

EXAGGERATED FEATURES



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Infringement of Your Copyright | Increasing Your Chances of Prevailing Later

by Meaghan Hemmings Kent

As caricaturists, you create original works everyday, and those original works are covered by copyright. Copyright exists in your original work as soon as the work is “fixed,” i.e., put into a tangible medium of expression, such as pen on paper. As the “author” (legal term for the creator of a copyrighted work), you likely own those copyrights (ownership is discussed below). With ownership of that copyright, you control, among other things, who may reproduce, display, distribute copies of, and make derivatives of that work. Unfortunately, there may come a time when someone, be it a customer, contractor, or third party, violates one of your exclusive rights, thereby infringing on your copyright. This article will review some things that you can do now, before infringement, to increase your chances of prevailing against an infringer later.

Determine Who Owns the Copyright in Your Work: The first thing to work out is whether you own the copyright in the works that you are creating. As the “author,” you will likely own the copyright in your work.

However, if you created the work as part of your duties as an employee, your employer will own the copyright of the work. Furthermore, even if you created the work on your own time and with your own resources, your employer may still own the copyright in that work if the type of work is considered within the scope of your duties as an employee. Take a look at your employment agreement or other paperwork that describes your duties as an employee.

If you were commissioned to create the work, you may or may not own the copyright in the work, depending on the terms of any written agreement entered and depending on the type of work created. If there was no written agreement, you still own the copyright in the work. If there was a written agreement that said you “assigned” the copyright in the work, then the party that commissioned the work likely owns the work. If there was a written agreement that said the work was a “work for hire,” the party that commissioned the work owns the copyright only if (1) both you and the party commissioning the work signed the agreement, and (2) the type of work commissioned is listed in the categories of “work for hire” in the Copyright Statute. The categories do not include artwork as a category, but they do include works specially ordered or commissioned for use as a contribution to a collective work or as a part of a motion picture or other audiovi-

sual work. Take a good look at any written agreements to determine who owns the copyright in the work. Work for hire is a particularly complicated area where many mistakes are made between artists and those that commission those artists, so it is best to have an attorney review agreements whenever possible.

Importantly, you should remember that the ownership of a copyright is separate and distinct from the ownership of the material object in which the copyrighted work is embodied. In other words, transfer of the physical embodiment of the work (i.e., the caricature itself) does not transfer the copyright in the work. That means that you still own the copyright in your work even when someone pays you to create a caricature of them and they purchase the resulting caricature, and they may not make copies of that image (including electronic copies) without your permission.

Include a Copyright Notice on Your Works: The owner of the copyright should include a copyright “notice” on the work. A copyright notice typically takes the form: © [year of publication][owner’s name]. Publication occurs when you distribute, or offer to distribute copies of the work; sale of the original work is not considered publication. For unpublished works, the U.S. Copyright Office recommends a copyright notice such as: “Unpublished work © 2007 John Doe” where the date is the creation year rather than the publication year.

While a copyright notice is not required, they are extremely beneficial and you should always include one. By including a copyright notice, you put the public on notice that the work is protected by copyright, you advise the public who to contact for a license, you decrease the chance that someone will claim that your work is an “orphan work” (one where the copyright owner is unknown and cannot be found), and you eliminate the infringer’s defense of “innocent infringement.” A successful defense of innocent infringement greatly decreases the monetary damages you can recover from an infringer, so including the notice helps ensure you recover the amount you are entitled to.

Consider Registering Your Copyright(s): Like copyright notice, while registration is not required for protection, it provides definite advantages. Also, registration is required in any event before a lawsuit may be instigated to enforce your copyright. If a copyright is registered before the infringement begins, the copyright owner can



seek to recover attorneys’ fees and “statutory damages.” Statutory damages dictate a minimal amount of monetary damages. Without registration prior to infringement, a copyright owner is limited to “actual” damages caused by the infringement and may not recover attorneys’ fees. While “actual” damages can be large if the infringer has made a lot of money from the infringement, they can be very small if the defendant has not made any money from the infringement and if you cannot show that you have been monetarily damaged by the infringement. In addition, registration within five years of publication of the work also creates a presumption that the copyright is valid, so the infringer then has the burden to prove that it is invalid. Without registration, you have the burden to show validity of the copyright.

Copyright registration is considered a good deal in the intellectual property field because it is inexpensive compared to trademark registrations and patent applications. To further cut costs, rather than registering each and every work individually, you might consider registering a group of your works as a collection if they are unpublished.

Stay tuned for the next issue of *Exaggerated Features*, where the next installment will discuss what to do when you are faced with a potential infringement of your copyright.

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