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The top 10 ways copyright law can ruin your transaction

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Many transactional lawyers who represent clients in entertainment, media or publishing deals have some working knowledge of copyright law. However, as they say, "a little knowledge can be a dangerous thing." Copyright law is full of exceptions and qualifiers, and many clients and lawyers have only broad understandings of the way copyright law works to protect the original expression of ideas. Copyright litigators see many deals go sideways because of client or attorney misunderstandings about copyright law. Here is our top 10 list.

1. The work is in the public domain (I know because the copyright expired). Rarely true or, better said, rarely diligently investigated. The work you are looking at may have been changed, and some changes may have breathed new life into an "old" work. If the new material is sufficiently original and creative, the resulting new "derivative" work obtains its own copyright (but only to the extent of the "new" material). 17 U.S.C. §§ 101, 103(b).

Also, some copyright extensions occur automatically (see, e.g., 17 U.S.C. § 304(b) — automatic renewals), and some public-domain foreign copyrights are restored. And don't forget foreign countries where copyright protection, even for U.S. works, often survives the lapse of protection here, and where moral rights, especially in civil law countries such as France, may exist in perpetuity. (Hint: U.S. lawyers tend to overlook foreign-protection issues).

2. I bought it. I paid for it. It's mine. Not so fast. Did you get a written assignment or work-made-for-hire agreement from the "author" and co-signed by yourself? If not, don't count on much protection of your "exclusive" rights under an oral assignment or an oral work made for hire agreement with nonemployees. 17 U.S.C. § 204(a).

Moreover, only certain works specifically listed in the Copyright Act, such as motion pictures, may be made works for hire by agreement with nonemployees. For example, a biography, novel or play, or even computer software, even if specially commissioned under a written for hire agreement, simply can't be works-for-hire no matter what language you use in the agreement. See 17 U.S.C. § 101 (definition of a "work made for hire"). The specific work limitation does not apply to works created by regular "nine to five" employees. But beware — even a work created by an employee outside of the scope of employment does not constitute a work made for hire. Id.

3. You can't enforce an oral contract relating to copyrights. This is a presumptive corollary of the second issue listed above, but it's not necessarily true either. Certain oral agreements to create a copyrightable work can create either joint ownership and/or nonexclusive licenses to use the work. Also, traditional "nine to five" employees working under oral, "at will" employment agreements can create works-for-hire if within the scope of their employment.

4. An assignment is better (or as good as) a work made for hire agreement. Not true. Assignments can expire or be terminated. See 17 U.S.C. § 203. A work-made-for-hire agreement, on the other hand, makes the commissioning party the actual "author" of the work, and thus the owner for the full term of the copyright without the possibility of termination or reversion, except by express agreement. But don't forget, foreign laws may not recognize work-for-hire and still allow for reversions under local law.

5. I got all the rights. Now I can do whatever I want. A common error of lawyers and clients is defining the scope of the assignment of a copyrighted work ambiguously or inadequately.

Each of the exclusive rights in a copyrighted work can be assigned separately, 17 U.S.C. § 201(d), and modern technology is helping us create more media (and more markets) than ever before in which to exploit those rights. In addition, industry, talent or the government may create limitations to the transfer of rights by contract or law. A good example of the potential for confusion in the area of copyright assignments is *Wagner v. Columbia Pictures Industries, Inc.*, Cal. Ct. App., Seventh Dist., Case No. B184523 (Jan. 8, 2007), in which the court struggled after three rounds of briefing and two oral arguments to interpret the proper scope of the parties' quite valuable copyright assignment.

6. I didn't infringe because there's nothing creative about the work I copied (and I only took just a little bit). This is almost always wrong. "Originality," the *sin qua non* of copyright law, lies in the eyes of the beholder, and only minimal creativity is required for protection. See 17 U.S.C. § 102(a); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) ("the requisite level of creativity is extremely low; even a slight amount will suffice"). Moreover, while it is true that copyright law does have a "de minimus" defense, in practice it is rarely applied. For example, in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), the court found infringement when, without permission, one song "sampled" a mere three notes from another recording.

7. It's not registered. It's got no notice. It's not protected. Copyrights are currently formality free. Registration of a copyright with the U.S. Copyright Office does give the owner additional advantages, but a copyright vests immediately in a work upon its being fixed in a tangible medium regardless of the absence of registration or marking. 17 U.S.C. § 102(a). While registration of a work of U.S. origin is necessary before bringing an infringement action, 17 U.S.C. § 411, this is not necessarily true of a work of foreign origin. Also, a copyright notice is no longer mandatory, and only critical for works created and published before March 1, 1989. Unfortunately, if the work has no notice, it may be hard to find out when it was published.

8. It was never "published," so it can't be protected by copyright. Not true, at least for works of U.S. origin created and published after Jan. 1, 1978, which, not so incidentally, is the effective date of the current Copyright Act of 1976. While publication is still relevant and important to copyright law for a variety of reasons, it is no longer essential to securing copyright. Even before 1978, when works secured copyright through publication with notice under the 1909 Act, certain kinds of works, such as plays and music, could acquire copyright through registration in unpublished form. Also, pre-1978 works had been protected under state law. In fact, pre-1972 sound recordings are still protected under state rather than federal copyright law.

9. I am a joint author of the work, so I have a right to control distribution and use of the work. Not really, at least not as to the other joint author(s). Joint authors are deemed joint owners. 17 U.S.C. § 201(a). Under relevant copyright principles and state law, while joint owners must account to each other for profits from exploitation of a work (*Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984)), they cannot sue each other for infringement or otherwise control the other's independent right to exploit the work. *Community for Creative Non-Violence*, 846 F.2d 1485, 1498 (D.C.Cir. 1988), *aff'd on other grounds*, 490 U.S. 730 (1989).

10. Copyright law is easy. Draw your own conclusions.

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