGISTRATION (ASSUMING AFFIDAVIT REQUIREMENTS ARE MET)
- 4) GIVES RIGHT TO SUE IN FEDERAL COURTS
- 5) GIVES RIGHT TO REQUEST U.S. CUSTOMS SERVICE TO BAR IMPORTATION OF GOODS
- 6) REGISTRANT CAN SEEK TREBLE DAMAGES AND ATTORNEY FEES UNDER LANHAM ACT



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TYPES OF REGISTRATION

- PRINCIPAL REGISTER
- SUPPLEMENTAL REGISTER
 - For marks not registerable on the Principal Register.
 - Allows party to register mark in other countries that require, as prerequisite for registration, that the mark be registered in the applicant's own country.
 - Does not provide preemptions gained by registration on Principal Register.
 - Provides access to Federal Courts.
 - Provides access to treble damages and attorney fees.



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REQUIREMENTS FOR REGISTRATION OF A MARK

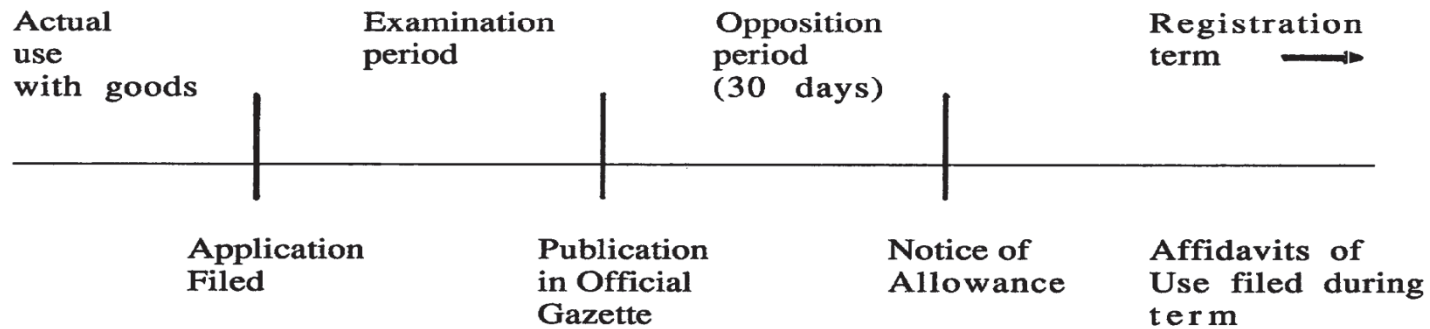
- 1) NOT CONFUSINGLY SIMILAR TO ANOTHER MARK USED FOR SIMILAR GOODS OR SERVICES
- 2) NOT DECEPTIVE
- 3) NOT DESCRIPTIVE OR DECEPTIVELY *MIS*DESCRIPTIVE OF THE GOODS
 - e.g. Hawaiian Pineapples
- 4) DOES NOT CONSIST PRIMARILY OF A PERSON'S SURNAME



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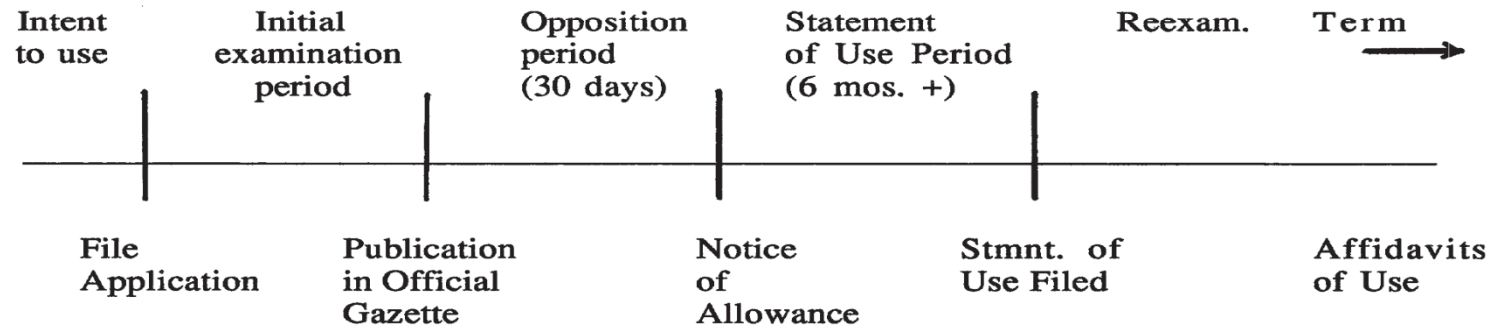
REGISTRATION BASED ON ACTUAL USE OF MARK



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REGISTRATION BASED ON INTENT TO USE



- Can amend "intent to use" application to allege "actual" use
- Statement of Use period may be extended up to 36 Months
- Reexamination does not cover matters that could have been covered during initial examination. Focuses on issues arising from use, e.g., sufficiency of drawings and specimens.



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COPYRIGHT PROTECTION

- OF ORIGINAL WORKS OF AUTHORSHIP
- FIXED IN ANY TANGIBLE MEDIUM OF EXPRESSION
- FROM WHICH SUCH WORKS CAN BE
 - PERCEIVED
 - REPRODUCED
 - OTHERWISE COMMUNICATED



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SUBJECT MATTER PROTECTABLE BY COPYRIGHT

- LITERARY WORKS
- MUSICAL WORKS, INCLUDING ACCOMPANYING WORDS
- DRAMATIC WORKS, INCLUDING ACCOMPANYING MUSIC
- PANTOMIMES AND CHOREOGRAPHIC WORKS
- PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS
- MOTION PICTURES AND OTHER AUDIOVISUAL WORKS
- SOUND RECORDINGS
- ARCHITECTUAL WORKS



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SUBJECT MATTER NOT PROTECTABLE BY COPYRIGHT

- IDEAS
- PROCEDURES
- SYSTEMS
- METHODS OF OPERATION
- CONCEPTS
- PRINCIPLES
- DISCOVERIES

REGARDLESS OF THE FORM IN WHICH THEY ARE DESCRIBED, EXPLAINED, ILLUSTRATED, OR EMBODIED IN SUCH WORK



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FURTHER SUBJECT MATTER NOT PROTECTED BY COPYRIGHT

- FACTS

“...No one may claim originality as to facts...This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; s/he has merely discovered its existence...one who discovers a fact is not its maker or originator...The discoverer merely finds and records...The same is true of all facts – scientific, historical, biographical, and news of the day. [T]hey may not be copyrighted and are part of the public domain available to every person...”

Deist Publications Inc. v. Rural Telephone Service Co.

Inc., U.S. (March 27, 1991) 111 S. CT. 1282, 1288-1289



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FURTHER SUBJECT MATTER PROTECTABLE BY COPYRIGHT

- **DERIVATIVE WORKS**

WHAT IS A DERIVATIVE WORK?

- a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted – including a work consisting of editorial revisions, annotations, elaboration, or other modifications which, as a whole, represent an original work of authorship.



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FURTHER SUBJECT MATTER PROTECTABLE BY COPYRIGHT

- **COMPILATIONS**, including compilations of facts

“Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.”

Feist, 111 S.Ct. at 1289



WHAT IS A COMPILATION?

- a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship – including collective works

WHAT IS A COLLECTIVE WORK?

- a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole



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LIMITATION ON PROTECTION OF DERIVATIVE WORK OR COMPILATION

- COPYRIGHT IN A DERIVATIVE WORK OR COMPILATION EXTENDS ONLY TO THE MATERIAL CONTRIBUTED BY THE AUTHOR OR SUCH WORK
- THIS IS DISTINGUISHED FROM THE PREEXISTING MATERIAL EMPLOYED IN THE DERIVATIVE WORK OR COMPILATION, WHICH HAS ITS OWN INDEPENDENT COPYRIGHT



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EXCLUSIVE RIGHTS OF COPYRIGHT OWNER

A BUNDLE OF RIGHTS:

- TO REPRODUCE the copyrighted work in copies
- TO PREPARE DERIVATIVE WORKS
- TO DISTRIBUTE copies by sale or other transfer of ownership, or by rental, lease or lending.
- TO PERFORM PUBLICLY the copyrighted work (i.e., literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works)
- TO DISPLAY PUBLICLY the copyrighted work (i.e., 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)



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LIMITATIONS ON EXCLUSIVE RIGHTS FAIR USE

SCOPE OF FAIR USE:

FOR PURPOSES SUCH AS

- CRITICISM
- COMMENT
- NEWS REPORTING
- TEACHING (including multiple copies for classroom use)
- SCHOLARSHIP
- RESEARCH

NOTE: Fair use is a DEFENSE to a charge of copyright infringement and is an equitable doctrine which permits, under certain conditions, the limited use of copyrighted material without the owner's consent.



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FOUR FACTORS CONSIDERED TO DETERMINE FAIR USE

- (1) PURPOSE AND CHARACTER OF USE [e.g., use of a commercial nature or nonprofit educational purpose]
- (2) NATURE OF THE COPYRIGHTED WORK [e.g., unpublished nature of the work]
- (3) AMOUNT AND SUBSTANTIALITY OF THE PORTION USED IN RELATION TO THE COPYRIGHTED WORK AS A WHOLE [e.g., quantitatively and qualitatively (“essentially the heart of” the work)]
- (4) EFFECT OF USE UPON THE POTENTIAL MARKET FOR, OR VALUE OF, THE COPYRIGHTED WORK



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THE “GOLDEN RULE” GUIDELINE OF FAIR USE

As quoted in Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 551 (1985):

“TAKE NOT FROM OTHERS TO
SUCH AN EXTENT AND IN
SUCH A MANNER THAT YOU
WOULD BE RESENTFUL IF THEY
SO TOOK FROM YOU.”



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OWNERSHIP OF COPYRIGHT

- INITIAL OWNERSHIP VESTS IN THE AUTHOR(S) OF WORK
- FOR A WORK MADE FOR HIRE, THE EMPLOYER OR OTHER PERSON FOR WHOM THE WORK WAS PREPARED IS CONSIDERED THE AUTHOR, AND UNLESS the parties have expressly agreed otherwise in a written instrument signed by them, OWNS ALL OF THE RIGHTS COMPRISED IN THE COPYRIGHT



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WHAT IS A WORK MADE FOR HIRE?

- A WORK PREPARED BY AN EMPLOYEE WITHIN THE SCOPE OF THEIR EMPLOYMENT, OR
- A WORK SPECIFICALLY ORDERED OR COMMISSIONED FOR USE AS
 - a contribution to a collective work
 - a part of an audiovisual work
 - a translation
 - a supplementary work



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- a compilation
- an instructional text
- a test
- answer material for a test
- an atlas

IF THE PARTIES EXPRESSLY AGREE IN A WRITTEN INSTRUMENT
SIGNED BY THEM THAT THE WORK SHALL BE CONSIDERED A
WORK MADE FOR HIRE



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CONTRIBUTIONS TO COLLECTIVE WORKS

- COPYRIGHT IN EACH SEPARATE CONTRIBUTION TO A COLLECTIVE WORK IS DISTINCT FROM COPYRIGHT IN THE COLLECTIVE WORK AS A WHOLE
- OWNERSHIP OF EACH SEPARATE CONTRIBUTION IS INITIALLY VESTED IN EACH AUTHOR OR EACH SEPARATE CONTRIBUTION
- COPYRIGHT OWNER OF THE COLLECTIVE WORK IS PRESUMED TO HAVE ACQUIRED ONLY THE PRIVILEGE



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- OF REPRODUCING AND DISTRIBUTING THE CONTRIBUTION AS PART OF THAT PARTICULAR COLLECTIVE WORK, ANY REVISION OF THAT COLLECTIVE WORK AND ANY LATER COLLECTIVE WORK IN THE SAME SERIES, UNLESS – there has been an express transfer of the contribution copyright or any rights under it



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DURATION OF COPYRIGHT FOR WORKS CREATED AFTER JANUARY 1, 1978:

- DURATION OF COPYRIGHT IS FOR THE LIFE OF THE AUTHOR PLUS SEVENTY (70) YEARS AFTER THE AUTHOR'S DEATH



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DURATION OF COPYRIGHT FOR ANONYMOUS WORKS AND WORKS MADE FOR HIRE

- DURATION OF COPYRIGHT IS FOR NINETY-FIVE (95) YEARS FROM THE YEAR OF ITS FIRST PUBLICATION OR ONE-HUNDRED TWENTY YEARS FROM THE YEAR OF ITS CREATION, WHICHEVER EXPIRES FIRST



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NOTICE OF COPYRIGHT

- NOTICE IS NOW PERMISSIVE (for works published on or after March 1, 1989) – it is no longer required to ensure enforceable copyright protection
- A NOTICE OF COPYRIGHT MAY BE PLACED ON PUBLICLY DISTRIBUTED COPIES FROM WHICH THE WORK CAN BE VISUALLY PERCEIVED
- IF THE NOTICE APPEARS ON THE COPIES, IT MUST HAVE THREE (3) ELEMENTS:
 - the symbol © (the letter C in a circle), or the word “Copyright”, or the abbreviation “Copr.”
 - the year of first publication of the work
 - the name of the owner of copyright in the work or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner
- THE NOTICE SHOULD BE AFFIXED TO COPIES IN SUCH MANNER AND LOCATION SO AS TO GIVE REASONABLE NOTICE TO THE CLAIM OF COPYRIGHT



COPYRIGHT REGISTRATION

- REGISTRATION IS NOW PERMISSIVE, IT IS NOT A CONDITION OF COPYRIGHT PROTECTION
- THE OWNER OF ANY OR ALL EXCLUSIVE RIGHTS IN A WORK MAY OBTAIN REGISTRATION OF THE COPYRIGHT CLAIM BY PROVIDING THE REQUIRED DEPOSIT, FEE, AND APPLICATION TO THE COPYRIGHT OFFICE AT ANY TIME
- HOWEVER, THE COPYRIGHT MUST BE REGISTERED PRIOR TO FILING AN ACTION FOR COPYRIGHT INFRINGEMENT OF U.S. WORKS, BUT NOT FOREIGN WORKS



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REGISTRATION AS A PREREQUISIT TO CERTAIN REMEDIES FOR INFRINGEMENT

- STATUTORY DAMAGES AND/OR ATTORNEY'S FEES WILL NOT BE AWARDED FOR
 - any infringement of copyright in an unpublished work commenced before the effective date of its registration
 - any infringement of copyright commenced after first publication of the work and before the effective date of its registration, UNLESS such registration is made within three (3) months after the first publication of the work



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INFRINGEMENT OF COPYRIGHT

- ANYONE WHO VIOLATES ANY OF THE EXCLUSIVE RIGHTS OF THE COPYRIGHT OWNER, OR WHO ILLEGALLY IMPORTS COPIES INTO THE U.S., IS AN INFRINGER OF THE COPYRIGHT
- THE LEGAL OR BENEFICIAL OWNER OF AN EXCLUSIVE RIGHT UNDER A COPYRIGHT IS ENTITLED TO INSTITUTE AN ACTION FOR ANY INFRINGEMENT OF THAT PARTICULAR RIGHT COMMITTED WHILE S/HE IS OWNER OF IT subject to applicable registration requirements



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REMEDIES FOR INFRINGEMENT

- INJUNCTIONS
- IMPOUNDING AND DISPOSITION OF INFRINGING ARTICLES
- DAMAGES AND PROFITS, INCLUDING:
 - ACTUAL DAMAGES AND PROFITS
 - STATUTORY DAMAGES

in general, \$500 to \$20,000
for willfulness, up to \$100,000;
for innocent infringement, \$200 or more
- COSTS AND ATTORNEY'S FEES - discretionary



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THE VISUAL ARTISTS RIGHTS ACT OF 1990

- “moral rights” only for authors of “a work of visual art”

A WORK OF VISUAL ART IS DEFINED AS:

- (A) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies of fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (B) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.



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A WORK OF VISUAL ART IS NOT DEFINED AS:

- (A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication:
- (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
- (iii) any portion or part of any item described in clause (i) or (ii);
- (B) any work made for hire, or
- (C) any work not subject to copyright protection under the Act.



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RIGHTS OF VISUAL ARTISTS TO ATTRIBUTION AND INTEGRITY

SUBJECT TO THE FAIR USE PROVISIONS AND INDEPENDENT OF THE EXCLUSIVE RIGHTS OF A INDEPENDENT OF THE EXCLUSIVE RIGHTS OF A COPYRIGHT OWNER, THE AUTHOR OF A WORK OF VISUAL ART:

(A) has the right

- (1) to claim authorship of that work, and
- (2) to prevent the use of his/her name as the author of any work of visual art which s/he did not create:

(B) has the right to prevent the use of his/her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his/her honor or reputation; and



(C) subject to certain limitations in the Act, has the right

(1) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his/her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(2) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right



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TRANSFER AND WAIVER OF THE RIGHT

- THE AUTHOR'S RIGHTS MAY NOT BE TRANSFERRED, BUT MAY BE WAIVED IF THE AUTHOR EXPRESSLY AGREES TO SUCH WAIVER IN A WRITTEN INSTRUMENT SIGNED BY THE AUTHOR.

SUCH WAIVER MUST EXPLICITLY AND SPECIFICALLY IDENTIFY THE WORK, AND USES OF THAT WORK, TO WHICH THE WAIVER APPLIES, AND THE WAIVER SHALL APPLY ONLY TO THE WORK AND USES SO IDENTIFIED.

IN THE CASE OF A JOINT WORK PREPARED BY TWO OR MORE AUTHORS, A WAIVER OF RIGHTS UNDER THIS PARAGRAPH MADE BY ONE SUCH AUTHOR WAIVES SUCH RIGHTS FOR ALL SUCH AUTHORS.



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SHORT LIST OF SUGGESTIONS

TRADEMARKS

1. CONSIDER THE FOLLOWING FOR REGISTRATION:
 - A. ASSOCIATION NAME
 - B. PRINCIPAL PROGRAMS
 - C. ACRONYMS FOR NAME AND PROGRAMS
2. CONSIDER THE FOLLOWING SERVICES AND GOODS:
 - A. ACCEPTING
 - B. EDUCATION ACTIVITIES
 - C. CERTIFICATION ACTIVITIES
 - D. ASSOCIATION ACTIVITIES
 - E. PUBLICATIONS INCLUDING DIGITAL FORMS
 - F. TESTING ACTIVITIES
 - G. CHARITABLE ACTIVITIES



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3. CONSIDER SEARCH PRIOR TO USE AND TO CONFIRM REGISTRABILITY

- USPTO.GOV
- GOOGLE

4. ADOPT USAGE RULES

- A. PROPER NOTICE - ® OR TM OR SM
- B. USE ON GOODS/PROMOTIONAL MATERIALS
- C. USE AS ADJECTIVE
- D. CONSISTENT NON POSSESSIVE USE
- E. EMPHASIZE



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COPYRIGHTS

1. OWNERSHIP ISSUES

- A. WORK MADE FOR HIRE
- B. WRITTEN CONTRACT RIGHTS
- C. AUTHORSHIP

2. TYPICAL AREAS OF CONFLICT

- A. STANDARD AND ACCREDITATION REGULATIONS
- B. INTERFACE WITH LEGISLATIVE AND RELATED SUBJECT MATTER ORGANIZATIONS
- C. EXTRA TERRITORIAL CONFLICTS AND EXPANSION
- D. FAIR USE/PERMISSION ISSUES
- E. DIGITAL MILLENNIUM COPYRIGHT ACT (INTERNET)
- F. NOTICE



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