Videographers and Copyrights
by
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Last Christmas the family decides to get a family portrait, and then make copies to send out to family and friends. So, you and your family get dressed up, go to the local commercial studio at the mall and have your portraits made. You decided on the outfits, the background, the poses and then you paid for the sitting fee and selected portraits. You then go to your local photofinisher for reprints and/or photo greeting cards. But the alert attendant says that without the negatives or an executed copyright release, you cannot legally reproduce your professional photographs. Or you buy an expensive and original work of art. You want to make a copy it for whatever reason but you run into the same legal hurdle. Etc. and etc.

In other words, mere physical ownership of a work, e.g., manuscript, painting, does not necessarily confer or convey any rights in the copyright. Analogously, the same rationale may apply to the work product of a court videographer under typical situations. This article discusses general U.S. copyright law as it may apply to the typical professional court videographer.

Copyright is a form of legal protection for authors of “original works of authorship” and is available to both published and unpublished works, regardless of the nationality or domicile of the author. Copyright protection automatically starts from the time the work is fixed in a tangible or material form, and such fixation does not have to be directly perceptible so long as it can be through some machine or device. Although copyright

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2 Copyright is not claimed as to any part of the original work prepared by any government entity.

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4 The first American copyright law was enacted in 1790, with the most recent revision having been made in 1976. The Copyright Act of 1976 became effective on January 1, 1978, per Section 102 of the Act, Oct. 19, 1976, P.L. 94-553, 90 Stat 2598.

5 Publication is no longer a requirement for federal copyright protection as it was under the Copyright Act of 1909; however, it is still important to copyright owners under certain circumstances.

6 There is no such thing as an “international copyright,” but copyright protection in any given country depends on the laws of the country, as there are international copyright treaties and conventions, e.g., Berne Convention and the Universal Copyright Convention (UCC). For further information and a list of countries that maintain copyright relations with the U.S., see Circular 38a from the U.S. Copyright Office.
notice is no longer required under U.S. law,\textsuperscript{7} it is nonetheless recommended because it informs the public that the work is copyright protected, it identifies the copyright owner and it indicates the year of first publication. The use of the copyright notice is the responsibility of the copyright owner and does not require permission or registration\textsuperscript{8} with the U.S. Copyright Office\textsuperscript{9}.

Specifically, Article II of the U.S. Constitution gives Congress the explicit power “To promote the progress of science...by securing for limited times to authors...the exclusive right to their...writings....” Copyright laws are codified in Title 17 of the United States Code. Any work is legally protectable if it is “fixed” in a “tangible medium of expression,”\textsuperscript{10} including but not limited to i) literary works, ii) musical works, iii) dramatic works, iv) pantomimes and choreographic works, v) pictorial, graphic or sculptural works, vi) motion pictures and other audiovisual works, vii) sound recordings, and iix) architectural works.

Section 106 of the 1976 Copyright Act gives the copyright owner (or holder) the exclusive right to do or authorize others to do certain things,\textsuperscript{11} (subject to sections 107-120) namely, i) to reproduce or make copies of the work, ii) to prepare derivative works and compilations, iii) to distribute by sale or other ownership transfer, or by rental, lease or lending, iv) a qualified right of public performance, v) qualified right to display the work, and vi) to perform sound recordings publicly via digital audio transmission.\textsuperscript{12} So, for example, the copyright holder or owner has the exclusive right to display the motion picture or other audiovisual work publicly. A copyright owner may transfer any or all of his or her exclusive rights. However, transfer of exclusive rights occurs only when in writing and signed by the transferor (or an authorized agent thereof).

So, only the author or creator (or transferee or authorized agents thereof) of the copyrightable work can use, reproduce or distribute the copyrighted material. If someone other that the aforementioned wants to use, reproduce or distribute the copyrighted material, then he or she must ask for and get permission from the copyright owner. Even then, it can be used only in the way expressly allowed. And it stands to reason that

\textsuperscript{7} Notice was required under the 1976 Copyright Act, but was later eliminated when the United States complied with the Berne Convention [Berne Union for the Protection of Literary and Artistic Property], effective March 01, 1989. Although works published without notice before March 01, 1989 could have entered the U.S. public domain, the Uruguay Round Agreements Act (URAA) restored copyright in certain foreign works.

\textsuperscript{8} There are advantages for formal copyright registration although, again, it is not a prerequisite for copyright protection. Registration, which may be made at any time within the life of the copyright, establishes a public record of the copyright claim, may establish a claim of copyright validity, may allow statutory damages and attorney's fees in addition to actual damages and profits, and may provide protection against the importation of infringing copies. Also, before an infringement suit can be filed, registration is a prerequisite for works of U.S. origins. Registration is very simple: a properly completed form, $30 filing fee and a nonreturnable deposit of the work being registered.

\textsuperscript{9} The Copyright Office is located at the Library of Congress, 101 Independence Ave., S.E., Washington, D.C., 20559-6000, ph. 202/707-3000. Circulars, announcements, regulations, other related materials and all copyright application forms are available on the Copyright Office website at \url{www.copyright.gov}

\textsuperscript{10} 17 U.S.C. § 102(a) lists 8 broad, non-exhaustive categories of works subject to copyright protection.

\textsuperscript{11} See 17 U.S.C. § 106.

\textsuperscript{12} Authors of works of visual art may have rights of attribution and integrity as described in 17 U.S.C. § 106A.
permission to use copyrighted work does not mean that the permitted user becomes a copyright owner or holder.

Many people are under the good-faith but mistaken impression that if they make changes to a copyrighted work (whether registered or not), then there is no infringement (discussed below). However, modifying a preexisting work without a proper license or permission not only violates the owner’s exclusive right to copy but also the owner’s exclusive right to prepare derivative works. On the other hand, the Copyright Act does not protect short phrases, including titles, as original works, unless they have achieved “secondary meaning” such there is a general association of a particular work with the title or phrase.

The Federal Court has exclusive jurisdiction for all civil copyright infringement actions arising under copyright law. All copyright infringement actions can only seek a remedy expressly provided by the Copyright Act. The majority view of the infringement test is called “Copying/Improper Appropriation.” In these cases, the plaintiff has the burden to prove that he or she is the rightful owner or holder of the rights in the work at issue, and infringing actions by the defendant. To do so, the “copying” requirement may be met assuming the defendant had access to the allegedly infringed work and there is substantial similarity between the infringed work and the infringing work.

There are many criteria for assessing infringement, including the purpose and character of use, the nature of the copyrighted work, the amount allegedly infringed, and the effect of the use on the potential market for the copyrighted work.

Remedies under federal law include monetary damages, statutory damages and injunctive relief. Monetary damages are based on either profits from the infringement or plaintiff’s losses, but not both. Statutory damages by one unintentional infringer of one work are $750.00 to $30,000.00; damages from intentional infringement of multiple works are up to $150,000.00 per work. Injunctive relief may be granted if i) there is a threat of irreparable harm to the plaintiff, ii) harm to the defendant is accounted for if granted, iii) probability that the plaintiff may succeed on the merits, and iv) public interest is promoted. An injunction should be granted if denial would amount to a forced license to use the creative work of another. Additional remedies may include forfeiture or destruction of the counterfeiting items, court costs, attorney’s fees if the copyright had been registered, sanctions as well as criminal prosecutions.

(Recently, as a response to growing technology and the unintended consequences thereof, the United States has passed much legislation that criminalizes the willful infringement of copyrights. (In civil cases, the plaintiff may be a private citizen and the burden of proof is a preponderance of evidence (or sometimes clear and convincing

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14 The minority view for the infringement test is called “Access/Substantial Similarity”.
15 Judge Dennis Jacobs wrote in Silverstein v. Penguin Putnam Inc., 368 F.3d 77 (2nd Cir. 2004) (compilations of fact may be copyrightable if they possess at least some minimal degree of creativity, even though facts themselves are not protected); see also 17 U.S.C.A. §§ 102, 103.
evidence). In criminal cases, the plaintiff is a governmental entity and the burden of proof
is a beyond a reasonable doubt.) For example, it is a crime to “infringe a copyright
willfully either 1) for purposes of commercial advantage or private financial gain, or 2) by
the reproduction or distribution, including by electronic means, during any 180-day period,
of 1 or more copies or phonorecords of 1 or more copyrighted work, which has a retain
value of more than $1000.00.”¹⁶ Punishment for the criminal infringement of copyrights
may include prison terms between one to ten years,¹⁷ with repeat offenders being dealt
with more harshly.)

For works originally created on or after January 01, 1978, the duration of copyright
protection for an individual is the life of the author + 70 years; for an entity, it’s the shorter
of 95 years from the date of publication or 120 years from the date of creation. (As for
public domain, works published in or before 1922, works published between 1923 and
1989 without a copyright mark (“ © “) (with few exceptions), works published between
1923 and 1964 if the renewal terms were not exercised, and works authored by federal
government employees are all in the public domain. Unpublished works created before
1978 are in the public domain [as of Dec. 31, 2002].)

Not surprisingly, these rights are not absolute nor unlimited in scope. Sections 107
through 121 of the 1976 Copyright Act limits the aforementioned rights, and gives specific
exemptions from copyright liability, discussed below. One major limitation and thus, a
defense to a claim of copyright infringement, is the complex doctrine of “fair use.”¹⁸ “Fair
use” (or “fair dealing” [Canada] or “fair practice”) allows a non-owner to use the
copyrighted material in a reasonable and limited manner without consent.¹⁹ There are
four statutory factors to be considered when “fair use” is raised.²⁰ Examples of fair use:
when the copyrighted work is used in a review, criticism, or parody; short quote or small
reproduction for scholarly (non-profit) work or by a teacher or student; summary for a
news report or publication; reproduction by a library or for legislative or judicial
proceedings; incidental, ancillary or fortuitous reproductions. Fair use determinations
often depend on whether and how much money is involved or whether commercial harm
exists.

Original works not subject to the protection of U.S. copyright law²¹ includes any
idea, procedure, process, system, method of operation, concept, principle, or discovery,
although U.S patent law may provide protection to some of the aforementioned. But, let’s
focus on videotaped depositions, motion pictures, sound recordings and other audiovisual
works.

¹⁹ Even if a copying was not a “fair use,” a court could award no damages if the person made copies
reasonably believing that what he or she did was a fair use. This is called the “good faith fair use defense,”
described in 17 U.S.C. § 504(c)(2).
²⁰ For a case in which these factors are applied, see Hustler Magazine, Inc. v Moral Majority, Inc., 606
F.Supp 1526 (C.D. Cal.), aff’d 796 F2d 1148 (9th Cir. 1985).
For purposes of U.S. copyright law, sound recordings are “works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work.” Examples of sound recordings include music, drama and lectures. Note that what is protected is the aggregation of sounds and not the tangible medium in which those sounds are fixed, i.e., the sound recording may be legally protected but not the “phonorecord,” which may be one of the media in which sounds can be fixed. Therefore, a videotaped deposition does not seem to be legally defined as a “sound recording.”

For purposes of U.S. copyright law, a motion picture is i) a series of images, ii) capable of showing the images in certain successive order, and iii) with an impression of motion when shown. Although we have found no case law indicating otherwise, a videotaped deposition may be considered a “motion picture” or an “audiovisual work” and, therefore, may be subject to U.S. copyright protection. However, this may not be the best classification of the typical work product of the typical court videographer.

A videotaped deposition can be classified as a “derivative work” or a “compilation.” Under the Copyright Act, 17 U.S.C.A. § 101, copyrighted compilation is created only by combining materials so that the resulting work as a whole constitutes an original work of authorship. So, for copyright purposes, a compilation exists where one chooses, sorts, compiles, organizes or arranges previously existing material regardless of whether the individual material separately is subject to legal copyright protection. To the extent that a videographer does the aforementioned in making the work product, the videographer owns the copyright, it is legally protectable and not transferred or conveyed when possession is relieved.

In a copyright infringement case, a Federal court stated that to qualify as original under 17 U.S.C.A. § 103, compilation must consist of the collection and assembly of pre-existing material, facts, or data; selection, coordination, or arrangement of those materials; and creation, by virtue of particular selection, coordination, or arrangement, of "original" work of authorship. Likewise, another Federal court held that the text of a poster discussing driving while under the influence satisfied the Copyright Act originality requirement, despite the claim that it was nothing more than compilation of statutes and other previously available material. This seems to be the majority view. See, e.g., American Geophysical Union vs. Texaco Inc., 37 F3d 881 (2nd Cir. 1994) (publishers of scientific and technical journals held copyright in each journal issue as collective work to extent that compilation of issue involved original work of authorship); Matthew Bender & Co., Inc. vs. West Pub. Co., 158 F.3d 693 (2nd Cir. 1998), cert. denied, 119 S. Ct. 2039 (1999) (case reporters are "compilations" of judicial opinions, for purpose of copyright law).

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On the one hand, compilations of non-protectable facts are copyrightable if it features original and non-trivial selection or arrangement of facts, such that the selection or arrangement possesses at least some minimal degree of creativity. See, e.g., MyWebGrocer, LLC v. Hometown Info, Inc., 375 F.3d 190 (2nd Cir. 2004); Silverstein vs. Penguin Putnam, Inc., 368 F.3d 77 (2nd Cir. 2004). In United States v Hamilton, 583 F2d 448 (9th Cir. 1978), the court held that a map, which showed the boundaries, roads, terrain, features and improved areas of a certain county, was sufficiently original to merit copyright protection because the new information, when taken into account with the compilation and synthesis from the maps that were introduced into evidence, made the map an original one subject to copyright.

In a finding of infringement, the court held that a study of the robotics industry was a "compilation" for purposes of the Copyright Act, 17 U.S.C.A. §§ 101 et seq., since it was work formed by collection and assembling of preexisting materials or arranged so that the resulting work product as whole constituted an original work of authorship, and that the infringer appropriated, not only specific language of study, but also its "selection, coordination and arrangement." Business Trends Analysts, Inc. vs. Freedonia Group, Inc., 887 F2d 399 (2nd Cir. 1989).

In MAI Photo News Agency Inc., et al. vs. American Broadcasting Co., Inc., there was a dispute over the licensing of and payment for 2 videotapes from an independent photo agency. ABC licensed videotapes from MAI, and then ABC used it for home video version sales. The license agreement gave ABC the right "for two distributions...in all media.” MAI contended that ABC exceeded its agreement to use the tapes because it meant for all in-house productions and not to sell videotapes for home use. The court granted summary judgment for ABC because “in all media” logically includes “home video,” which is a media. (MAI’s attorney was also sanctioned and ordered to pay costs under Federal Rules of Civil Procedure Rule 11(c).) The moral here is that any licensing agreement, like anything other written document, needs to be carefully written.

However, on the other hand, without a modicum of original and non-trivial selection or arrangement of facts or without the showing of some form of independent creation, there is no legal copyright protection. For example, in Financial Information, Inc. vs. Moody’s Investors Service, Inc., 808 F.2d 204 (2nd Cir.), cert denied, 108 S.Ct. 79 (1986), the court held that a financial publisher's service (the "Financial Daily Card Service") was not a protectable compilation under the Copyright Act because there no sufficient showing of independent creation associated with the cards that made up the publisher’s service.

A derivative work is also defined in 17 U.S.C.A. § 101 as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." To the extent that a videographer does the aforementioned in making the work product, the videographer owns the copyright, it is legally protectable and not transferred or conveyed when possession is relieved. Although § 101 defines "derivative work," what
constitutes a derivative work has often been litigated. In *Feist Publications, Inc. vs. Rural Telephone Service Co.*, 25 the U.S. Supreme Court held that although facts are not copyrightable, compilation of facts may be copyrightable if the work involves originality 26 in their presentation.

When can a videotaped deposition be classified as a “work made for hire”? According to section 101 of the copyright law, “work made for hire” applies when the work was prepared by an employee within the scope of his or her employment, or the work was specially ordered or commissioned for use under certain circumstances and the parties specifically agree and sign in writing that said work shall be considered and intended to be a “work for hire,” and the work product at issue is i) a contribution to a collective work, ii) a translation, iii) a compilation, iv) a test, v) a part of a movie or other audiovisual work, vi) a supplementary work, vii) an instructional text, viii) answer material for a test, or ix) an atlas.

Copyright assignment is a contract that transfers the copyrights from the author or creator to someone else; it becomes legal and binding when it is in writing and signed by the transferor(s). 27 Keep in mind that that does not make the copyright assignee an author or creator, but does give the assignee the copyrights enjoyed by the original owner author or creator. Also, the copyright owner may transfer non-exclusive rights without a writing. 28

In summary, to the extent that the production of a videotaped deposition has a minimum amount of original and non-trivial selection or arrangement of facts, or possesses some form of independent creation, it is a “derivative work” or a “compilation” for purposes of the Copyright Act, 17 U.S.C.A. § 101. And as such, it is entitled to legal copyright protection, and the videographer is the copyright owner in the absence of a written, signed, and explicit agreement assigning (exclusive or non-exclusive) rights to another or an employee-employer relationship existed. Therefore, no one else can legally, for examples, i) reproduce or make copies of the work, ii) prepare derivative works and compilations, iii) distribute by sale or other ownership transfer, or by rental, lease or lending, and iv) display the work publicly, without the express permission of the copyright owner, whether for personal or commercial purposes.

26 As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. *Feist Publications, Inc. v Rural Tel. Service Co.*, 111 S.Ct. 1282 (1991).
28 Section 204 of the Copyright Act invalidates attempted transfers of copyright ownership made without a writing. 17 U.S.C. § 204(a) (2000). However, section 101 of the Act specifically excludes nonexclusive licenses from the definition of “transfer of copyright ownership.” 17 U.S.C. §101. A nonexclusive license may be granted orally or arise from the parties’ conduct. *Nelson-Salabes, Inc. vs. Morningside Dev’t, LLC*, 284 F.3d 505, 514 (4th Cir. 2002). The burden of proving the existence of an implied license is on the alleged infringer.
I still need to:

- WESTLAW “IMPROPER APPROPRIATION” AND COPYRIGHT INFRINGEMENT
- WESTLAW “CONTRIBUTORY INFRINGEMENT”
- WESTLAW “FAIR USE” and “FAN FICTION”

Highly creative work based on someone else’s characters or settings, as in “fan fiction,” is derivative work in violation of the original author’s copyrights.

- Look up *Allen-Myland, Inc. v IBM Corp. (1991, ED Pa) 770 F Supp 1004*
- Look up *MAI Phot News Agency Inc., et al. vs. American Broadcasting Co., Inc., 2001 out of NY*