

PROTECTING THE CREATIVE PRODUCT OF YOUR MIND™

Copyright and Business Law

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PROTECTING THE CREATIVE PRODUCT OF YOUR MIND™

Business Law

- Very broad topic
 - Covers everything from business entity selection and formation to contracts to mergers and acquisitions to antitrust to intellectual property to negotiations to strategic partnerships to making money to losing money to bankruptcy to winding down and closing...
 - And everything in between
 - We will not cover all of this material here today
 - Entity Selection and Formation
 - Intellectual Property
 - Specifically, copyright
 - Contracts if there's time

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Business Law

- You will at the end of this hour know:
 - Enough to be dangerous to yourself and others
 - The different business entities that exist in New York
 - What is involved in forming each entity, and in closing each entity down
 - Why you need to pay attention to copyright
 - What is, on a very general level, involved in forming, performing and destroying contracts

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Intellectual Property

- What is Intellectual Property (or “IP”)?
 - IP is the creative product of the creative mind
 - Comes in several flavors:
 - Patent - protects invention
 - Copyright - protects works of authorship
 - Trademark/Service mark - protects business goodwill
 - Service marks are trademarks for services
 - Trade dress - protects the “look” of a business
 - McDonald’s restaurants all look alike, whether they are on the Champs-Elysées in Paris or across the street from CVS in Clifton Park
 - Trade secret - protects invention as long as the secret is kept
- What IP law does NOT protect
 - Intangible, unexpressed ideas
 - We have no “thought police”
 - ESP is too fuzzy a discipline for that

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What’s a Copyright?

- Basis for copyright is the US Constitution, which states:
 - The Congress shall have Power...To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries....

-- US Constitution, Article 1, Section 8, Clause 8

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What’s a Copyright?

- The idea behind copyright is simple:
 - In exchange for society having access to works contributed by creative people, we grant to those creative people special rights in what they create.
 - The rights granted are exclusive to the author.

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What's a Copyright?

- “Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

17 USCA §102(a)

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Copyright Protects...

- Literary works;
- Musical works, including any accompanying words;
- Dramatic works, including any accompanying music;
- Pantomines and choreographic works;
- Pictorial, graphic and sculptural works;
- Motion pictures and other audiovisual works;
- Sound recordings;
- Architectural works.

17 USCA §102(a)(1-8)

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Copyright Does NOT Protect...

- Ideas (not protectable);
- Procedures (patent protection);
- Processes (patent protection);
- Systems (patent protection);
- Methods of operation (patent protection);
- Concepts (not protectable);
- Principles (not protectable); or
- Discoveries (patent protection, if patentable)

17 USCA §102(b)

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Exclusive Rights in Copyrighted Works

- Subject to limitations, a copyright holder has the *exclusive right* to:
 - Reproduce the copyrighted work in copies or phonorecords;
 - Prepare derivative works based on the copyrighted work;
 - Distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - In the case of literary, musical, dramatic, and choreographic works, pantomines, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 - In the case of literary, musical, dramatic, and choreographic works, pantomines, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 USCA 106(1)-(5)

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Exclusive Rights in Copyrighted Works

- Pictorial representations of architectural works;
- Alterations to and destruction of architectural works by their then-current owners.

17 USCA §120

- Fair use

17 USCA §106

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Why Obtain Copyright Protection?

- Copyright exists the moment a work is “affixed in a tangible medium.”
- Remedies for infringement of unregistered works
 - Provable actual damages
 - Must show loss that can be directly traced to the infringement
 - Injunctive relief
 - Many courts refuse to hear cases where copyright is not registered or registration is not applied for
- Remedies for infringement of registered works
 - Statutory damages
 - Actual damages do not need to be proved in court
 - \$750-\$30,000 per infringing act
 - For willful infringement, at the judge’s discretion:
 - Up to trebled statutory damages
 - Costs and reasonable attorneys’ fees
 - Injunctive relief

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How To Obtain Copyright Protection

- Register your work with the United States Copyright Office
 - Professional organizations that “register” works do NOT give the protection that registration with the US Copyright Office does
- Visit the Copyright Office’s website at www.copyright.gov and click on Register Online (in the left-hand column) or on the logo for the Electronic Copyright Office
- Fill out the form online
- Upload your work
- Pay \$35.00 filing fee with credit or debit card
- Wait to hear from the Copyright Office
 - Questions
 - Getting through the Copyright Office’s questions about your filing is why you hire a lawyer who practices copyright law to handle copyright registration for you...
 - Certificate of Registration of Copyright

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How To Obtain Copyright Protection

- The Copyright Office prefers online registration filings, and they reflect that in their fees for registration
 - Online registration filing fee is currently \$35.00
 - Paper filing on Form CO is currently \$50.00
 - Paper filing on Forms TX, VA, SR, PA, SE, GR/CP, GR/PPh/CON is currently \$65.00
- This listing is incomplete and will quickly become obsolete
 - Up-to-date, complete listing of Copyright Office fees is found at <http://www.copyright.gov/docs/fees.html>

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People Spend Lifetimes Studying Fair Use

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Fair Use Preamble

Notwithstanding the provisions [enumerating exclusive rights], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in [the statute], for purposes such as:

- Criticism;
- Comment;
- News reporting;
- Teaching (including multiple copies for classroom use);
- Scholarship; or
- Research

is not an infringement of copyright.

17 USCA §107

Fair Use Factors

- In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include
 - The purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes;
 - The nature of the copyrighted work;
 - The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - The effect of the use upon the potential market for or value of the copyrighted work.

17 USCA §107

Fair Use Assumptions

- What needs to be in place for a fair use analysis to occur?
 - A *prima facie* case of copyright infringement
 - Valid copyright
 - Two substantially similar works

Fair Use History

- Invented by the courts
- Original definition:
 - “Look to the nature and objects of the selections made, the quantity and value of materials used, the impact of the new work on the old, and how the new affects the old’s value.” *Folsom v. Marsh* (USSCt, 1841)
- Fair use was codified in 1976 (17 USC §107)

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Fair Use Analysis

- First Factor: What’s the Use?
 - Commercial?
 - Who does the copying?
 - School → Educational Use: leans toward fair use
 - Commercial entity → Commercial Use: leans toward infringement
 - Does the copying go to the heart of the fair-use preamble (I.e., is it for a purpose such as criticism, comment, or parody)?
 - Yes: leans toward fair use
 - No: leans toward infringement

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Fair Use Analysis

- First Factor: What’s the Use?
 - Transformative?
 - Has the supposed infringer added something new to the copyrighted work?
 - Leans toward fair use
 - Has the supposed infringer merely superseded or created another version of what is already there?
 - Leans toward infringement

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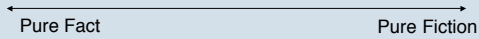
Fair Use Analysis

- **First Factor: What's the Use?**
 - Will the copyright holder be in the derivative market?
 - Yes
 - leans toward infringement
 - No
 - leans toward fair use

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Fair Use Analysis

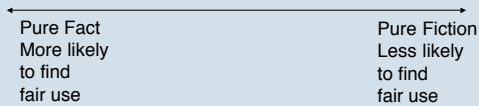
- **Second Factor: Nature of the work?**
 - Is the work creative or factual?



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Fair Use Analysis

- **Second Factor: Nature of the work?**
 - Is the work creative or factual?



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Fair Use Analysis

- **Third Factor: Amount Taken**
 - Quantity
 - Quality
 - How to determine substantiality?
 - Determine:
 - Purpose taken for
 - » You can use a lot of the original material if you took for the purpose of criticism or comment
 - » You can use less if you took for parody
 - » You can use least if you took for satire
 - Argument must match the defendant's original intent in taking the material

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Fair Use Analysis

- **Aside: Parody vs. Satire**
 - Parody is a reflection of the work itself
 - Satire is a reflection on the society that produced the work
- **If you're not talking about the work itself, you are entitled to take a lot less from it.**
 - Some courts have taken satire out of the realm of fair use altogether

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Fair Use Analysis

- **Fourth Factor: Potential Market Effect**
 - Look at the use or potential use of the original work and the derivative work in the market
 - Was the original unknown until the parody occurred, and after the parody occurred did the original become popular?
 - Fair use. No problem.
 - Does the derivative work completely usurp the market for the original work?
 - Infringement. Big problem.
 - Does a scathing review that destroys the market for the original work constitute infringement?
 - No.

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Fair Use Analysis

- Last step
 - Sum up the results of the questions asked
 - Go back to the Preamble
 - Apply an equitable rule of reason
 - Each judge must then decide for themselves what is fair use

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Fair Use Bottom Line

- Fair use is finicky, at best
- Ideally, get the rights to use the materials
- When in doubt, get an attorney who practices copyright law to give you an infringement opinion (you'll pay for this but the lawyer will be far less expensive than would losing a fair-use lawsuit)
 - Do this BEFORE taking any possibly illegal activity

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Your Most Valuable Asset

- IP can comprise up to 98% of the value of your business
 - Works of authorship
 - Inventions
 - Business goodwill developed over years
 - Trade secrets
- Your business *deserves* to have the creative product of YOUR and your employees' creative minds protected

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Entity Selection and Formation

- New York recognizes several business entities:
 - Sole proprietorship
 - Partnership
 - LLC/LLP
 - Corporation, which comes in two flavors:
 - S-corporation
 - C-corporation

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Entity Selection and Formation

•So which is best for you?

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Entity Selection and Formation

- Sole proprietorship
 - Simple to form
 - File a Certificate of Doing Business with the clerk of each county in which the business will be conducted
 - Pay a one-time \$25 fee to the clerk of each county in which business will be conducted
 - Very few formalities required
 - You are the BOSS; the buck stops with you
 - Every personal asset is at risk
 - House
 - Car
 - First-born child
 - No separation of the person (you) and the business; therefore you are automatically personally responsible for all the debts of the business

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Entity Selection and Formation

- **Partnership**
 - VERY simple to form
 - Hold yourselves out to the public as being partners
 - Can file a partnership certificate with the state, but this is purely voluntary, NOT required
 - Very few formalities required
 - You and your partner(s) are the BOSSES: the buck stops with you
 - Every personal asset is at risk
 - House
 - Car
 - Second-born child
 - No separation of the person (you and your partner) and the business; therefore you and your partner are automatically personally responsible for all the debts of the business
 - Each partner is individually and personally responsible for the debts of each and every other partner, whether those debts are business-related or not

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Entity Selection and Formation

- **Corporation**
 - Business form has been in existence for hundreds of years
 - Laws of different states (and countries) that govern corporations are similar
 - Everyone knows how these entities behave
 - Not difficult to form, but not as easy as partnership or sole proprietorship
 - File Articles of Incorporation with the Secretary of State
 - Pay \$125 formation fee and \$10 stock fee (for 200 NPV shares) to the Secretary of State
 - Very formal structure to maintain
 - Annual meetings are required (even if you are the sole shareholder and sole officer and sole director of the corporation)
 - Biennial reporting requirements to the Secretary of State
 - Annual franchise tax based on revenue
 - Separate entity from the shareholder(s)
 - Corporations are legally "people" separate and apart from the shareholders / officers / directors, just as a child is a person separate and apart from its parents
 - Limits personal liability of the shareholders
 - Bankers and landlords and other business people know
 - Personal guarantee of payment for business debt

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Entity Selection and Formation

- **C-Corporation and S-Corporation**
 - Tax designations, named after the sections of the IRS code that define them
 - C-Corporation is taxed as an entity separate and apart from the shareholders / officers / directors
 - "Double taxation"
 - Every corporation is a C-corporation when it is formed
 - The entity may elect to become an S-corporation IF it meets the requirements of the IRS code:
 - 75 or fewer shareholders (i.e., a "closely held" corporation)
 - All shareholders are natural persons; no corporate entities may hold shares in an S-corporation
 - S-corporation election must be done at both the federal and the state level
 - S-corporation is taxed like a partnership
 - Profits and losses "flow through" to the tax returns of the shareholders
 - No "double taxation"

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Entity Selection and Formation

- **Limited Liability Company (LLC)**
 - Have not been around very long
 - Form first appeared in Wyoming in 1986; New York's LLC law went into effect in 1994
 - Unincorporated entity
 - Combines the ease of partnership management with the limited liability of corporations
 - Creditors know about the limited liability part of LLCs and therefore require personal guarantees of payment on any financing (loans, leases, credit extensions, ...) for new businesses
 - Formalities up the wazoo to start
 - File Articles of Organization with the Secretary of State, with a \$200 fee
 - Publish for six consecutive weeks in two English-language newspapers that are designated by the Clerk of the county wherein the LLC will have its principal place of business
 - File Affidavits of Publication with the Secretary of State, with a fee of \$25/affidavit
 - Some formalities to continue
 - Annual meeting, but not as tight as corporate annual meetings
 - Biennial reporting requirement
 - Franchise tax for LLCs with 2 or more members; New York dispensed with its franchise tax for single-member LLCs in 2006. Franchise tax rate is based on the number of members
 - LLC can choose to be taxed as either a partnership (pass-through to the members' personal income taxes) or as a corporation
 - Must elect taxation both federally and in New York State
 - Governing law is NOT uniform across state lines, and the courts are still in the process of deciding how to treat these amalgams

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Entity Selection and Formation

- **Limited Liability Partnership (LLP)**
 - LLPs are similar to LLCs in many ways, but there are differences:
 - The "P" stands for "Partnership" which necessitates more than one entity be a member of the LLP
 - LLPs can only be formed by certain professionals -- doctors, lawyers, architects, etc., as designated by the Department of Education
 - Form and maintain an LLP in essentially the same manner as an LLC
 - Have not been around very long
 - Same timeframe as LLCs
 - Partnership liability is limited to the amount that each individual partner invests in the LLP; NO liability of one partner for personal debts of other partners
 - Taxed as a partnership

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Closing Down Your Entity

- **Sole proprietorship**
 - Stop doing business
 - Can file a Certificate of Discontinuance of Business with the County Clerk
 - No fee for this filing
- **Partnership**
 - Actively discontinue holding out as partnership
 - Publish the dissolution of the partnership through advertising and/or legal notice
- **LLC/LLP**
 - File Articles of Dissolution with the Secretary of State, along with a filing fee of \$60.00
- **Corporation**
 - File a Certificate of Dissolution with the Secretary of State, along with a filing fee of \$60.00

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Entity Selection and Formation

- So which is best for you?
 - Only you and your attorney and accountant know for sure....

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Contracts

- What IS a contract?
 - A promise...
 - To which the parties intend to be bound...
 - Between two or more parties...
 - To perform a legal service or provide legal goods....
 - In exchange for legal consideration.

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Contracts

- For a contract to bind...
 - The promise must be to exchange value for value
 - The promise must be definite in nature
 - The promise must be legal
 - The promise must be enforceable
 - The promise must have at least two sides to it: a promisor and a promisee
 - The promisor and promisee must show an intention to be legally bound by the promise

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Contracts

• How to Make a Baby Contract

- Offer
 - “May I have this dance?”
- Consideration:
 - “I’ll give you a ride home”
- Acceptance
 - “Yes”

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Contracts

• Four ways to form a contract:

- Bargained-for exchange
 - This is the way most contracts are formed
- Detrimental reliance
 - If one party relies to its detriment on the promise of another, a contract is formed that binds both
- Past benefit
 - If one party has benefited from an action of the other in the past, a contract may have been formed at the time of the benefit
- Formality
 - Sometimes a contract can be formed simply by going through the formal motions (“contract under seal”)

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Contracts

• Statute of Frauds

- Statute of Frauds: A contract within the scope of the Statute of Frauds cannot be enforced unless a memorandum of it is written and signed by the party against whom the contract is to be enforced
- The Statute of Frauds covers:
 - Contract for sale of land or interest in land;
 - Contract that, by its terms, cannot be completed within one year of formation;
 - Contract for sale of goods over \$500;
 - Contract made in consideration of marriage;
 - Contract promising to answer for debts of another;
 - Contract of executor promising to answer for debts of decedent;
 - Contract for security interest in goods not in possession of secured party;
 - Contract for sale of securities;
 - Contract for sale of personal property worth >\$5000
- A contract covered by the Statute of Frauds *must be in writing* to be enforceable

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Contracts

- **Fourteen ways to get out of a contract:**
 1. **Infancy:** A person under age 18 (in NY: 21 in some states) can enter a contract, but that contract is voidable at the infant's option
 2. **Mental incapacity:** A person who is mentally incapacitated and is recognized as such by a court can enter into a contract, but that contract is voidable at the mentally incapacitated person's option
 3. **Impossibility:** If the purpose for which the contract was formed becomes impossible to achieve, the contract is voidable
 4. **Impracticability:** If the performance of the contract becomes impractical (that doesn't mean inconvenient, it means really impractical), the contract is voidable
 5. **Duress:** If the contract was entered into under duress by one party, the contract is voidable at the option of the duressed party
 6. **Unconscionability:** If performance of the contract, or the contract itself, is or becomes unconscionable (legal but morally repulsive to a Reasonable Person), the contract is voidable
 7. **Bilateral mistake:** If both parties are mistaken in their understanding of each other's positions and promises, the contract is voidable at the option of either party

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Contracts

- **Fourteen ways to get out of a contract:**
 8. **Unilateral mistake:** If one party is mistaken in its understanding of the other's positions and promises, the contract is voidable at the option of the party
 9. **Changed circumstances:** If circumstances surrounding the performance of the contract materially change during the course of performance, the contract may be voidable at the option of the affected party
 10. **Frustration of purpose:** If the purpose for which the contract was formed is no longer viable, the contract is voidable
 11. **Public policy violation:** If a contract is repugnant to public policy, the contract is voidable
 12. **Misrepresentation:** If one party misrepresents a material fact to another, the contract is voidable at the option of the party to whom the misrepresentation was made
 13. **Nondisclosure:** If one party fails to disclose a material fact to another, the contract is voidable at the option of the party who was the victim of the nondisclosure
 14. **Undue influence:** If a person exerts undue influence on a party at the time of contract formation in order to achieve formation of the contract, the contract is voidable at the option of the victim of the undue influence

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Contracts

- **Types of nonperformance**
 - Material breach
 - Anticipatory repudiation
 - Violation of conditions
 - Express conditions
 - Conditions to the contract's performance that the parties express in the contract document
 - Implied conditions
 - Conditions that the parties did not express in the contract document, but that a judge interprets into the document in litigation of the contract

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Contracts

- **Fixing nonperformance**
 - Discuss with nonperforming party
 - Compromise solution may be possible
 - If discussions between parties break down:
 - Mediate
 - Arbitrate
 - Litigate

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Contracts

- **Remedies available**
 - Contract damages
 - Money damages
 - Designed to put injured party in the same position s/he would have been in had the contract never been formed
 - Injunctive relief
 - Court may force the nonperforming party to perform through a court order

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Questions?

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