

# THE UNFORGIVEN

(Copyrights, Trademarks and Protecting Yourself in the Business)

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- While this handout and the accompanying presentation contain general legal principles, they are not to be understood to provide legal advice on any specific case or dispute. What is appropriate legal advice in one situation may not be appropriate for another.
- In addition, the legal principles set forth in these materials are subject to change and are not necessarily uniformly applied by every court. Rather, they are general principals followed by most courts in most states. In the event that a specific dispute or legal issue arises, you should contact your attorney.

# Copyrights vs. Trademarks

## Copyrights

Property rights in works of art or authorship:

- Books
- Songs
- Movies
- TV shows
- Plays
- Dances
- Computer programs

## Trademarks

Help consumers identify the source of goods or services:

- Brand names
- Band names
- Team logos
- Slogans
- Jingles
- Internet domain names

## vs. Right of Publicity

- Similar to South Carolina's "privacy" right of (mis-)appropriation of name or likeness
- Protects commercial use of a person's name, likeness or other elements of identity:
  - Wheaties box image
  - Baseball cards
  - Impersonators

## Key Rights of Copyrights

- Copyrights include:
  - Copy
  - Perform/Display publicly
    - Restaurants, bars and health clubs
  - Prepare “derivative works”
    - Movie from book
    - Painting from photo
    - Song in TV show
- Ownership of a copy generally does not give copyrights

## How Do I Get a Copyright?

- Old Rule: Registration
- New Rule (since 1978): Fix in tangible medium

## Why Register a Copyright?

- Can't sue without registration
- Statutory damages
  - \$750 - \$30,000 per infringed work
  - Up to \$150,000 if intentional
- Attorney fees



## Who is the Copyright Owner?

- **Original author/artist**
  - Sale in writing
  - License oral
- **Joint works**
  - Intent to be merged into whole
  - Get it in writing!
- **Derivative works**
  - CDs
  - License to adapt underlying work
- **Works made for hire**
  - Employer
  - Contract

## When Does Copyright Expire?

- **Created after 1978**
  - Life of the author + 70 years
  - WMFH, anonymous, pseudonymous: shorter of 120 years after creation or 95 years after publication
- **Created before 1978**
  - 28 years from publication
  - plus renewal of 28/47/67 years
  - renewal automatic since 1992
- **So, if published before 1922, may have expired**
  - And if published before 1964, may have failed to renew

## Hot Copyright Infringement Issues

- The Internet is not a license to copy
  - Even if it is posted publicly on a website, you probably still need permission to use it
    - “Public domain” means failed or expired copyright
- Sampling
- Uses in other formats
- “Licenses” from YouTube and Facebook

## Hot Copyright Infringement Issues

- **Contributory infringement**
  - “Induces, causes or materially contributes to the infringement of another with knowledge of the infringing activity”
  - Napster: file sharing service
  - Grokster: file sharing software with intent to induce infringement
- **DMCA safe harbor**

# Copyright Infringement Defenses

- Facts and Ideas
- **Fair Use - Four Factor Test**
  - 1) Purpose and character of the use
    - E.g., for profit or for education or news
    - Incidental, transformative
  - 2) Nature of the copyrighted work
    - E.g., factual, unpublished
  - 3) Portion of work used in relation to the whole
    - What's necessary vs. the "heart" of the work
  - 4) Effect of use on potential market for or value of the work
    - Facebook and YouTube

Fair use analysis is very fact specific – consult your lawyer.

- Attribution - is not a defense

# Trademarks

- Protect against consumer confusion as to source/affiliation of products/services
- Registration not required – but is important
  - Gives national protection
  - Gives presumption of ownership
  - Provides constructive notice
  - Searchable
- Registration may be rejected

## Hot Trademark Issues

- Band names
  - Picking a non-infringing name
  - Who keeps the name when band splits?
- Merchandising with team names and logos
- Celebrity trademarks
  - Tebowing
  - Paris Hilton - “That’s hot!”

## Right of Publicity

- Identity may include
  - Name
  - Face & voice - impersonators
  - Nickname
  - Catch-phrase
- First Amendment limits
  - Commercial speech



# Questions

- Any questions?