

AMAZON SELLERS' GUIDE:

COPYRIGHT LAW

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Purpose of the Book:

Rosenbaum Famularo, P.C., the law firm behind AmazonSellersLawyer.com, helps e-commerce Sellers around the world. Our clients sell on Amazon and other online platforms. We help develop and protect Amazon Sellers' brands and their intellectual property rights. This book focuses on teaching Amazon Sellers about United States Copyright Law.

Firm Profile

Rosenbaum Famularo, P.C., focuses on the needs of Sellers on Amazon and other online platforms. While every Plan of Action, account analysis and every document we write for Amazon Sellers is addressed in New York, we have lawyers, paralegals, former online Sellers, and other staff around the world. Our clients can meet with us, in person, in New York, Shenzhen, Yiwu and Melbourne.

Rosenbaum Famularo, P.C., has successfully reinstated thousands of accounts, obtained retractions of the vast majority of intellectual property complaints asserted against our clients and resolved many issues with Amazon's lawyers and staff in the United States, India, Ireland, Costa Rica, and the United Kingdom.

Attorneys CJ Rosenbaum and Anthony Famularo regularly speak at Amazon Sellers' events, ecommerce trainings and other retail trade shows around the world. There is no other law firm in the world that

handles more Amazon Sellers' Account suspensions and other issues for online retailers than Rosenbaum Famularo, P.C., The law firm provides better Plans of Action than any other service in the world because of three main pillars

- Everyone who analyzes Sellers' accounts and drafts Plans of Action or other documents are college-educated Americans. None of the account analysis or writing is outsourced to anyone in the Philippines or anywhere else;
- Collaborative Teamwork. Rosenbaum Famularo has a centralized location where we work in teams of 6 – 8 people working together. Every Plan of Action is discussed among a team of people to make sure that the Seller is receiving the best arguments for their reinstatement to submit to Amazon, and;
- Every document is either drafted by a lawyer or reviewed by a lawyer before it is sent out to be submitted to Amazon.

Our job is to get Sellers back in business, back online, and back to making money.

Our job is not to blindly follow the Amazon's or any other platform's policies. Our job is to provide Sellers with advice to empower Sellers to make educated business decisions based upon their risk versus reward analysis. Our job is to help Sellers accomplish their goals.

Our books for Amazon Sellers include

- *Amazon Law Library, Volume 1*
- *Your Guide to Amazon Suspensions*
- *Your Guide to Selling Fashion on Amazon*
- *Amazon Seller's Guide to Trademark Law*
- *Amazon Seller's Guide to Chinese Intellectual Property Law, and*
- *Merchandise Protection.*

Thousands of Pages of Free Information Can be Found at

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- Reddit: Amazon Sellers Lawyer (u/Rosenbaum Famularo)

Authors

CJ Rosenbaum, Esq.

CJ is the founder of the firm. He is known around the world for teaching tens of thousands of Amazon Sellers how to avoid suspensions. CJ teaches Amazon Sellers how to get their accounts back efficiently if they suffer a suspension of their Amazon Sellers' Account or the loss of the ability to sell one or more specific products. CJ has published thousands of pages of free guidance for Amazon Sellers. CJ started focusing on helping Amazon Sellers after learning that Amazon Sellers needed someone that could analyze accounts, draft concise and persuasive Plans of Action, address intellectual property issues and also represent Amazon Sellers against Amazon at arbitrations when Amazon refuses to amicably resolve issues. CJ uses his extensive prior education and experience in business and business law, negotiations, law for entrepreneurs and his fifteen years as a trial lawyer to help Amazon Sellers.

Prior to CJ, there was seemingly nobody who understood what was needed to win an arbitration and was then able to use that information to analyze accounts and draft persuasive Plans of Action. Fast forward to today, CJ, and his partner, Anthony Famularo, are responsible for saving thousands of Amazon Sellers' Accounts, thousands of businesses and likely tens of thousands of jobs around the world.

As Amazon Sellers pivoted into developing their own Private Label Brands, CJ, Anthony and the entire team at Rosenbaum Famularo, P.C.,

grew to help Private Label Sellers. The number one firm for helping Amazon Sellers is also the number one firm to help Sellers as they develop, monitor and protect their brands and their intellectual property rights.

Having written the books on selling on Amazon, CJ, Anthony and their firm law are uniquely qualified to help Sellers protect their intellectual property rights.

Anthony Famularo

Anthony is the Managing Partner at Rosenbaum Famularo, P.C. Anthony has worked with CJ from the beginning of the focus on Amazon Sellers. Anthony's experience includes addressing tens of thousands of issues related to Amazon and other e-commerce Sellers and intellectual property issues.

After working with CJ and saving countless accounts and jobs across the United States as the New York Managing Attorney, Anthony was made a Partner of the firm in 2016.

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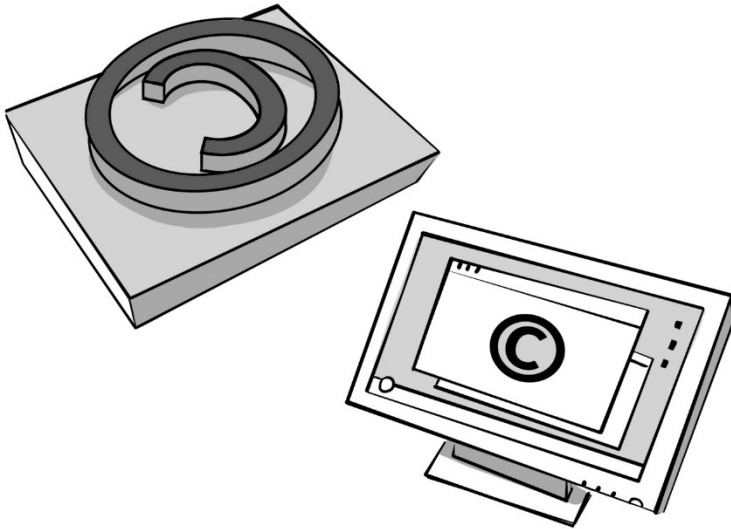
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Legal Disclaimer

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Chapter 1: A Brief History of Copyright Law



Amazon Sellers are technologically advanced and on the cutting edge of what it means to be an “entrepreneur” in the 21st Century global marketplace. They are held to extremely high standards by Amazon.com. As a result, Amazon Sellers must arm themselves with as much knowledge as they can. Copyright law is of paramount importance to the Amazon Seller. This book explores what material is copyrightable, when an Amazon Seller may allege copyright infringement, and how an Amazon Seller may defend against claims that they infringed another’s copyright. First, it is important to explore the origins of copyright protection in order for the Amazon Seller to better understand how this key-intellectual property concept can be used to the benefit and to protect their businesses.

I. The Development of The Printing Press

The development of U.S. copyright law traces back to the development of the printing press in Europe in the 1400s. In 1436, Johannes Gutenberg introduced the movable typing machine in Germany. It replaced wood blocks with metal block letters. With the movable type machine, Gutenberg created what is considered to be the first mass-produced book in history, The Gutenberg Bible. It consisted of 42 lines and was made into 180 copies.¹ Once introduced in Germany by Gutenberg, the printing press began to spread throughout the rest of the world.

When initially introduced to the public, noble classes looked down upon mass produced books as they held hand inked books in a much higher regard and viewed them as symbols of class and luxury.² However, commoners quickly gravitated towards press-printed books. As word spread about the printing press, additional shops opened. A whole new trade began to develop. Press-printed books served as a new outlet to spread information to large audiences efficiently and inexpensively. The printing press gained popularity among scholars and politicians. Scholars found the spread of scholarly ideas to be to their benefit and politicians used the invention as a way to attract

¹ *The history of print from 1400 to 1499*, PREPRESSURE (Feb. 11, 2018), <https://www.prepressure.com/printing/history/1400-1499>.

² *The Invention and History of the Printing Press*, PSPRINT (last visited June 4, 2018), <https://www.psp rint.com/resources/printing-press/>.

public interest by printing pamphlets.³ Not only did the printing press benefit politicians and scholars but society as a whole. Thanks to the printing press, people now had an easily accessible platform they could use to acquire knowledge and educate themselves, which lead to further discussion and establishment of new ideas. In addition, the printing press also created a uniform language, and system of grammar and spelling.

Political pamphlets and mass-publication, however, were not the only things heralded by invention of the printing press. The printing press brought about the establishment of copyright law. Prior to the printing press, authors relied on manual copyists to replicate their works.⁴ Because manual copying took so much time, authors had little worry of others copying and plagiarizing their books. The printing press, however, changed all of that. An author could print many more copies of their works and see significantly greater profits; this also made plagiarizing an author's work a far more attractive scheme and a much easier to do.

The development of church and state interests in censorship and publisher's interests in limiting the competition

³ *Id.*

⁴ Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 Cal. L. Rev. 323, 325-26 (2003).

grew together and established a quasi-copyright regime that continued until the beginning of the eighteenth century. Henry VIII issued a proclamation in 1529 prohibiting the possession of certain “heretical” works.⁵ In the years following the issuance of this proclamation, numerous works, decrees, proclamations and Acts of Parliament prevented the printing and publishing of books until a government panel or ecclesiastical officials approved them.⁶ Rather than the courts, the Stationer’s Company, a guild made up of bookbinders, booksellers, and printers, was assigned the daily task of making sure that printers adhered to licensing laws by the Crown.

II. Statute of Anne

Following the nullification of licensing which stripped the Stationer’s Company of its power to seize and abolish unauthorized works, the Company engaged in negotiations with Congress to obtain its own rights to do so by statute. Despite many failures to successfully negotiate for a statute with Parliament, the Stationer’s Company finally prevailed when Parliament enacted the Statute of Anne. The Statute of Anne went into effect in April of 1710 and was referred to as “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies,

⁵ *Id.* at 326-327.

⁶ *Id.* at 327.

during the times therein mentioned.”⁷ The Statute of Anne was the first copyright statute in the Western World and provided book publishers with legal protection for 14 years going forward and 21 years for books already in print.⁸ The Statute of Anne also provided that if the author was still alive at the expiration of his first 14-year copyright term, the copyright re-vested in the author for another 14-year term. In order to receive protection under the Statute of Anne, authors and owners of works were required to register their works in the Stationer’s Company register book. This process of “registration” gave birth to the very same requirement that is necessary to this day for the Amazon Seller seeking copyright protection today.

The significance of the Statute of Anne goes beyond the fact that it was the first ever-copyright law. The Statute of Anne also constituted a major shift in philosophy and law as the statute provided that copyright was a right that belonged to the author. This statute transformed copyright law of publishers from a public law into a private law.⁹ The statute’s influence extended beyond Great Britain into multiple other nations including the United States and is a statute that is still referenced to this day

⁷ THE AVALON PROJECT, *The Statute of Anne; April 10, 1710*, Yale Law School (last visited July 26, 2018), http://avalon.law.yale.edu/18th_century/anne_1710.asp.

⁸ *Id.*

⁹ *Id.*

by judges and scholars for containing fundamental principles of copyright law.

III. 1909 and 1912 Copyright Acts

The Copyright Act of 1909 was signed into law on March 4, 1909, by President Theodore Roosevelt and brought with it many desired changes to copyright law.¹⁰ Prior to the enactment of the 1909 Copyright Act, United States copyright law had not undergone any significant changes since the late 1700s and was in need of change in order to adapt to the reproductive landscape at the time.¹¹ Once the 1909 Act went into effect on July 1, 1909, numerous changes were made to older copyright laws including: (1) publications becoming secured by copyright with a copyright notice; (2) copyright protections became available for unpublished works such as performance, exhibitions, and oral deliveries; (3) foreign works in foreign languages became exempt from having to undergo publication in the U.S; (4) the copyright protection renewal period was extended 14 years which provided a maximum period of 56 years and mandated a newspaper copyright notice before a renewal was granted; and (5) granted owners of musical compositions mechanical recording rights.

¹⁰ COPYRIGHT ACT OF 1909.

¹¹ *Id.*

The Copyright Act of 1912 served as an amendment to the Copyright Act of 1909 and added motion pictures to the list of works that are protected by copyrights.¹² Prior to the 1912 amendment, which is also known as the Townsend Amendment, motion pictures were protected as photographs.¹³ The amendment added two new categories to section 5 of the 1909 Copyright Act entitled “motion picture photoplays” and “motion pictures other than photoplays.”¹⁴ These changes protected movies, travelogues, and newsreels. This quick update from the 1909 Copyright Law was another attempt by Congress to keep up with the increasingly rapid developing technology of the 20th Century.

IV. Sound Recording Amendment of 1971

The Sound Recording Amendment of 1971 was enacted on October 15, 1971, and went into effect on February 15, 1972, with the goal of protecting sound recordings.¹⁵ This amendment was implemented in response to the emergence of piracy issues that had come about due to the invention of the audio tape recorder. Concerns over piracy are evident in the language of the amendment as it permits the copyright owner to only “duplicate

¹² *Copyright Timeline: A History of Copyright in The United States*, ASSOCIATION OF RESEARCH LIBRARIES (last visited July 27, 2018), <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.W1tKQhpKg8Y>.

¹³ *Id.*

¹⁴ WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 61 (1994).

¹⁵ *Id.* at 73.

the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording.”¹⁶ The language of this final amendment shows the increasing difficulty and strain Congress was having attempting to amend laws made in the early 1900’s for the music scene of the 1970’s.

V. Copyright Act of 1976

The purpose of the 1976 Copyright Act was to give Congress the opportunity to update American copyright law and confront the technological advances since the Copyright Act of 1909 was enacted. The most significant changes the Copyright Act of 1976 included the introduction of commercial radio and television, the development of motion pictures, sound recordings and the introduction of new ways to reproduce printed materials and recorded sounds. Along with addressing new problems that had arisen in response to technological advances, the Act was also implemented with the intent of encouraging artistic and intellectual activity for the benefit of society. In order to allow copyright protection to extend to as broad of a range of creative works as possible, the Copyright Act of 1976 provides that any work expressed through “any tangible medium of expression” and that is an “original work of authorship” can qualify for copyright protection.¹⁷

¹⁶ 17 U.S.C. § 1(f).

¹⁷ 17 U.S.C. § 101.

Additionally, the language of the 1976 Act abolished a requirement for creative works to be federally registered in order to avoid being considered within the public domain. Instead, the 1976 Act required that works be “fixed,” meaning that they be obtainable through one of the permissible channels of media. In response to the public suggestions made in the reports from the Register of Copyrights and the House and Senate Judiciary Committees, the 1976 Act also extended an author’s copyright term protection period to the lifetime of the author plus 70 years following their death.¹⁸ The Act also clarified the length of payment required to an author’s heirs following the death of the author stating that the payment of fees to an author’s heirs would last for 19 years.

VI. Berne Implementation Act of 1988

The latter half of the 20th Century saw not only an increase in technology that copyright acts had to address, but also an increase in globalization and world trade. The Berne Convention was an attempt to make copyright protections uniform around und the globe.¹⁹ When the document was initially enacted in 1986, however, only ten nations adopted it; the United States was notably-absent. The act was designed to

¹⁸ *Id.*

¹⁹ Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT’L L.J. 171, 174 (1989) (discussing the five goals of the Berne Convention).

eliminate bias favoring domestic artists over foreign artists, and the United States, at the time, did not provide foreigners with the ability to litigate their copyrights in U.S. courts.

Eventually, President Ronald Reagan signed the Berne Implementation Act into law on October 31, 1988.²⁰ When signing the Act into law, Reagan made note of the benefits that would result from becoming part of the Berne Union stating:

With 77 countries as members, including most of our trading partners, the Berne Convention features the highest internationally recognized standards for the protection of works of authorship. Our membership will automatically grant the United States copyright relations with 24 new countries and will secure the highest available level of international copyright protection of U.S. artists, authors and copyright holders.²¹

Reagan went on to explain the significance of the U.S.'s adoption of the Berne Convention through an economic lens, stating:

[T]he cost to Americans [of not joining the Berne Convention] has been substantial not only in terms of the violation of the property rights of Americans but in terms of our trade balance as

²⁰ *Id.* at 171.

²¹ *Id.*

well. We've been running a trade surplus of over \$1 billion annually in copyrighted books, and it would have been much larger had it not been for the pirating of American copyright work. In 1986 alone, the entertainment industry may have lost more than \$2 billion in potential revenue, and our computer and software industries more than \$4 billion in potential revenue.²²

Reagan, a former actor turned actor's union leader turned politician, may very likely have felt the financial woes of those in the entertainment industry by merit of the U.S. having not been a member of the Berne Convention. This again, was another step toward recognizing the technological and globalized realities of the modern world.

Along with these improvements, the Berne Implementation Act of 1988 eliminated certain procedural requirements such as filing and registration requirements required to bring an infringement claim as well as a notice requirement.²³ Due to these significant potential revenue losses that may have resulted due to the U.S.'s abstention and the expansion of the U.S. copyright relations with over 20 new countries, the Berne Implementation Act of 1988 was one of the

²² *Id.*

²³ ASSOCIATION OF RESEARCH LIBRARIES, *supra* note 12.

most important advancements of the U.S. intellectual property law landscape of the decade.²⁴

VII. Copyright Renewal Act of 1992

The Copyright Renewal Act of 1992 provided for an automatic extension of copyrighted works with copyright protection in their first term of protection as of January 1, 1978.²⁵ This act also removed the previously required renewal mandate during the 28th year of the first term as it automatically extended the term an additional 47 years for the 75-year copyright term total. With the addition of this automatic renewal, the renewal requirement previously used by the 1976 Copyright Act was abandoned and works were no longer subject to the possibility of falling into the public domain upon failure to send a renewal application.²⁶

Compelling arguments were made for and against the enactment of the 1992 Act, with the removal of the mandatory renewal application being placed at the center of the Act's controversy. Proponents of the 1992 Act were authors, publishers, scholars, and the Copyright Office, who were highly

²⁴ *Id.* at 172.

²⁵ Richard R. Hammar, *The "Copyright Renewal Act of 1992,"* CHURCHLAW&TAX (Nov. 2, 1992), <https://www.churchlawandtax.com/cltr/1992/november-december/copyright-renewal-act-of-1992.html>.

²⁶ ASSOCIATION OF RESEARCH LIBRARIES, *supra* note 12.

critical of the registration renewal requirement and argued that the requirement was burdensome and unnecessary.

Congress opposed the idea of the enlargement of the public domain simply because of an author's unintentional failure to comply with a procedural requirement. Authors and rights owners were financially dependent on such works. Congress reasoned that these renewal requirements were not needed by looking at the laws of other countries that rarely utilized similar procedural requirements in order for one to



obtain or maintain copyright protection. Moreover, Congress came to the realization that keeping these renewal requirements in place would run afoul of the purposes of the Bern Convention,

which was to establish a uniform and standard international copyright law.²⁷

Ultimately, however, Congress found the opposition's arguments to be outweighed by what it felt was the true purpose behind copyright protection, which was to provide authors and artists with the exclusive limited rights to benefit from their works in order to incentivize authors and artists to continue creating works that benefited the public at large.²⁸

VIII. Copyright Term Extension Act (CTEA) of 1998

On October 28, 1998, President Bill Clinton signed the Copyright Term Extension Act of 1998 (hereinafter "CTEA") into law. This act was also known as the Sonny Bono Copyright Term Extension Act of 1998. It was intended to extend the time that copyrighted material would be exempt from being considered part of the public domain.²⁹ This increased the length of the copyright extension by 20 years.

In addition to the extension, the act provides that works or characters that are created outside of the U.S. that are based off of a copyrighted character or work cannot be sold within

²⁷ *Id.*

²⁸ *Id.*

²⁹ *What is the Sonny Bono Copyright Term Extension Act of 1998 (CTEA)?*, WISEGEEK (last modified July 2, 2018), <http://www.wisegeek.com/what-is-the-sonny-bono-copyright-term-extension-act-of-1998-ctea.htm>.

U.S. boundaries. As an example, a video game made in Japan that includes a copyrighted character in the U.S. cannot be sold within the U.S. The CTEA of 1998 did not renew copyright protection for works that were already considered part of the public domain. It only applied to works currently having copyright status. One of the major protections that the CTEA provided upon its enactment was the preservation of the copyright protection for the Disney character Mickey Mouse. Mickey Mouse was in danger of losing his protection at the time of the CTEA's implementation. The CTEA is often colloquially referred to as the "Mickey Mouse Act."

Despite the many benefits that the CTEA provided, it was still subject to controversy.³⁰ Small publishers and performers of music in the public domain argued that the term extensions that would come with the CTEA would prevent these publishers and performers from more quickly gaining access to works that served as their source of profits. Libraries and librarians were upset about the implementation of the act because the delay of these works becoming part of the public domain would hinder their ability to gain access to works.

The most noteworthy opposition came from a group of intellectual law professors who filed a statement with Congress

³⁰ ASSOCIATION OF RESEARCH LIBRARIES, *supra* note 12.

arguing that the CTEA would place a significant burden on the public without any public benefit to justify its implementation. The professors argued that the public domain serves as a wealth of information for current and future creators to utilize when making their own independent imaginative works. Ultimately, the Senate Judiciary Committee rejected the opposition and enacted the CTEA. The Committee explained how these specific term extensions in the CTEA had the goal of implementing a fixed term of protection based on the author's death and protecting a minimum of one generation of the author's heirs.

IX. Digital Millennium Copyright Act of 1998

The last major piece of legislation that will be covered in this chapter is the Digital Millennium Copyright Act of 1998 (the "DMCA"). President Bill Clinton signed the DMCA into law on October 28, 1998.³¹ The implementation of the DMCA was a result of Congress' effort to help U.S. copyright law transition to the digital age and impose the treaty obligations of the U.S.³² Again, technology drove the change in the law.

³¹ U.S. COPYRIGHT OFFICE, *The Digital Millennium Copyright Act Of 1998 U.S. Copyright Office Summary*, COPYRIGHT.GOV (Dec. 1998), <https://www.copyright.gov/legislation/dmca.pdf>.

³² *Executive Summary Digital Millennium Copyright Act Section 104 Report*, COPYRIGHT.GOV (last visited July 26, 2018), https://www.copyright.gov/reports/studies/dmca/dmca_executive.html.

CJ's Note: Because of the importance of the DMCA to Amazon Sellers, Chapter 3 delves deeper into the history of the law's enactment and some of its most notable features including the anti-circumvention provisions and the safe harbor provisions.

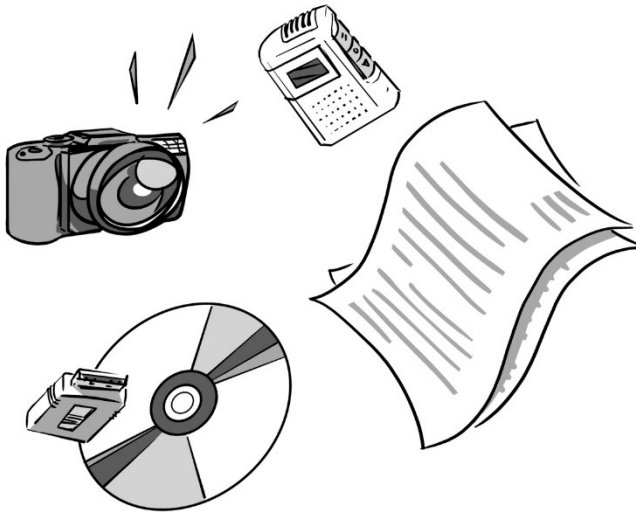
The DMCA focuses on combating situations where copyright infringement occurs in the digital world and striking a balance between copyright owners and internet service providers.³³ As long as internet service providers satisfy certain statutory requirements, the DMCA shields them from liability for copyright infringement by their users. Some of the statutory requirements an internet service provider must comply with in order to qualify for protection under the DMCA include taking action upon learning when copyright infringing material resides on their network and implementing a policy that terminates users accounts upon discovery when they have repeatedly infringed on copyrights. These provisions are known as “take down” procedures. It should also be noted the DMCA provides protection to the Internet service providers but not users who infringe on copyrighted material on the network. In other words, AOL was protected; Napster was not.

³³ *Digital Millennium Copyright Act*, HARVARD UNIVERSITY (last visited July 26, 2018), <https://dmca.harvard.edu/pages/overview>.

The amalgamation of these copyright acts has become the copyright law that applies to the legal landscape today. The acts and statutes were created to keep up with technology and the rest of the world's intellectual property rights are what governs Amazon Sellers today....and shields Amazon and other platforms from liability.

Chapter 2: Outline of Copyright Law

Amazon Sellers main copyright concerns are, generally, concerned with images and verbiage. This issue most often arises when it is claimed Sellers have used copywritten images for their product pages or used copywritten text to describe their product. Before we delve into the specifics of copyright law as it pertains to Amazon Sellers, we will examine copyright law more generally.



Copyright infringement is defined as a violation of a holder's exclusive right to a work of art, protected by the copyright act, using a protected work without permission of the owner. This chapter provides an overview of US copyright law and copyright registration with the U.S. Copyright Office that can be applied to all types of protected works of art both online and offline. It covers copyright's legal framework, what works

are eligible for copyright protection, the requirements for copyright protection, exclusive rights of copyright owners, moral rights and the Visual Artists Rights Act of 1990, copyright duration, copyright ownership and copyright formalities.

I. Legal Framework

Copyright protection in the US is governed primarily by federal statute. As explained in the previous chapter, the current law for copyright protections is the Copyright Act of 1976. The US Copyright Office oversees copyrights. Its primary functions include administrative rulemaking, reviewing and processing applications for copyright registration, enforcing mandatory deposit requirements and administering statutory and compulsory licenses. The Copyright Office also provides legal and regulatory information as well as limited procedural guidance on its website.

Copyright protection is authorized by Article 1 Section 8 of the U.S.C. The copyright clause empowers Congress “[t]o 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.”³⁴ This clause is the basis for most of the intellectual property law in the United States.

³⁴ U.S. Const. art. I § 8, cl. 8.

II. Works Eligible for Copyright Protection

The U.S. Code specifies eight categories that may apply as “works of authorship” for purposes of copyright protection: As per the United States Code:

- (1) literary works;
- (2) musical works; including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.”³⁵

The categories are interpreted broadly for registration purposes. For example, images can be registered as "pictorial, graphic, and sculptural works;" drawings and fashion designs can be registered as "pictorial, graphic and sculptural works."

The owner of a copyright has the exclusive right to use the copyright in various ways. Copyright can be used to protect rights to: (1) reproduce the work in copies or phonorecords; (2) prepare derivative works based upon the work; (3) distribute copies or phonorecords of the work to the public by sale or other transfer of ownership or by rental, lease or lending; and (4)

³⁵ 17 U.S.C. § 102.

perform the work publicly if it is a literary, musical, dramatic or choreographic work; a pantomime; or a motion picture or other audiovisual work.³⁶ Registered copyrights also provide copyright owners the exclusive right to authorize others to use these rights, as within the limits of certain statutory exceptions.

III. Copyright Ownership

Generally, the author of a work is the original owner of the copyright in a protected work. For works created by a single author and made as works for hire, the author is a person that transforms an idea to original expression and brings that expression into tangible form.³⁷

IV. Copyright Formalities

The formalities to obtain a copyright include: publication, notice, registration, deposit, and renewal. As per the Copyright Act, none of these formalities are requirements for copyright protection in a work, with limited exceptions for works created before March 1, 1989. Failing to observe them does not result in loss of copyright. However:

- Registration and notice provide substantial benefits (see Registration and Notice).

³⁶ *Id.*

³⁷ 17 U.S.C. § 201(a).

- Failing to make any required deposits may result in fines (see Deposit).
- Renewal provides certain benefits for works that were copyrighted under the 1909 Copyright Act (see Renewal).

Publication

As per the Copyright Act, a work is published by either:

- Distributing copies or phonorecords of the work to the public by transfer of ownership, rental, lease or lending.
- Offering a group of persons to distribute copies or phonorecords of the work for further distribution, public performance, or public display.³⁸

While publication is not a requirement for copyright protection, when a work was published can significantly affect the duration of the copyright protections. For example, whether a work was published on or before January 1, 1978 will have a significant effect upon the duration of that copyright's protection as per the 1976 Copyright Act.

Notice

Notice of copyright is not required for protection for works published after March 1, 1989, when the Berne Convention Implementation went into effect. However, notice

³⁸ 17 U.S.C. § 101.

still provides considerable benefits, including that proper notice of copyright:

- May disqualify an innocent copyright infringement defense.³⁹
- Notifies the public of the claim of ownership, which may prevent infringement.
- Can help others locate the copyright owner to obtain permission for reuse.

The 1909 Copyright Act required proper notice for published works to be protected by federal statutory copyright.⁴⁰ Failure to provide notice on a published work caused the work to fall into the public domain.

The Copyright Act recognized the notice requirement until the Berne Convention Implementation Act. Works first published between January 1, 1978 and February 28, 1989 must display proper notice, and publishing a work publishing a work during that period without proper notice may have caused the work to lose copyright protection. However, leaving out notice did not negate the copyright if the copyright owner both:

- Registered the work before or within five years after publication without notice, and;

³⁹ 17 U.S.C. §§ 401(d), 402(d).

⁴⁰ COPYRIGHT ACT OF 1909, *supra* 10.

- Made reasonable efforts to add notice to all copies distributed after learning of the omission.⁴¹

Publication without notice also did not cause the copyright owner to lose copyright protection if the publication was made without the copyright owner's permission, or notice was omitted from only a relatively small number of copies.⁴²

Elements of Proper Notice

Proper notice as per the Copyright Act must include all three of the following elements:

- Any of the following:
 - The symbol © for visual or observable copies, or the symbol ® for phonorecords of protected sound recordings
 - The abbreviation "Copr.;" or
 - The word "Copyright."
- The year of first publication.
- The name of the copyright owner, which may include an abbreviation or alternate designation that is generally known.⁴³

Furthermore, the size and position of the copyright must provide clear notice of the claim of the copyright to the viewer.⁴⁴

⁴¹ PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, *supra* note 41 (quoting 17 U.S.C. § 405).

⁴² 17 U.S.C. § 405.

⁴³ *Id.*

⁴⁴ 17 U.S.C. §§ 401(c), 402(c).

Effect of Defective Notice

Defective notice does not affect copyright protection or duration for works created on or after March 1, 1989. For works created before then, defective notice may cause the work to lose copyright protection, including if the notice contains the wrong or no name, or a date that is later than when the work was created. Defective notice may also shorten the duration of the copyright in the work, if the date included in the notice is earlier than the actual date the work was created.⁴⁵

Registration

Registration is not required by the Copyright Act for federal copyright protection.⁴⁶ However registration may have been required to fix certain defective notices on works published between January 1, 1978 and February 28, 1989. Additionally, registration provides several benefits to the registrant, including:

- In most cases, a copyright owner must register its copyright in a work before suing for infringement.⁴⁷
- A copyright owner may recover statutory damages and attorneys' fees in an infringement action, only if the work was registered prior to the start of the infringement action or within three months after first publication.⁴⁸

⁴⁵ 17 U.S.C. §§ 402(b), 405.

⁴⁶ 17 U.S.C. § 408(a).

⁴⁷ 17 U.S.C. § 411.

⁴⁸ 17 U.S.C. § 412.

- A copyright that is registered within five years of the work's first publication is prima facie evidence of the copyright's legitimacy.⁴⁹
- Registration may disqualify an innocent infringement defense.
- The copyright owner may record the registration with the US Customs Service to prevent the importation of infringing copies.

Registration of Works Published Between January 1, 1978 and February 28, 1989

Registration may have been necessary to maintain the copyright in works first published with defective notice between January 1, 1978 and February 28, 1989. This includes works first created on or after January 1, 1978 and works created but not registered or published before that date.⁵⁰

Until the Berne Convention, the Copyright Act retained the notice requirement for published works as a requirement for copyright protection. Publication without notice caused the work to fall into the public domain unless either:

- A relatively small number of copies were published without notice
- The work was registered either before or within five years after the publication without notice, and the owner

⁴⁹ 17 U.S.C. § 410 (c).

⁵⁰ PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, *supra* note 41.

made reasonable efforts to include notice after discovering its absence.⁵¹

Deposit

The Copyright Act requires that each copyrighted work published in the US, with limited exceptions, must be deposited with the Library of Congress. Registration must always include a deposit, but a deposit may be made without registration. Failing to make a deposit will not result in the loss of a copyright but may result in a number of fines. Unpublished works do not require a deposit.⁵²

V. Copyright Duration

Generally, the term of the copyright for a work created on or after January 1, 1978 starts when the work was created and expires 70 years after the life of the author. For works created by joint authors, the copyright expires 70 years after the last author's death.

For works made for hire, or anonymous works, or works bearing an assumed pen name, the copyright expires 120 years after creation, or 95 years after first publication, whichever comes first.⁵³ However, publishing a work without proper

⁵¹*Id.* (quoting 17 U.S.C § 4045(a)).

⁵² 17 U.S.C. § 407.

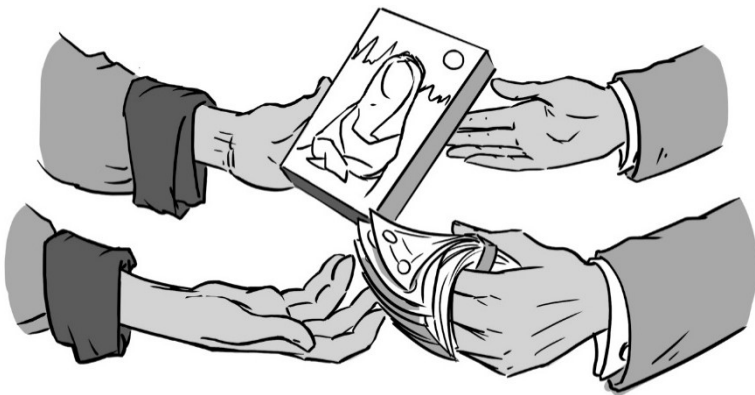
⁵³ 17 U.S.C. § 302.

notice, or registration, before March 1, 1989, may have caused the work to lose copyright protection.⁵⁴

CJ's Note: A “work made for hire” is a work created by an employee, or it is a commissioned work. A work by an employee must be created during the scope of her employment to be considered a work for hire. Whereas a commissioned work is often specified by a contract.

VI. Licensing Requirements

The Copyright Act sets out several statutory and compulsory licensing requirements. These provisions allow certain specified use if the user pays required royalties as per the



⁵⁴ 17 U.S.C. § 405(a).

relevant statutory provision and complies with other statutory and administrative requirements. The Copyright Act imposes licensing requirements for among other things:

- Making and distributing phonorecords of any published, non-dramatic, musical work.⁵⁵
- Certain noncommercial broadcasts of non-dramatic, musical works and pictorial, graphic and sculptural works⁵⁶
- Certain secondary transmissions of cable and television systems.⁵⁷
- Certain digital audio transmissions of sounds recordings.⁵⁸

The Copyright Office's Licensing Division enforces the Copyright Acts various statutory and compulsory licenses discussed here.

VII. Exclusive Rights

Registering for a copyright provides its owner with a bundle of exclusive rights. The primary benefits granted to a copyright holder are reproduction, adaptation, distribution, public performance and public display.

⁵⁵ 17 U.S.C. § 115.

⁵⁶ 17 U.S.C. § 118.

⁵⁷ 17 U.S.C. § 119.

⁵⁸ 17 U.S.C. § 114(d)(2).

Reproduction:

The exclusive right to reproduce a work allows the copyright holder to prevent others from copying her work through recordings or any other format or by any other means. This reproduction right generally covers any work that is fixed in a tangible form.

Right to Create Derivative Works

A copyright holder has the exclusive right to make adaptations, or derivative works of the copyrighted work.⁵⁹ This can include translation, musical arrangement, dramatization, fictionalization, motion picture making, sound recording, art reproduction, abridgement and condensation. For example, the writer of a non-fictional book about World War II can sell the rights to create a movie from her book.

Distribution:

A copyright owner has the exclusive right to distribute to the public copies or phonorecords of the original protected work.

Distribution, as defined by statute, includes both:

- i. The transferring of ownership of tangible copies of the practiced work by any means, and;

⁵⁹ PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, *supra* note 41 (quoting 17 U.S.C. § 106(3)).

ii. Physically transferring custody, but not ownership, of tangible copies, such as rental, lease, and lending.⁶⁰

Payment or other consideration is not required for a transfer to be a distribution. The distribution right prevents others from distributing the work to the public. In addition, as with the reproduction right, distribution only deals with tangible copies.

The U.S. Supreme Court held that delivering electronic copies online constitutes distribution.⁶¹

The distribution right is limited by the First Sale Doctrine.⁶² The copyright owner has the right to control the first sale of the protected work. Once the copy is lawfully sold, the new owner has the right to distribute the title by sale, rental or any other means.

Public Performance:

The copyright owner has the right to allow or restrict the public performances of the work. Copies that are lawfully obtained of a work may be privately performed by the owner of

⁶⁰ 17 U.S.C. § 106(3).

⁶¹ New York Times Co. v. Tasini, 533 U.S. 482 (2001).

⁶² The First Sale Doctrine permits people to buy and re-sell property without permission of the original owner as long as the consumer receives a product that is not materially different from the product delivered by the original owner.

that copy. As per the Copyright Act, performing a work means "to recite, render, play, dance or act it. In addition to live performances, a work may be performed by television, radio or audio player. Only public performances infringe on this right. A public performance is defined as a performance that is made in person at, or transmitted or communicated to, either a place that is open to the public, or a gathering of a substantial number of persons other than family members and acquaintances.⁶³

In addition, a performance is considered public regardless of whether the members of the public are in the same place or able to receive it at the same time. For example, an on-demand video stream is a public performance even though it may never be viewed by more than one person at the same time.⁶⁴ Downloads have been held not to be performances by the U.S. Court of Appeals but may constitute reproduction and distribution.⁶⁵

Public Display:

The copyright owner's exclusive right to public display extends to: literary works, musical works, dramatic works, choreographic works and pantomimes and pictorial graphic and

⁶³ 17 U.S.C. § 101.

⁶⁴ PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, *supra* note **Error! Bookmark not defined.** (quoting *U.S. v. Am. Soc. of Composers, Authors, & Publishers*, 627 F.3d 64, 74 (2d. Cir. 2010)).

⁶⁵ *Id.* (quoting *Am. Soc. of Composers*, 627 F.3d at 74-75).

sculptural works.⁶⁶ Like the right to public performance, only displays that are public constitute infringement. The determination of what is considered public is the same as those for performance. While limited by the first sale doctrine, however, the lawful owner of a copyright may make use of a copyright in some cases without express permission from the copyright holder or the payment of royalties.

VII. Statutory Exceptions

The Copyright Act includes express limits on the creators' exclusive rights. The main limitations, also called exceptions, include: fair use, the first sale doctrine, archival reproductions and distributions and statutory or compulsory licenses that allow other make certain limited uses of the work in exchange for the payment of a royalty.

Fair Use:

Fair Use is a widely applied limitation on a copyright-owners' rights. The Copyright Act provides a list of purposes that are permitted as fair use, including: criticism, commentary, news reporting, teaching, scholarship and research.⁶⁷ In essence, if a claimed-infringer's use of a copyright falls into any of the exceptions that constitute "fair use," there is no infringement.

⁶⁶ *Id.*

⁶⁷ *Id.*

The Copyright Act provides four factors that are considered when determining whether the use of someone else's copyright is fair. This copyright limitation is a powerful defensive tool that an Amazon Seller could potentially use in a legal proceeding. For more details on the exact inner-workings of this type of defense, see Chapter 6: *Defenses to Copyright Infringement on the Amazon Platform*.

Chapter 3: Digital Millennium

Copyright Act



I. History of DMCA Enactment

In 1992, President Bill Clinton implemented an “Information Infrastructure Task Force” in an effort to create a policy to address the emergence of the internet and copyright issues.⁶⁸ In order to accomplish this task, Bruce A. Lehman, the former Assistant Secretary of Commerce, U.S. Commissioner of Patents and Trademarks, and an attorney in the computer software field provided assistance.⁶⁹ Lehman was a proponent of copyright holders having greater control over digital content.

⁶⁸ *History of the DMCA*, DIGITAL MILLENNIUM COPYRIGHT ACT (last visited July 27, 2018), <https://bcgrouptwo.wordpress.com/about/>.

⁶⁹ *IPPI Board of Directors*, INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE (May 2010), <https://iipi.org/2010/05/iipi-board-of-directors/>.

The World Intellectual Property Organization (“WIPO”), an international organization focused on protecting intellectual property, assisted Lehman in his desires for greater legal control over the digital landscape by implementing his ideas. A year later in 1993, the Administrative Working Group on Intellectual Property Rights began its work as part of the task force implemented by President Clinton.

The Working Group released multiple papers recommending changes to copyright laws in order to adapt to new technology and increased internet usage. In 1996, the WIPO copyright treaty mandated some European countries to afford legal protection and legal remedies in order to combat the circumvention of technologies used to protect copyrighted works. In response to these suggestions from the Administrative Working Group on Intellectual Property Rights and the recent mandates introduced by the WIPO copyright treaty, President Clinton signed the Digital Millennium Copyright Act (DMCA) into law on October 28, 1998.

II. Purpose of the DMCA

As the prior acts, the Digital Millennium Copyright Act was implemented to keep U.S. copyright law up to date with

technology, the explosive growth of the internet and the digital age.⁷⁰

The DMCA implemented two 1996 WIPO treaties: the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.⁷¹

The DMCA makes it unlawful to spread and produce devices, services, or technology that can circumvent safeguards in place to control access to copyrighted works.⁷²

The Act makes it unlawful to bypass the safeguards that control access to copyrighted works regardless of whether copyright infringement occurred. The only circumstances under which these access controls can be circumvented is when encryption research is being conducted, computer security systems are being tested, or when product interoperability is being evaluated. In certain situations, specific groups such as academic institutions, archives, and non-profit libraries are exempt from anti-circumvention provisions.

⁷⁰ EXECUTIVE SUMMARY, *supra* note 32.

⁷¹ U.S. COPYRIGHT OFFICE, *supra* note 31

⁷² R. Elizabeth & C. Kitchen, *Understanding the Digital Millennium Copyright Act*, BRIGHT HUB (last updated Jan. 29, 2010), <https://www.brighthub.com/office/entrepreneurs/articles/62799.aspx>.

The DMCA shields online service providers, like Amazon, from copyright infringement liability as long as the provider satisfies certain statutory requirements and “take down” methods.

The definition of an online service provider is “an entity offering the transmission, routing, or providing of connections for digital online communications.”⁷³

The DMCA is made up of 5 different titles; Title II: *The Online Copyright Infringement Limitation Act*, pertains to the Amazon Seller.

III. Title II: Online Copyright Infringement Liability Limitation Act

Title II of the DMCA adds section 512 to the Copyright Act with the purpose of creating limitations on copyright infringement liability for online service providers, which are known as “safe harbors.”⁷⁴ This section of the DMCA implements four specific categories of conduct where platforms like Amazon and other service providers are protected. The categories include

- “transitory digital network communications,”

⁷³ *About the Digital Millennium Copyright Act*, INDIANA UNIVERSITY (last modified May 14, 2018, 11:47:38), <https://kb.iu.edu/d/alik>.

⁷⁴ U.S. COPYRIGHT OFFICE, *supra* note 31.

- “system caching,”
- “information residing on systems of networks at the direction of users,” and;
- “information location tools.”⁷⁵

With regard to the first safe harbor “transitory digital network communications,” the definition of “service provider” in section 512(k)(1)(A) is “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”⁷⁶

As for the other three safe harbors, “service provider” is defined by a broader standard in section 512(k)(1)(A) as “a provider of online services or network access, or the operator of facilities therefor.”⁷⁷

Take Down Policies and Methods

In addition to the creation of each of these four safe harbors, there are two requirements applicable to every online service provider to: (1) implement some type of policy for terminating users who repeatedly infringe, and: (2) that

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

providers need to accommodate and not interfere with the technological safeguards in place to protect copyrighted conduct which are referred to as “standard technical measures” in section 512(i) of the Copyright Act.⁷⁸

Section 512(i) Act defines “standard technical measures” as “technical measures that are used by copyright owners to identify or protect copyrighted works and (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.”⁷⁹

Transitory Digital Network Communications:

Section 512(a) implemented transitory digital network communications as the first of four safe harbors and applies to online service providers engaging in the transmitting and routing of data or messages across the internet at the request of a user.⁸⁰

In addition to covering acts of transmission, routing and providing connections for the information requested, this safe

⁷⁸ 17 U.S.C. § 512 (i)(2).

⁷⁹ *Id.*

⁸⁰ *Id.*

harbor applies to the intermediate and transient storage of material made automatically in the network's operation.⁸¹

In order for a provider to receive protection under this safe harbor, they must comply with numerous requirements, including:

- (1) the information must be initiated or transmitted by or through the direction of someone who is not the service provider;
- (2) the transmission, routing, provision of connections, or storage must be done by an automatic technical process in which the service provider does not select the material;
- (3) there must be no selection by the service provider as to who receives the material outside of the automatic response to the person who requested the material;
- (4) any intermediate or transient copies cannot be ordinarily accessible to anyone besides anticipated recipients and for a period that is not longer than reasonably necessary, and;
- (5) the content of the material cannot be modified as it is transmitted through the network or system.⁸²

⁸¹ U.S. COPYRIGHT OFFICE, *supra* note 31.

⁸² 17 U.S.C. § 512(a).

System Caching:

Section 512(b) provides limitations on service provider liability when providers retain copies of material that a person other than the provider previously made available and transmitted to a user at their request.⁸³ Amazon can save content without subjecting itself to liability.

Under this safe harbor, the provider can keep the material for future requests. This way, when this same material is requested again, the requests can easily be fulfilled by transmitting the copy held onto by the provider instead of having to acquire the material from the original source on the network.

This safe harbor is beneficial because it decreases the bandwidth requirements of the service provider and lowers the waiting time for future requests for the same information.⁸⁴

In order to benefit through the safe harbor on system caching, five conditions must be met:

- (1) the retained material's content cannot be changed,
- (2) the provider must adhere to rules about refreshing, reloading, or updating material when requested by the person who makes the material available online when

⁸³ U.S. COPYRIGHT OFFICE, *supra* note 31.

⁸⁴ *Id.*

specified in accordance with a generally accepted industry standard data communication protocol,

(3) the provider cannot interfere with the technology that provides “hit” information to the person who posted the material when such technology fulfills specific requirements,

(4) the provider must restrict the access to information to comply with the access restrictions used by the person who posted the material (i.e.: password), and;

(5) the service provider must act swiftly in removing or blocking any material that is posted without the authorization of the copyright owner upon receiving notice that this unauthorized material has been blocked, removed or ordered to be blocked or removed at the originating site.⁸⁵

Information Residing on Systems or Networks at Direction of Users (Sellers):

Section 512(c) provides protection for hosting companies and platforms whose system-hosted websites possess infringing material. This limitation applies to storage based on the user’s request. However, similar to the first two safe harbors, there are also multiple requirements that must be satisfied to enjoy the benefits of this safe harbor:

⁸⁵ *Id.* at 11.

(1) the service provider cannot have requisite knowledge that the material or activity utilizing the material is infringing;

(2) in addition to not having actual knowledge, they also must not be aware of facts or circumstances that would make it clear that infringing activity is clearly present;

(3) in the event that the provider were to have actual knowledge, they must act quickly to remove or prohibit access to the material;

(4) in a case where the provider has the ability to control such activity, they are not receiving any financial incentive pertaining to the infringing activity and;

(5) the service provider must act quickly to remove or block material that is the subject of a copyright infringement claim.⁸⁶

CJ's Tip: The safe harbor provisions are satisfied by Amazon's and the other platform's take-down mechanisms. Amazon's system seems to take down products with no evidence of any infringement. This is great for rights owners and awful for legitimate Amazon Sellers who sell grey market goods. eBay uses the Vero⁸⁷ system which requires more from the complainant and

⁸⁶ 17 U.S.C. § 512(c)(1).

⁸⁷ VeRO: verified rights owner.

AliExpress mimics the Chinese legal system where a complainant must have registered rights in order to assert a complaint.

Information Location Tools:

Section 512(d) limits the liability of providers for their conduct in referring or linking users to a site that contains infringing material by way of information location tools such as an online directory, hyperlinks and search engine.⁸⁸ As is the case in the first three safe harbors, there are also multiple requirements that must be met in order to enjoy the benefits of this safe harbor. These requirements include:

(1A) the service provider must not possess actual knowledge that the material or activity is copyright infringing;

(2A) in the absence of actual knowledge, the service provider cannot have knowledge of facts or circumstances from which it would be apparent that infringing activity was present;

(3A) upon obtaining actual knowledge, the provider must act quickly to discontinue or prohibit access to the copyright infringing material;

(B) the service provider cannot receive any financial compensation directly related to the infringing material in a case

⁸⁸ *Id.* at 12.

in which the provider has the option to control such activity, and;

(C) upon obtaining actual knowledge that the online location that the provider referred users to, has infringing material, the provider must also remove or prohibit access to the reference or link that is used to access this infringing material along with any information that is reasonably sufficient to allow the service provider to locate that reference or link.⁸⁹

Special Rules Regarding Liability of Nonprofit Education Institutions:

Section 512(e) governs situations in which a faculty member or graduate student employee is performing research or teaching duties in their capacity as an employee of a public or nonprofit institution of higher education and when their



⁸⁹ 17 U.S.C. § 512(d).

knowledge or conduct impacts a nonprofit educational institution's eligibility for one of the four safe harbors.⁹⁰

The transitory digital network communications and system caching safe harbors provide that the student or faculty member should be deemed a person other than the provider in order to prevent the institution's eligibility from being disqualified. With regard to the information residing on systems or networks at the direction of users and the information location tools safe harbors, the faculty member or student's awareness/knowledge will not be attributed to the institution.

In order for the institution to maintain its eligibility for one of these four safe harbors, multiple conditions must be satisfied. These conditions are as follows:

- (1) the infringing activity of the faculty member or student cannot involve giving online access to course materials that were required or recommended within the past three years for a course that the faculty member or student taught at their institution;

⁹⁰ *Id.* at 13.

(2) the institution must not have received more than two alerts within the past three years that the faculty member or student was infringing, and;

(3) the institution must give informational materials that inform and encourage compliance with copyright law to all of its users.

VII. Impact of DMCA

The enactment of the DMCA is considered one of the most significant moments in United States copyright law since the introduction of the Copyright Act of 1976.⁹¹ However, the enactment of the DMCA received mixed responses from the public.

Supporters of the DMCA argue that the DMCA implemented necessary modifications to U.S. copyright law in order to adapt to the technological advances of the 21st century. That it closed loopholes for new forms of infringement and protected honest copyright holders.

Those opposed to the DMCA argue that this Act allows copyright owners to unfairly extend the control they have over the use of their works. Critics argue that the DMCA threatens free speech and first amendment rights by overextending the

⁹¹ Mark Heaphy, *The Impact of The Digital Millennium Copyright Act*, WIGGIN & DANA, LLP, <http://www.wiggin.com/files/m%20heaphy%20impact%205-5-2003.pdf>.

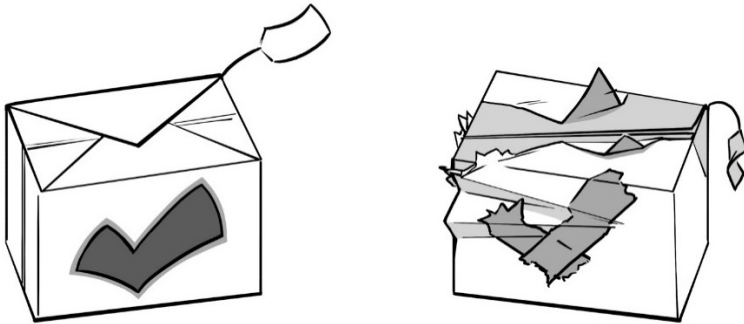
power of copyright holders to control the use of their copyrighted works and that U.S. copyright law prior to the DMCA's enactment was adequate to deal with the technological advances in our society.⁹²

For Sellers, since Amazon's implementation of the DMCA through their policies there have been an increasing number of Seller accounts suspended. Intellectual property complaints, because of the DMCA, have increased exponentially because manufacturers have a simplified legal avenue by which to have smaller Sellers removed from the Amazon platform. Larger companies can kick the "little guys" off the Amazon platform more easily, leaving smaller Sellers with no option other than to appeal to Amazon for reinstatement of their account. Reinstatement often comes down to well organized and well-worded Plan of Action sent to Amazon.

⁹²*Amazon Intellectual Property Policy*, AMAZON SELLER CENTRAL (last visited July 27, 2018), https://sellercentral.amazon.com/gp/help/external/201361070?language=en-US&ref=mpbc_201361050_cont_201361070.

Chapter 4: Copyrightable Subject

Matter on Amazon



I. What Types of Works of Authorship Are Copyrightable on Amazon’s Detail Pages?

The works of authorship that are copyrightable on Amazon are generally images and text. A person who takes an original photograph of a product generally has copyright protection over the photo and can use that photo on his or her detail page to sell that product. However, a photo found on someone else's website should not be uploaded onto a product detail page without the other person's permission.

For example, Timex had photos of its watches taken. Timex owns the copyright in the images of its watches. If an Amazon Seller copies and pastes Timex’s images onto a product detail page on Amazon, that Seller would be violating Timex’s copyright in the images.

Similarly, a person who drafts a product's description has copyright protection over the verbiage. Text created by someone or by a company should not be copied and pasted without the other person's or the company's permission. For example, Cannon camera drafts text describing the various features of its cameras. Cannon has copyright interest to the description of the cameras. If a Seller copies Cannon's verbiage and pastes it anyplace, the Seller would be violating Cannon's intellectual property rights.

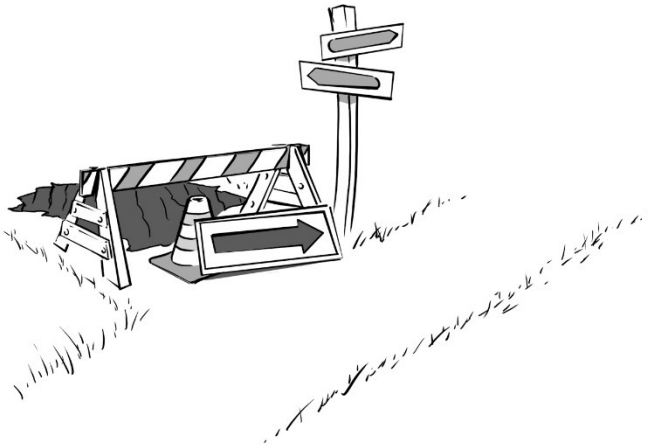
To prevent violating someone else's copyrights, Sellers should only upload images or text that are created by him or herself, or where the Seller has the copyright owner's permission to use the verbiage or image(s).

II. How Do I Know if I Own the Copyright for the Product I am Selling?

Another form of copyright protection that exists on Amazon is the copyright interest in the products being sold. The creator of an original work typically owns the copyright in that work.

First Sale Doctrine Exception

A Seller can lawfully sell someone else's copyrighted



work on Amazon if she has received permission from the copyright owner or if the use is protected by the "First Sale Doctrine."

The First Sale Doctrine generally protects the resale of genuine goods that are lawfully obtained, such as a book or CD, without permission from the copyright owner.

For example, a Seller who decides to sell a used copy of someone else's book on Amazon is selling someone else's copyrighted work. A Seller is typically permitted to sell his/ her particular copy of the book without further permission from the copyright owner because the First Sale Doctrine protects the resale of genuine, lawfully obtained products.

III. What Type of Copyright Claims are Typically Brought Against Amazon Sellers?

The most common claims that occur on Amazon are:

1. The Seller impermissibly used images the author had not authorized for Seller's use;
2. The Seller impermissibly use text from the author had not authorized for Seller's use

When an Amazon Seller creates a detail page for a product, the Seller wants to make their listing as attractive as possible to the potential-buyer. Efforts to gain a competitive edge in the e-commerce space has led many Sellers, often unknowingly, to commit copyright infringement violations. If a Seller is selling brand-name watches, they cannot take the exact image of that watch from that brand's website without the permission of the brand that owns the image.

Amazon takes claims of copyright infringement seriously. Even if a Seller is infringing on someone else's copyrights

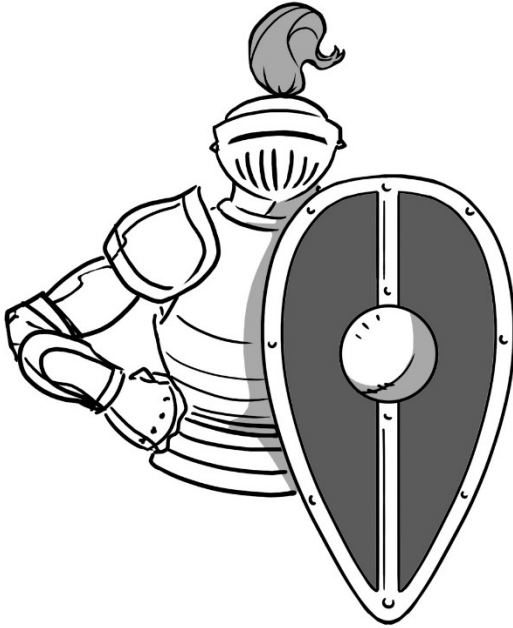
without knowledge, Amazon will still take action and the Seller's account is often suspended.

IV. Conclusion

Sellers should be aware of what copyright law protects and to avoid violating others' rights. If an Amazon Seller receives a complaint that it violated someone's copyright, the Seller is at risk of losing her ability to sell on Amazon.

Chapter 5: Protecting Your Product and

Fighting Infringers



I. Why File for Copyright?

A work is covered by copyright protection as soon as the work is fixed in a tangible form that can be perceived either directly or through a machine or device.⁹³ However, there are significant reasons to file.

Filing for copyright protection is accomplished by submitting the appropriate form and registration fee to the Copyright Office in Washington, D.C., together with one

⁹³ *Copyright in General*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/help/faq/faq-general.html#mywork>.

complete copy of the copyrighted work. If the work has not been published, two copies of the copyrighted work are required.

The Register of Copyrights reviews the work and determines if the work qualifies for a copyright and unless the subject matter is not copyrightable, or the claim is otherwise invalid, issues a certificate of resignation.

While registering for a copyright is not required, it provides several benefits. First, registering a copyright allows the Seller to establish a public record of his or her original work.

A registration with the US Copyright Office is evidence of the validity of the copyright if registered within five years of first publication of the work.⁹⁴ This can be used to prove that the copyright and the exclusive rights associated with copyright ownership belongs to the Seller. Another benefit of filing for copyright is that it gives notice to third parties of the transferee's interest and all facts stated in the certificate.⁹⁵

Second, registering for a copyright allows the owner of a copyright to take action against alleged infringers in court.⁹⁶

⁹⁴ 17 U.S.C. § 410(c).

⁹⁵ WILLIAM C. HOLMES, 1 INTELLECTUAL PROPERTY & ANTITRUST LAW § 4:7 (2018).

⁹⁶ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (quoting 17 U.S.C. § 411(a)).

For example, a fashion designer who designs a new dress can bring a claim of copyright infringement against another designer who sells a similar design. However, the fashion designer may be barred from bringing a claim of infringement if the dress is not registered for copyright.

The courts in the US are “split” as to what is required for a work to be “registered.” This means that in some areas of the US the law is different than in others. In some parts of the US a *pending* application is sufficient to use the courts while others require evidence that the Register of Copyrights has *approved* the application before a claim of copyright infringement can be brought.

Registering for a copyright is generally required for recouping statutory damages and attorney's fees for acts of copyright infringement that commenced before registration, unless the registration was completed within three months of the first publication of the work.

II. What Work Products Should be Copyright Protected?

The types of works that are typically copyright protected by Online Sellers are images and verbiage. The U.S. Copyright Office defines visual art works as, among other things pictorial

and graphic images.⁹⁷ Photographic images are included in this definition and are protected by U.S. copyright law as pictorial works.

As with all copyrighted works, a photograph must have been creative to be eligible for copyright protection. This photographic creativity could include:

the photographer's artistic choices in creating the image, such as selection of the subject matter, the lighting, any positioning of subjects, the selection of camera lens, the placement of the camera, the angle of the image, and the timing of the image.⁹⁸

III. How to Secure a Copyright with the USPTO

An application for copyright registration can be filed by the author or owner of an exclusive work, the owner of all exclusive rights, or an agent on behalf of an author or owner.⁹⁹

An application contains three primary elements: a completed application form, a nonrefundable filing fee, and a

⁹⁷ U.S. COPYRIGHT OFFICE, VISUAL ART WORKS 2 (2017), <https://www.copyright.gov/comp3/chap900/ch900-visual-art.pdf>.

⁹⁸ *Id.*

⁹⁹ Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

nonreturnable deposit-which is a copy or copies of the work being registered with the Copyright Office.

IV. The Application

An application for copyright establishes the facts of the claim, such as the author of the work, the name and address of the claimant or owner of the work, the year of creation, whether the work is published and whether the work includes pre-existing material. Once submitted to the Copyright Office, the application becomes part of the public record and can be viewed by any member of the public.

In registering a claim for copyright, it is important to give clear and accurate information. Filing a complete and accurate claim serves the public interest because it provides potential licensees and other authors with accurate information and reduces the cost of litigation.

Applying Online

An application can be submitted online through www.copyright.gov or by mail on a paper application. The copyright office strongly encourages applicants to apply online to register most individual works of authorship. In some circumstances, an applicant can also register multiple works with one application through the online system. The online

system has many benefits compared to submitting the application by mail, “including lower filing fees, faster examination; status tracking, payment by credit card, debit card, or electronic check, and option deposit upload.”¹⁰⁰ For more information about submitting an application online see *Copyright Registration* (Circular 2) on Copyright.gov.

Applying by Mail

Although the copyright office strongly encourages applicants to file an application online, copyrights can also be registered using one of the fillable PDF forms available on the office’s website. Alternatively, one can print out and complete a blank version of one of the forms. Once the applicant completes the application, he or she sends it in along with a filing fee and deposits it to the Copyright Office. More information about the details of these forms can be found on the Copyright Office website at www.copyright.gov.

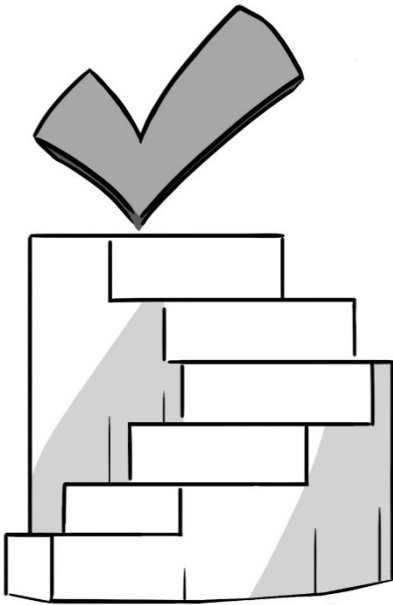
Filing Fee

The copyright office charges a nonrefundable filing fee as part of each application. These fees are subject to change. For information about current registration fees *Copyright Office Fees* (Circular 4) on copyright.gov.¹⁰¹

¹⁰⁰ *Id.*

¹⁰¹ *Copyright Office Fees*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/circs/circ04.pdf>.

For online applications, payment can be made by credit or debit card, electronic check or Copyright Office deposit account. If the applicant submits a paper form, he or she can pay by deposit account, check, or money order. For more information about deposit accounts, see *How to Open and Maintain a Copyright Office Deposit Account* (Circular 5) on copyright.gov.¹⁰²



¹⁰² *How to Open and Maintain a Copyright Office Deposit Account*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/circs/circ05.pdf>.

V. Mandatory Deposit Requirement

A deposit copy must be submitted along with every application. The term deposit, as used here, refers to the completed copy of the work or works which must be submitted along with the application to the Copyright Office and to the payment of the filing fee. Once a deposit is submitted to the Copyright Office, the application becomes part of the public record and can be viewed by members of the public upon request.

The Copyright Office uses the deposit to examine the work and to maintain a public record. The deposit requirement varies depending on the nature of the work. Therefore, applicants will submit a different version of the deposit depending on:

- Whether the work is published or unpublished;
- Whether the work is in physical or digital format;
- Whether the work was published in the United States or a foreign country.

Some factors for Amazon Sellers to consider when selecting and submitting the deposit copy are included below. For more complete information about the Copyright Office's

deposit requirement, see *Copyright Registration* (Circular 2) and *Chapter 1500* of the *Compendium* on copyright.gov.¹⁰³

Unpublished and Online Only Works –One Copy Needed

For unpublished works and works solely published online, the applicant must submit one complete copy of the work. The copyright office’s website strongly suggests uploading the file containing the work through its website, rather than submitting them on a flash drive, or other physical storage device. A complete list of acceptable file types that are fit for upload can be found on the Office’s website.

Mandatory Deposit Requirement – Two Copies for Published Works

As per the Copyright Act, the Library of Congress has the authority to demand any work published in the United States for its collection and use. This authority is called the “mandatory deposit requirement.”

When a work that is subject to the mandatory deposit requirement is registered, one must submit two complete copies of the “best edition” of the work within three months of first

¹⁰³ *Copyright Registration*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/comp3/chap1500/ch1500-deposits.pdf>.

publication. The “best edition” of a work is “the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.”¹⁰⁴

If two or more editions of the same version of a work were published in the United States before the date of deposit, the owner is responsible to determine which edition is best. This means color instead of black and white, a physical copy of the work instead of a digital copy, and archival quality paper rather than less permanent paper. For more information on which edition of a work constitutes the best edition, see *Best Edition of Published Copyrighted Works for the Collections of the Library of Congress* (Circular 7B).¹⁰⁵

The mandatory deposit requirement is separate from the deposit requirement included in the registration process. The owner of copyright or of the exclusive right of publication may comply with the mandatory deposit requirement either by submitting the best edition of the work when registering the work with the Copyright Office, or without seeking a registration of the work, solely for the purpose of filling the

¹⁰⁴ *Best Edition of Published Copyrighted works for the Collections of the Library of Congress*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/circs/circ07b.pdf>.

¹⁰⁵ *Id.*

mandatory deposit requirement. The mandatory deposit clause is for the purpose of ensuring the Library of Congress holds copies of every copyrightable work published in the United States for its collections and for use by other libraries.

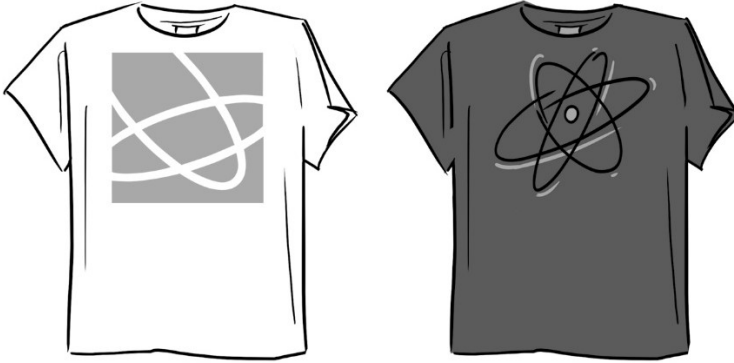
The mandatory requirement only applies to works published in the United States. Therefore, unpublished works and works published outside of the United States are not subject to this requirement.

Per the Copyright Office's regulations, there are several categories of published works that are also exempt from the mandatory deposit requirement. Some examples of the types of works that are exempt are jewelry, dolls, toys and games, packaging materials and online only electronic works, except for electronic serials that have been demanded by the copyright office. For a complete list of works exempt from the mandatory deposit, see *Mandatory Deposit of Copies or Phonorecords for the Library of Congress* (Circular 7D) on www.copyright.gov.¹⁰⁶

¹⁰⁶ *Mandatory Deposit of Copies or Phonorecords for the Library of Congress*, COPYRIGHT.GOV (last visited July 27, 2018), <https://www.copyright.gov/circs/circ07d.pdf>.

Chapter 6: Defenses to Copyright

Infringement



I. Copyright Infringement

Copyright infringement is the act of violating exclusive rights that are granted to the owner of a copyright under the 1976 Copyright Act.¹⁰⁷

As previously mentioned in chapter 2, the rights granted to copyright holders upon registration include the exclusive rights to control who reproduces their work, distributes their work, performs their work, displays their work, and creates derivative copies based on their work. If an unauthorized party seizes one of these exclusive rights, the copyright holder may be entitled to bring a claim for copyright infringement.

¹⁰⁷ University Copyright Office, *Copyright Infringement Penalties*, PURDUE UNIVERSITY (last visited July 27, 2018), <https://www.lib.purdue.edu/uco/CopyrightBasics/penalties.html>.

To successfully bring a copyright infringement claim, two elements must be proven; first, one needs to prove they have “ownership of a valid copyright” and second, there must be “copying of constituent elements of the work that are original.”¹⁰⁸

To prove that you have a valid copyright one should be able to provide a copyright certificate or some other form of proof that shows the date on which the copyrighted material was made.¹⁰⁹

To satisfy the second copyright infringement element, the holder of the copyright must be able to show that the third party accused of infringing had access to the original work, copied that work, and that the third party’s copied work is substantially similar to the original copyright protected work.¹¹⁰

¹⁰⁸ Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 361 (1991).

¹⁰⁹ Louis Kroeck, *How to Prove Copyright Infringement*, CHRON (last visited July 27, 2018), <http://smallbusiness.chron.com/prove-copyright-infringement-60828.html>.

¹¹⁰ *Id.*

Copyright infringement can occur through various mediums including books, movies and photos.¹¹¹ Some examples of copyright infringement include recording a movie in a theater, downloading movies or music without paying for them, using pictures for a blog without authorization to do so, and copying a blog, book or podcast without authorization.¹¹²

II. The Doctrine of Fair Use

The Fair Use Doctrine is an exception to the rule that no one may use an artist or author's exclusive rights granted under a copyright. This doctrine is one of the more commonly-invoked defenses to copyright infringement claims.¹¹³ It was implemented by courts to avoid the strict application of copyright law, which would sometimes result in limiting creative ideas.

There are four factors that are taken into consideration when a court decides whether the use of a copyright protected work is fair use:

¹¹¹ Mary Juetten, *How to Avoid Copyright Infringement*, LEGALZOOM (last visited July 27, 2018), <https://www.legalzoom.com/articles/how-to-avoid-copyright-infringement>.

¹¹² *Id.*

¹¹³ University Marketing and Communications, *Fair Use Doctrine*, WASHINGTON STATE UNIVERSITY (last visited July 27, 2018), <https://ucomm.wsu.edu/fair-use/>.

- (1) the way and purpose for how the copyright protected work is used and whether it is used for a commercial or non-profit educational purpose;
- (2) the nature of the copyrighted work;
- (3) the proportionality between the amount and substance of the copyrighted work used and the copyrighted work as a whole, and;
- (4) the impact that this use has on the market value of the copyright protected work.¹¹⁴

The first of the four factors is primarily concerned with the reasons behind why one is using a copyrighted work and if one is attempting to make a profit through their usage of the copyrighted work. The use of the material to make a profit generally weighs against one being able to use the fair use defense but does not entirely prevent one from getting this first factor to weigh in their favor.¹¹⁵

The second fair use factor focuses on the level of creativity of a work. Generally, the more creative a work is, the more likely it is that the court will find Fair Use. On the other hand, the less creative a work is, the more likely it is that one will be able successfully use the fair use doctrine against the new work.

¹¹⁴ University Marketing and Communications, *supra* note 113.

¹¹⁵ *Id.*

The third factor focuses on the amount and substance of a copyright protected work that one uses. The greater the amount one copies or uses and the more similar it looks to the original work, the less likely one will be able to show fair use. However, Sellers should be aware that just because one makes a copy of the entire original work, it does not bar them from being able to show fair use, as this is just one of the four factors that will be looked at. Moreover, this particular factor also takes the substantive value of the work that is used into consideration as well; so, if one *only* copies the most noteworthy or significant parts of a work, they still may not be able to successfully invoke fair use because copying these significant, noteworthy parts, as few as there may be, can still be looked at as the equivalent to copying an entire work.

The last of the four factors, and probably most pertinent to Amazon sellers, is the commercial impact that the use would have on the rights holder. This fourth factor, which is one of the more complex factors to determine, considers the hypothetical harm that would result if the copied product was for sale in the same market as the original copyright protected product.



III. The Doctrine of De Minimis Use

Another doctrine that is vital when defending yourself from claims of copyright infringement is the *de minimis* doctrine. The *de minimis* doctrine holds that some copyright issues are so insignificant and minimal that courts should not spend time on them, and instead concern themselves with more substantive issues.¹¹⁶

“*De minimis*” stems from the Latin phrase, “*de minimis non curat lex*,” which translates to “the law does not concern itself with trifles.” The *de minimis* defense to copyright infringement

¹¹⁶ *The De Minimis Defense in Copyright Law. De Mini-What?*, UNT (Sept. 5, 2017), <https://blogs.library.unt.edu/copyright/2017/09/05/the-de-minimis-defense-in-copyright-law-de-mini-what>.

acknowledges that even if a work has been copied, and there is no other defense available, a little or non-substantial copy should not be regarded as copyright infringement.¹¹⁷

An example of where a court will likely allow one to successfully invoke the *de minimis* doctrine as a defense would be where a party copies a portion of a copyright protected work but the copied portion in the new work is so inconspicuous that it is not easily visible.

To break down this doctrine in the simplest of terms, it may be helpful to our readers and sellers to start by asking themselves “how much is too much?” when thinking about the *de minimis* doctrine.

IV. The First Sale Doctrine

The First Sale Doctrine states that “the owner of a particular copy or phonorecord lawfully made under the [Copyright Act], or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”¹¹⁸ This means that when one buys a copy of a copyright protected work from a copyright holder, the buyer

¹¹⁷ *Id.*

¹¹⁸ 17 U.S.C. § 109(a).

acquires the rights to sell, display, distribute or dispose of that particular copy however they wish without having to take the interests of the copyright holder into consideration.¹¹⁹

Despite the name of the First Sale Doctrine, a sale does not need to happen in order for the doctrine to be invoked as the doctrine can apply to situations in which a copy of a copyrighted work is given away or permanently transferred without any money changing hands.¹²⁰ The doctrine serves as a statutory limitation that Congress has placed on the exclusive rights that are granted to copyright holders.¹²¹

There are restrictions on these rights that are granted to the buyer. The restrictions include the buyer's right to distribute his or her copy of the copyright holder's work being terminated once he or she has sold his or her particular copy and the lack of protection for those who make unauthorized copies of a copyright protected work. The First Sale Doctrine cannot be used to protect those who have rented, leased, or obtained possession of a copyright protected work without having actual ownership of the work.¹²²

¹¹⁹ Offices of the United States Attorneys, *1854. Copyright Infringement*, UNITED STATES DEPARTMENT OF JUSTICE (last visited July 27, 2018), <https://www.justice.gov/usam/criminal-resource-manual-1854-copyright-infringement-first-sale-doctrine>.

¹²⁰ WILLIAM F. PATRY, 4 PATRY ON COPYRIGHT § 13:15 (2018).

¹²¹ Offices of the United States Attorneys, *supra* note 119.

¹²² 17 U.S.C. § 109(d).

The doctrine serves as another way in which a party can defend themselves when being sued for copyright infringement.

V. Conclusion

Copyright infringement claims against Sellers are common. Generally, Amazon will remove a Seller from a listing or suspend the Seller's account if a complaint is received from an alleged rights owner. Sellers need to be aware that in addition to the loss of sales on Amazon, a copyright holder can elect to recover statutory damages as opposed to actual damages due to lost profits, which can result in an infringer or infringers being liable for anywhere between \$750 and \$30,000.¹²³

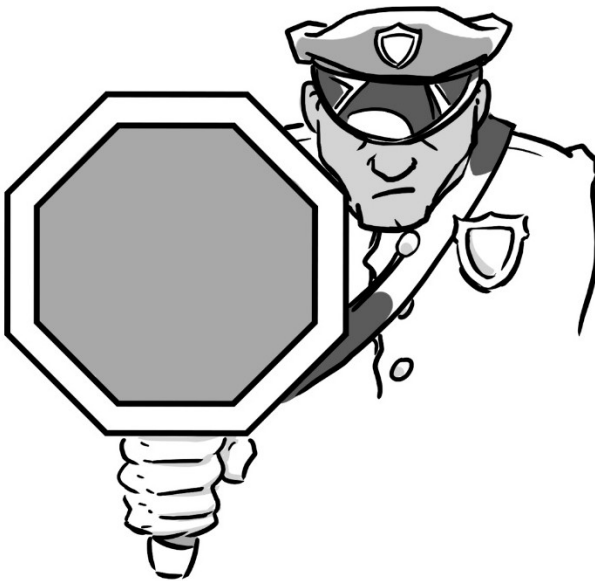
A party who willfully infringes on a work with copyright protection may be held liable for up to \$150,000.¹²⁴ The test for determining copyright infringement is vague and can be a complicated issue for courts to address¹²⁵ and erratic holdings by courts is not uncommon.

¹²³ 17 U.S.C.A. § 504 (c)(1).

¹²⁴ *Id.*

¹²⁵ Jason E. Sloan, *An Overview of the Elements of a Copyright Infringement Cause of Action-Part I: Introduction and Copying*, AMERICAN BAR ASSOCIATION (last visited July 27, 2018), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/elements_of_a_copyright.html.

**Chapter 7: Intellectual Property Claims and
Suspensions: A.K.A “Rights Owner”
Complaints & Suspensions.**



I. Operating on Amazon

Sellers operating on Amazon should try to avoid infringing on others' copyright. An Amazon Seller that receives a complaint from a rights owner will likely lose the ability to sell the product or their entire Seller's account may be suspended.

The suspension of the Amazon Seller’s account is “Amazon’s way of avoiding liability for the infringement.”¹²⁶ This policy places the burden on the Sellers to first seek to have the complaint asserted by the complainant and, if unable to do so, to persuade Amazon’s MPA team that the complaint was baseless. This can be frustrating for Amazon Sellers who are often the subject of baseless complaints.

II. What the Seller Should Do if They Receive an Intellectual Property Rights Complaint

When an Amazon listing or account is suspended, the Amazon Seller will receive an email from Amazon informing the Amazon Seller that a complaint was asserted and that the Seller should contact the complainant. The Seller must then contact the person who has made the allegation and seek a retraction.

Seeking retractions can be sought from positions of strength when there has been no violation of anyone’s intellectual property rights. Retractions can also be sought when there has been a clear violation. Whether an Amazon Seller was violating another’s intellectual property rights or not, a retraction should be sought.

¹²⁶ CJ ROSENBAUM, *YOUR GUIDE TO AMAZON SUSPENSIONS* 54 (2017-2018 ed.).

Seeking a Retraction from Position of Strength: No Violation

When an Amazon Seller did not violate the complainant's rights, she can seek a retraction of the complaint from a position of strength. An attorney's opinion letter can be employed and the complainant can be informed that there was no violation of the complainant's rights and also provide an explanation of the potential liability for the assertion and maintenance of a baseless complaint.

On Amazon, baseless complaints may be deemed by Amazon as anti-competitive behavior. The maintenance of a baseless complaint could cause the complainant's account to be suspended.

Most complaints asserted on Amazon for US Sellers are baseless because the First Sale Doctrine permits people to buy and sell just about anything they want. This is limited, of course, to genuine products. However, if the consumer is receiving a product that is not "materially different" than what the brand delivers, there is likely no violation of anyone's intellectual property rights.

Countless brands file baseless complaints to remove competition and to raise prices. Brands are aware that Amazon

Sellers are risk of losing their entire businesses when they receive complaints. Brands rely on this fear to obtain agreements from Amazon Sellers to refrain from selling their brands and competing with the brands.

If a brand agrees to withdraw a baseless complaint, then reinstatement of the listing or the account is easy. Often the Amazon Seller's account will be reinstated without sending in a formal Plan of Action to Amazon. If a brand refuses to withdraw its complaint, then the Amazon Seller's next step is to try and persuade Amazon's team to reinstate without the retraction. This is often accomplished by the Seller drafting a persuasive Plan of Action that refers to the lawyer's legal opinion that there was never any infringement.

DMCA Counter Notices

Another way that Amazon Sellers can recoup their ability to sell genuine products and their entire account without the brand's cooperation, is to file a DMCA Counter Notice.

A Counter Notice is, basically, a "put up or shut up" mechanism that protects Sellers from baseless complaints on all platforms operating in the US. The way a Counter Notice works is that the recipient of a complaint that has not been withdrawn challenges the complaint in writing and agrees to be subjected

to a federal court's jurisdiction for the dispute. Once a Counter Notice is properly drafted and served, the complainant has ten (10) business days to file an actual lawsuit. If no lawsuit is filed, the platform, i.e. Amazon, puts the product or account back online. If the brand doesn't put its money where its mouth is and file a lawsuit in a federal court, their complaint is dismissed. This route is effective against baseless complaints and against complainants located far offshore who lack the ability or gumption to actually file a lawsuit.

There are some oddities on Amazon:

1. In order to link the withdrawal with the suspended account, the Seller must ensure that the withdrawal comes from the same email from which the complaint was asserted;
2. Since Amazon seems to "lose" withdrawals, the Seller should be cc'd on the email withdrawing the complaint;
3. Even though there was never a violation of anyone's intellectual property rights, the Amazon Seller should draft a concise POA explaining the issues in a positive manner;
4. If the account is not reinstated quickly, the Amazon Seller should contact Amazon's notice-dispute team to assert that the complaint has been withdrawn and the Seller's account should be reinstated.

III. Intellectual Property Plan of Action

The format of a proper POA is follows:

What went wrong?

First, the Seller should explain the root cause of the issue. There are three primary types of intellectual property complaints: the complainant either mistakenly or purposely filed a baseless complaint, or the complaint can be disproven, or there is a legitimate infringement allegation that can be amicably resolved.

First, in many cases, the complainant files the allegations. These complaints are made due to a rights owner's belief that the Seller's products sold on Amazon are not authentic. However, once on notice, the accused party may be able to have the complaint retracted by contacting the complainant and providing accurate invoices from his or her supplier proving the legitimacy of the goods. While these complaints are baseless, however, Amazon will require the Seller to persuade Amazon's staff that there was no intellectual property infringement and that his or her account should be reinstated or that similar issues will be avoided in the future.

If a false complaint is made, the Seller should state that the items he or she sells through his or her Amazon account are

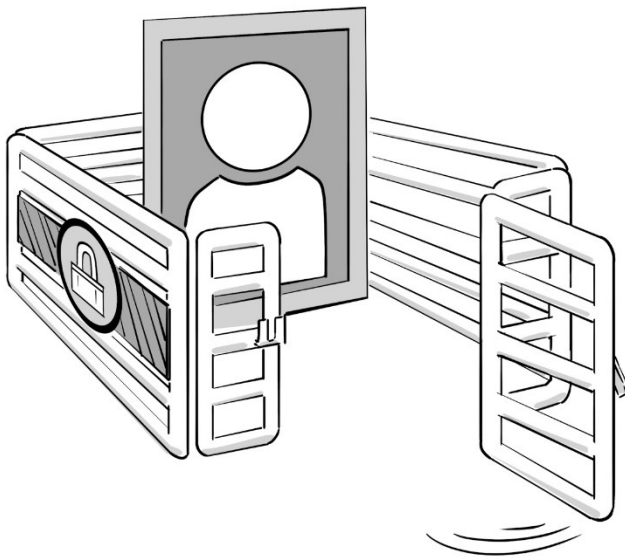
completely authentic, and that a rights owner mistakenly filed a complaint alleging the products are counterfeit. The Seller should also state that he or she has contacted the seller and they have acknowledged their mistake and removed the complaint, as well as provide documented proof that his or her products are authentic. These complaints are generally easy to resolve, and the rights owner will usually remove its complaint and Amazon will reinstate the account upon request from the Seller.

A second type of complaint is that which alleges infringement and can be disproven by demonstrating there was no actual infringement. If this type of complaint is made, the Seller should contact the complaining party and demonstrate that the product in question is completely authentic and is not violative of anybody's rights. If the rights owner willingly retracts his or her complaint, then the Seller will likely be able to continue selling products on Amazon. However, if the rights owner is unwilling to retract his or her complaint, it is unlikely that Amazon will reinstate selling privileges for that item.

There are many times when a complaint can be disproven. For example, as discussed in the previous chapter, the First Sale Doctrine generally permits the resale of genuine, lawfully purchased physical items, such as a book or CD, without permission from the owner. The Seller should be

allowed to sell an item he or she bought from a third party because the First Sale Doctrine permits the resale of genuine, lawfully purchased items.

A third type of case is legitimate infringement allegations that can be resolved with the complainant. If the company alleging infringement has a legitimate claim, the Seller should resolve the issue directly with the complainant. For example, to prove trademark infringement the owner of the trademark must show that there is “likelihood of confusion”



between his or her trademark and the allegedly infringing mark. If the company alleging infringement can prove that the brands are similar enough to cause confusion among the ordinary consumer between the two trademarks, then there is a legitimate claim of trademark infringement. Once the complainant

establishes that the claim is valid, the Seller should resolve the complaint with the complaining party by either removing the allegedly infringing products from Amazon listings or by sufficiently changing the trademark to prevent a likelihood of confusion between the marks in question.

If the company alleging infringement has a legitimate claim, the Seller should seek to negotiate a resolution that includes a retraction of the complaint.

What actions have you taken to correct the problem?

Once the Seller explains what she can do better to avoid the problem in the future, she should then detail all the steps taken to resolve the infringement allegations. This may include a letter or email correspondence from the Seller acknowledging the error or that the dispute has been resolved, proof that the complaint has been removed, or, most importantly, proof that the products are being purchased or manufactured legally.¹²⁷

By showing Amazon the actions taken to correct the problem, Sellers demonstrate that he or she is taking responsibility for the compliance of his or her account and making sure the dispute is resolved and that it will never occur again. Besides helping to organize the dispute's resolution, this

¹²⁷ *Id.* at 58.

will help demonstrate to Amazon how seriously the Seller is taking the matter.

What have we done to make sure the problem won't occur again in the future?

After the Seller explains what has been done to correct the problem, he or she should then explain how the actions which have been taken will prevent the problem from recurring. This can be accomplished by describing the Seller's business practices and showing Amazon that he or she has followed their rules and will continue to follow their rules. Sellers must demonstrate that they have someone reviewing their inventory to show that all items being sold are legitimate and not violating another individual or business' intellectual property rights.¹²⁸

IV. When the Complainant Refuses to Withdraw the Complaint:

If the complainant refuses to withdraw his or her complaint, then the Seller should hire an attorney with intellectual property experience. An attorney with intellectual property experience can take the following actions to have the complaint removed.

- 1) Draft a POA for the Seller to submit to Amazon's Dispute Resolutions Team stating that the complaint

¹²⁸ *Id.*

is baseless and should be removed by disproving the infringement allegation.

- 2) Draft a Legal Opinion letter in support of the POA stating that the products are authentic and demonstrating that the complaint is baseless by again disproving the intellectual property allegation.

Once these documents are drafted by an attorney, the Seller can demonstrate to Amazon's staff that the complaint is baseless and support his or her position with the opinion of an attorney, as well as documented proof to strengthen their argument. By hiring an attorney, the Seller will show Amazon that he or she are serious about his or her account and the allegations brought against your business.

Chapter 8: Conclusion



I. Brief History of Copyright Law Review

The history of copyright law dates back to the 1400s, when the printing press was introduced in Europe. Johannes Gutenberg's invention of the printing press quickly spread throughout Europe and would transform the reproduction process for books, laying the foundation for the establishment of copyright law.¹²⁹ Authors were met with the unique ability to reproduce their works in an efficient and inexpensive fashion.¹³⁰ As an unintended consequence, one's ability to copy another author's work and illegitimately take credit was also made easier. Soon, the very first statutes to recognize copyrights as a concept were signed into law.

In America, the Copyright Act of 1909 brought about many necessary changes to the copyright law landscape. It allowed works to receive federal statutory copyright protection upon

¹²⁹ PREPRESSURE, *supra* note 1.

¹³⁰ PSPRINT, *supra* note 2.

publication and the acquisition of a copyright notice. This granted unpublished works the ability to receive copyright protection, exempted foreign works in foreign languages from having to undergo publication in the U.S., granted a 14-year extension to the copyright protection renewal period, and provided owners of musical compositions with mechanical recording rights.¹³¹

Next, the Copyright Act of 1912 added motion pictures to the list of works that qualified for copyright protection.¹³² The Sound Recording Amendment of 1971 was then implemented to protect sound recordings and address piracy issues that had arisen due to the invention of the audio tape recorder.¹³³ In response to the major technological advances that society had experienced, Congress implemented the 1976 Copyright Act which provided protection for any work expressed through “any tangible medium of expression” and that is an “original work of authorship” would be eligible for protection.¹³⁴

On October 31, 1998, the Berne Implementation Act of 1988 was signed into law, through which the U.S immediately provided 24 new countries with copyright relations and granted

¹³¹ COPYRIGHT ACT OF 1909, *supra* note 10.

¹³² United States Copyright Law, *supra* note 12.

¹³³ PATRY, *supra* note 14, at 73.

¹³⁴ 17 U.S.C. § 101.

U.S. artists, authors, and copyright holders with the highest possible quality of international copyright protection.¹³⁵ The CTEA extended the terms of copyright protection, extending the protection term for works created prior to 1978 to 95 years total. It also extended the term of protection for works created on or after January 1, 1978, to the life of the author plus 70 years.¹³⁶ The DMCA helped the U.S. adjust to the digital age, acclimate to the emergence of the Internet, and combat online copyright infringement issues which had arisen.¹³⁷

II. General Outline of Copyright Law Review

To recap, a copyright is provided by U.S. law to authors of “original works of authorship” that are fixed in a tangible form of expression.¹³⁸ An “original work of authorship” is a work independently created by an author that contains some degree of creativity.¹³⁹ A work is considered to be fixed if it is presented in an adequately permanent form so that the work can be received, produced, or communicated for more than a short period of time. The exclusive rights guaranteed by a copyright include the right to: (1) reproduce the work in copies or

¹³⁵ Hatch, *supra* note 19, at 171 (quoting Remarks on Signing the Berne Convention Implementation Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1405 (Oct. 31, 1988)).

¹³⁶ UNITED STATES COPYRIGHT LAW, *supra* note 12.

¹³⁷ *Executive Summary Digital Millennium Copyright Act Section 104 Report*, *supra* note 32.

¹³⁸ U.S. COPYRIGHT OFFICE, *supra* note 31.

¹³⁹ *Id.*

phonorecords; (2) create derivative works based on the original work; (3) sell or transfer ownership of copies or phonorecords of the work to the public; (4) perform the work publicly if it is a choreographic, dramatic, literary, or musical work; and (5) authorize the use of these exclusive rights to others in accordance with certain statutory exceptions.¹⁴⁰

The use of copyright-protected work is allowed as long as the user pays the required statutory fees.¹⁴¹ Moral rights in copyright law protect the noneconomic interests of the copyright holder and include the right of attribution and the right of integrity.¹⁴² The copyright is jointly owned by the authors unless the parties make some alternative agreement.¹⁴³ However, sellers should understand that just because one offers ideas for a work, makes improvements to a work, or provides guidance in the creation of a work does not make that person a joint author of the work.¹⁴⁴

A work made for hire is created if the work is commissioned by an employer. Sellers should understand that an employer who hires the employee who creates the work is the owner of the

¹⁴⁰ U.S. Const. art. I § 8, cl. 8.

¹⁴¹ 17 U.S.C. § 115.

¹⁴² 17 U.S.C. § 114(d)(2).

¹⁴³ 17 U.S.C. § 201(a).

¹⁴⁴ PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, *supra* note 41.

copyright for that work, not the actual hired employee or assigned creator of that work.¹⁴⁵ Further, when two or more parties have equal exclusive rights in a work, one joint owner does not usually need another joint owner’s approval to transfer their own individual interests in the copyright, as a joint owner does not have the right to restrict, transfer, or license another’s interest in the copyright.¹⁴⁶

In order to register a copyright, one must satisfy various requirements on their application for copyright registration, including: (1) the name of the copyright owner; (2) the year of first publication; and (3) include the word “copyright,” “copr,” or the symbol © for observable or visual copies or the symbol ® for phonorecords of protected sound recordings.¹⁴⁷ Another major takeaway is the benefits of registering a copyright, which include: (1) enabling someone to bring a lawsuit for copyright infringement; (2) providing a copyright owner with the ability to recover statutory damages and attorney’s fees in an infringement action; and (3) how registration serves as prima facie evidence to support the legitimacy of a copyright as long as that copyright is registered within five years of the work’s first publication.¹⁴⁸ Aside from a few exceptions, a work is

¹⁴⁵ 17 U.S.C. § 201(b).

¹⁴⁶ PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, *supra* note 41.

¹⁴⁷ 17 U.S.C. §§ 401(b), 402(b).

¹⁴⁸ 17 U.S.C. § 410(c).

deposited with the Library of Congress, and although failing to make a deposit may not result in the loss of your copyright, a Seller may still be subject to certain fines.¹⁴⁹

III. Digital Millennium Copyright Act Review

Some of the primary goals of the DMCA are to outlaw the distribution, production, and usage of circumvention technologies that are used to render technological protection measures ineffective.¹⁵⁰ Another major objective of the DMCA is to shield online service providers from liability for copyright infringement, which is the purpose of the safe harbor provisions. The DMCA is comprised of a few different titles, including: (1) Title I, the WIPO Copyright Performances and Phonograms Treaties Implementation Act of 1988; (2) Title II, the Online Copyright Infringement Liability Limitation Act; and (3) Title III, the Computer Maintenance Competition Assurance Act.

The WIPO Copyright and Performances and Phonograms Treaties Implementation Act contains a provision that grants copyright protection to other WIPO copyright treaty member country's works that have not become part of the public domain in their own country, but were still denied protection in the U.S.¹⁵¹ It is primarily known for its anti-circumvention

¹⁴⁹ 17 U.S.C. § 407.

¹⁵⁰ Elizabeth, *supra* note 72.

¹⁵¹ PBWORKS, *supra* note 101.

provisions.¹⁵² Anti-circumvention provisions prevent the use of circumvention tools, devices, or technologies to get around technological protection measures or access controls such as passwords or encryption codes in order to access a copyright protected work.¹⁵³ The anti-circumvention provisions do not apply to works that belong to the public domain since these works are not accorded copyright protection. For sellers, these provisions outlaw three forms of conduct when it comes to the circumvention technologies: (1) the production; (2) distribution; and (3) usage of these technologies.¹⁵⁴ A tool, device, or piece of technology will likely to be considered circumvention technology if the technology's purpose and scope of use is primarily to circumvent or exploit technological protection measures, is marketed for these purposes, and has minimum commercial value.

Title II, entitled the Online Copyright Infringement Liability Limitation Act, consists of various safe harbor provisions designed to protect online service providers from liability for copyright infringement.¹⁵⁵ In particular, there are four safe harbor categories, for: (1) transitory digital network communications; (2) system caching; (3) information residing

¹⁵² *Id.*

¹⁵³ Stoel Rives LLP, *supra* note **Error! Bookmark not defined.**

¹⁵⁴ *Id.*

¹⁵⁵ U.S. COPYRIGHT OFFICE, *supra* note 31.

on systems of networks at the direction of users; and (4) information location tools.¹⁵⁶ Although these safe harbors limit an online service provider's liability, sellers should be cognizant of the two requirements that apply to every provider in order for them to qualify for these protections under the safe harbors, which is that: (1) providers must adopt some policy that terminates the use of repeat infringers; and (2) providers must not interfere with the technological safeguards in place to protect copyrighted work.¹⁵⁷

Following our discussion of the Online Copyright Infringement Liability Limitation Act, we then touched on the Computer Maintenance Competition Assurance Act. This Act, which is Title III under the DMCA, is significant in that it allowed the owner or lessee of a computer to make copies of a computer program in order to service, maintain or repair the computer.¹⁵⁸ Although this act provides much more freedom to computer owners and lessees, sellers and readers should remember that the act's statutory language is fairly restricted in its application, as the act only applies to program copies that are automatically produced when the computer turns on and applies

¹⁵⁶ *Id.*

¹⁵⁷ 17 U.S.C. § 512 (i)(2).

¹⁵⁸ *Id.*

only to computers that are in lawful possession of a program copy in the first place.¹⁵⁹

IV. Copyrightable Works on Amazon Review

Generally, images and text are the works of authorship that are copyrightable on Amazon, as a person who takes an original photo of a product should be allowed to upload this to their product detail page but would need to obtain permission when using a photo from someone else's website.¹⁶⁰ The same idea applies to text. A person who drafts his or her own verbiage to describe his or her product is entitled to use that verbiage on their product detail page but will need to obtain permission if he or she uses product verbiage from another's website.¹⁶¹ As a general matter, a seller generally grants Amazon and its affiliates the license to use the images that it uploads to its product detail pages. Sellers should always aim to use their own photos and verbiage when drafting a listing. Sellers should also be aware of any copyright interests present that may be attached to the products they are selling, as this could also lead to potential legal issues if a seller is selling a work that was not originally created by them.

¹⁵⁹ U.S. COPYRIGHT OFFICE, *supra* note 31, at 13-14.

¹⁶⁰ AMAZON SELLER CENTRAL, *supra* note 163.

¹⁶¹ *Id.*

V. Protecting Your Brand and Fighting Infringers Review

In order for an Amazon Seller's picture to qualify for copyright protection however, it must possess an adequate amount of creativity which can be satisfied in a variety of ways.

¹⁶² This can be done through the photographer's placement of the camera or selection of the subject matter. Further, a copyright registration requires: (1) a completed application form; (2) payment of the nonrefundable filing fee; and (3) a non-refundable deposit of a copy or copies of the works that you are seeking to register. It is more efficient to submit an application online as opposed to by mail because of lower filing charges, the ability to pay with a credit or debit card, and a quicker application process. ¹⁶³ The mandatory deposit requirement mandates that the owner of a copyright or owner of an exclusive right of publication submit the best edition of their work with the Copyright Office, regardless of whether they plan to apply for copyright registration, in order to ensure that the Library of Congress possesses a copy of every possible copyrightable work in the U.S.

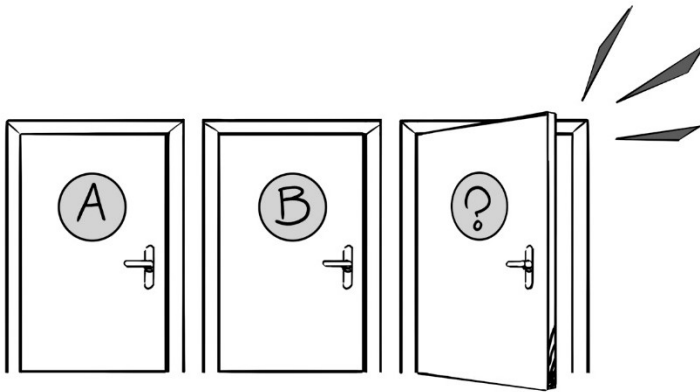
VI. Defenses to Copyright Infringement Review

The two requisite elements needed in order to succeed on a copyright infringement claim are that: (1) one must prove

¹⁶² COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES 20 (3rd. Ed.2014).

¹⁶³ HOLMES, *supra* note 165.

“ownership of a valid copyright” and (2) there must be “copying of constituent elements of the work that are original.”¹⁶⁴ There are a few potential defenses one could attempt to invoke when being subject to a copyright claim. The first is the fair use doctrine. Sellers should remember that the fair use doctrine is one of the most commonly raised defenses to infringement claims and provides that a copyrighted work is used fairly when it is used for criticism, commentary, news reporting, teaching, or research purposes.¹⁶⁵ A four factor test is used to determine whether a work is used fairly.¹⁶⁶ However, it is important to remember that a party does not have to prove all four factors in



order to succeed in invoking the defense.

The second defense is the doctrine of *de minimis* use. The *de minimis* use doctrine provides that a copying party

¹⁶⁴ Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

¹⁶⁵ 17 U.S.C. § 107.

¹⁶⁶ University Marketing and Communications, *supra* note 209.

should not be found liable for copyright infringement when that party copies only a very minimal or insignificant portion of a work.¹⁶⁷ The last defense is the first sale doctrine. When one goes about obtaining a copy of a copyright protected work in a lawful manner, he or she has the freedom to distribute or dispose of that particular copy in any way that he or she wishes without having to take the interests of the copyright holder into consideration. Although this can serve as a valuable defense, there are some limitations, namely that the defense does not apply to those that have unauthorized copies of a copyrighted work, and that it cannot be raised by those who do not have actual ownership of a copy such as renters or lessees of a particular copy.¹⁶⁸

VII. Copyright Claims and Suspensions: A.K.A “Rights Owner” Complaints & Suspensions

Sellers should be aware that any allegation against them claiming that they have infringed on someone else’s intellectual property right will likely result in the suspension of their seller’s account by Amazon. Once suspended, sellers should be aware that the burden will be placed on them to prove that intellectual property claim being brought against them is baseless or without merit.

¹⁶⁷ UNT, *supra* note 116.

¹⁶⁸ 17 U.S.C. § 109(d).

Sellers should also be aware of infringement claims that are mistakenly brought against them, as the Seller will need to notify the complaining party that it is their burden to prove that actual infringement occurred and, in the event that complaining party agrees, the Seller will also need them to notify Amazon that he or she and the complaining party have resolved the issue and the complaining party wishes to withdraw the complaint. A seller should begin their POA by providing the cause of the suspension in the first place, which is generally due to one of the three primary claims: (1) a mistakenly filed complaint; (2) a false complaint; or (3) a legitimate copyright infringement claim.

If a complaint is filed against a Seller by mistake, he or she can provide the complaining party with invoices from his or her supplier showing the complaining party that the products are authentic and that the complainant's monitoring system accidentally caught the product in its net.¹⁶⁹ If a legitimate infringement claim is brought against a seller, he or she should seek out the help of an experienced intellectual property law attorney as this will allow him or her to potentially avoid having to go to court or arbitration, and potentially lead to a settlement between him or her and the complainant. Additionally, hiring an

¹⁶⁹ *Id.* at 55.

intellectual property attorney shows to the complaining party that the Seller is taking their complaint seriously and taking the necessary steps to resolve the dispute. Second, the POA should include a detailed explanation of the steps taken to resolve the infringement allegations. This explanation should include all correspondence between the Seller and the complaining party acknowledging the complaint that has been filed, resolution of this complaint, and proof that the complaint has been removed. In addition to this correspondence the Seller should also include proof that the products are being manufactured and sold legally, which can be proven by showing invoices which support the supply chain of products. The final section of the POA should explain what has been done to correct the issue so that this will not be an issue that arises again. This final part should explain any modifications that have been made to the Seller's business practices to permanently solve the problem and show that someone reviewing his or her inventory to prove that the products are legitimate.

If the complainant refuses to remove the complaint, the Seller should seek the help of an experienced intellectual property attorney who can take a variety of actions to get his or her account reinstated. Sellers should note that the costs associated with hiring an intellectual property attorney are certainly worth it. Amazon respects sellers who hire attorneys as

this shows that they take initiative to protect their account and business while still being respectful of the Amazon marketplace.

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