Finding Commercial Value In Copyrights

David Rein
Copyrights Are Easier Than Patents . . .

- You Already Own It
- Register It
- License It
- License It Again
... And Can Be Just As Valuable

- Software
- Distance Learning Modules
- Design & Arts
Still, There Are Pitfalls

- Not Intuitive
- The Dream
- No Middle Ground
How Do You Spot A Copyright?

• An Original Work
  – Not Novelty
  – “Spark of Creativity”
  – Low Bar
  – Not Copied

• Author

• Fixed, Tangible Medium of Expression
Look For . . . (non-exhaustive list)

- Literary
- Musical
- Dramatic
- Pantomine & Choreograph
- Picture, Graphic & Sculpture
- Film & Other Audiovisual
- Sound Recordings
- Architectural
Take Software As An Example:

- Professor in lab & pounds out a program from scratch
  - Human, Original Work
  - Fixed Medium
  - Literary work

- Owns copyright NOW
Copyright Only Protects Expression

- Won’t protect the idea

- Sometimes Idea & Expression Merge
  - Gold Pin Bumble Bee

- Won’t Protect Facts
  - Claude Williams; baseball
Professor Owns Bundle Of Exclusive Rights

- Reproduce
- Adaptation/Derivative
- Distribution
- Performance
- Display

- For Visual Rights: Moral Rights
  - Attribution; integrity
Rare to Write Software Solo -- Joint Authors

- Intend contributions merged inseparable
- Work on different code routines
- Classic ex.: Song’s instrumental & vocals
- Joint ownership: tenancy in common
- Either author grant non-exclusive rights
What If Hire To Assist With Writing Code?

• Work-for-Hire Test
  – Employees
  – Indep. Contractors
    • Collective work
    • Motion picture
    • Translation
    • Supplemental Work
    • Compilation
    • Instructional Text
    • Test
    • Answer Material
    • Atlas
    • Sound Recording
Rare To Write Software From Scratch

- Use existing code & write new code
- Derivative Work
- Underlying work is transformed or recast
  - Book to Movie
  - Gaylord stamp case
- Get permission from underlying owner
We Have A Working Program!  Register!

- [link] www.copyright.gov
- Inexpensive ($50)
- Advantages
  - Sue
  - Remedies
  - Prima Facie Evidence
- Register If Consider Commercialization
  - Ideal w/in 3 months
How Long Do Copyrights Last?

- Works Jan. 1, 1978
  - Life + 70 yrs
    • Last of Joint Authors
  - Work For Hire: 95 yrs publish or 120 yrs create
- Before Jan. 1, 1978
  - Initial 28 yrs
  - Renewal term 67 yrs
- Termination
Exceptions to Copyright Protection

• Fair Use
  – Purpose (education)
  – Copyright Circular 21
  – Nature of Work (unpublished)
  – Amount Taken
  – Effect on Market

• First Sale Doctrine
  – Sell textbook back
  – Netflix
Someone Copied The Software Program!

- Need to Know for Negotiating License
- Violate Exclusive Rt.
- Test
  - Ownership + Copying
  - Usually Copying
    Tough To Prove
    - Access
    - Substantial Similarity
I’ll See You In Court!

- Actual damages plus infringer’s profit
  - Need proof
- Statutory Damages
  - $750 to $30,000/work
  - Innocent $200 floor
  - Willful up to $150,000
- Attorney Fees
- Injunction
Copyright Licensing Basics

- Transfer Ownership
- License an Infinite #
  - Exclusive v. Non-
  - 1 or more of rights
  - Limit purpose, geography, time etc.
- Transfer or Exclusive MUST be in Writing
  - Movie Director
Same Terms As In A Patent License

- Parties
- Property
  - Distinguish b/w object & copyright covering
- Performance
- Payment
- Reps & Warranties
- Indemnities
- Termination
- General Provisions
The Parties

- Single Author
- Joint Authors
  - Everyone if exclusive right or transfer
  - Graduate Students
- Work for Hire
  - Writing?
  - Need an Assignment?
- “This Agreement is made as of [date] b/w [Licensor] & [Licensee].”
Define the Copyrighted Work

• Define the copyright, not the object
• “Licensor is the owner of certain proprietary Software & Documentation (the “Work”).
  – Documentation: manuals, tutorials etc.
  – Software: the object-code version of “Make A Lot of Money”, U.S. Copyright Registration No. L00038492, as well as all Updates from Licensor.
Grant Language

“Subject to terms . . . Licensor hereby grants Licensee a non-exclusive, non-transferable, non-assignable license to [list rights such as display or distribute] to [identify purpose]. Licensor retains all rights not expressly granted in this Agreement.
New Media

• Best Practice: Specifically define medium & assume Licensee allowed any reasonable uses.
• Intent & Foreseeability
• E-books?: “print, publish, & sell work in book form”
• Internet?: “paper, diskette & CD-ROM”
Heads Up When You Give An “Exclusive”

• Usually Licensee Has Right To Sublicense Its Exclusive Right

• 9th Circuit Seems To Disagree.

• Best Practice: Specify If Sublicense
Don’t Forget About The Money!

• “Licensee will pay Licensor a [flat fee, royalty or combo] of $$ [define interval if any]. Failure to pay the License Fee on the due date is a Material Breach.”

• Define Gross/Net Revenue
Material Breach? Don’t Get Lawyerly On Me!
Living In The Material World . . . .

“Either party may terminate this Agreement for cause if the other party has materially breached this Agreement and has not cured such breach within (30) days of Licensor sending written notice of same.”
Limitations of Liability

• Usually same as patent agreements

• Remember Copyright Damages
  – Actual plus profits
  – Statutory
Confidentiality

- Consider whether any aspects of the work or documentation should be kept confidential.
Questions?
Contact Me Anytime (not 2 a.m.)

- drein@finchcampbell.com
- 913-732-3283
- @daverein
- http://iplitigatator.wordpress.com
Still Taking Notes?
You’re Out Of Room Now . . .