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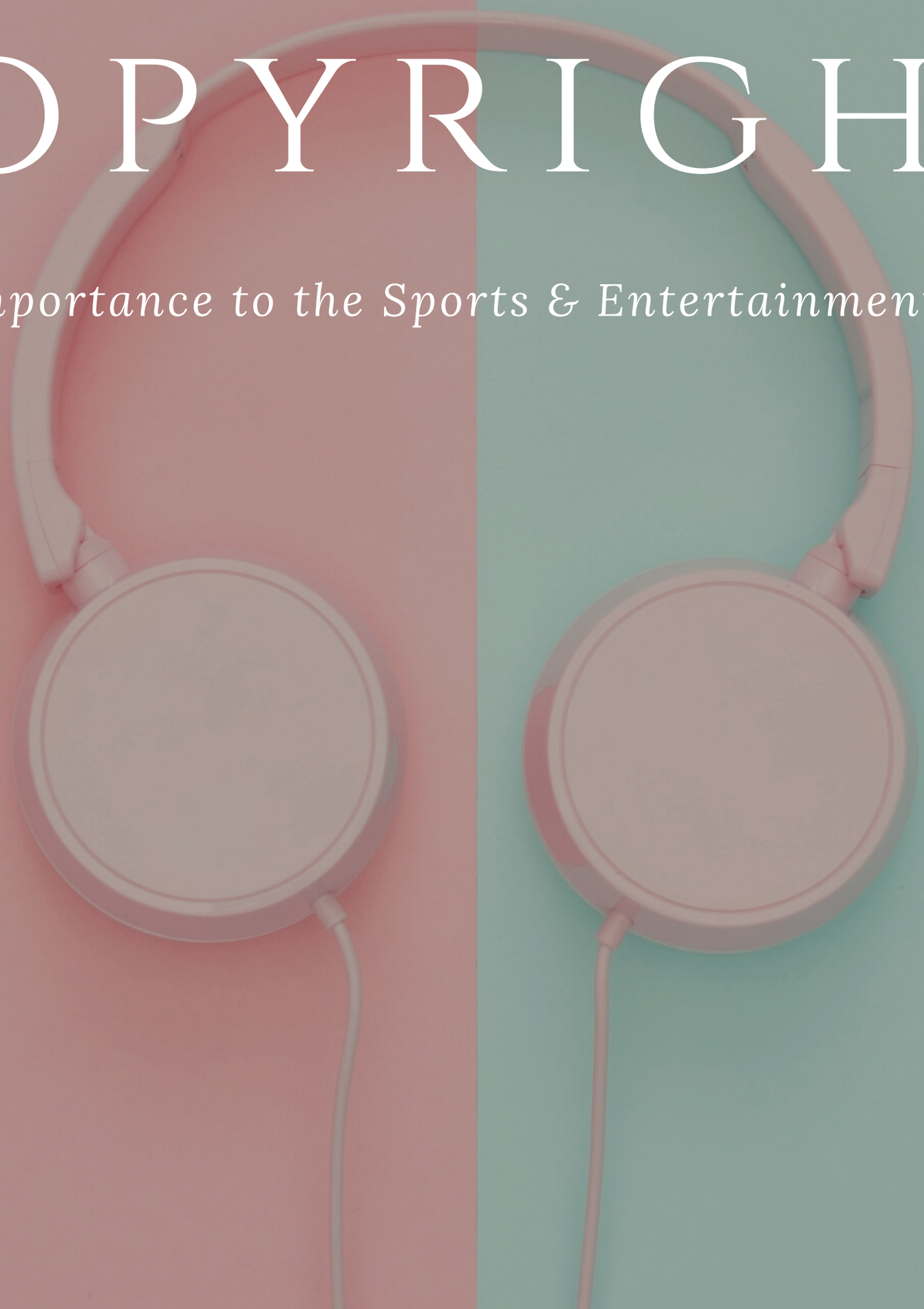
*Oliveras Legal LLC Presents:*

# COPYRIGHTS

*& Their Importance to the Sports & Entertainment Industries*



By Gilberto J. Oliveras Maldonado

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# COPYRIGHTS

**Copyrights are everywhere, they are almost inescapable for some reason. If you are in the sports or entertainment industries, you must know the basics of copyrights, or else you risk economic and personal losses, whether by violating copyrights or having your copyrights infringed and not being able to protect them. If you are in the music industry, just consider the case of *Robin Thicke vs Marvin Gaye* for Thicke's song "Blurred Lines". If you are in the sports industry consider the case of tattoo artists suing *2K games* for the tattoos on player's avatars, in a recently decided case. If you are an author, consider the case of the unauthorized sequel of *Catcher in the Rye* in *Salinger v. Colting*. These are just a few simple examples to prove to you that in the sports and entertainment industries, copyrights are essential, and with the lack of intellectual property knowledge in these industries, a basic knowledge of these concepts will put you at an advantage.**

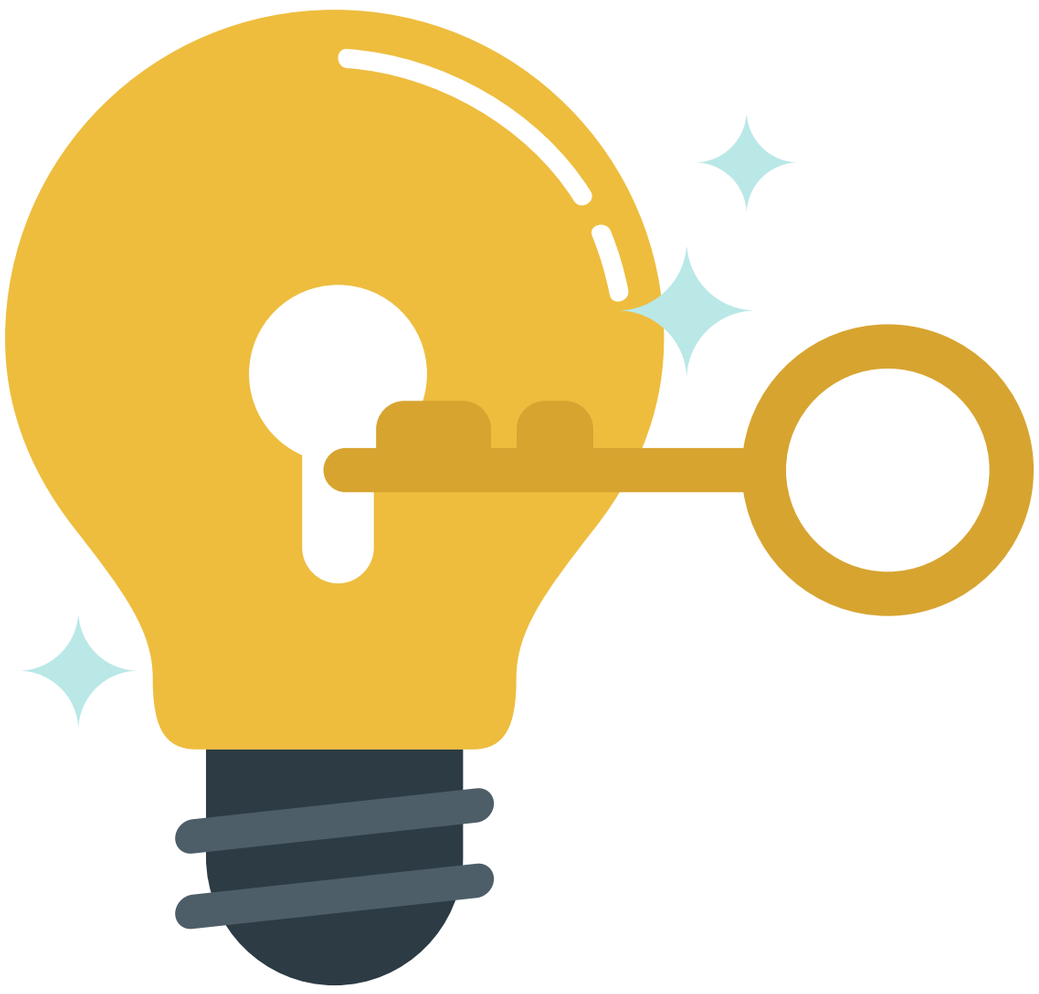
## WHAT ARE COPYRIGHTS?

Copyrights are the rights that creators have over their literary and artistic works. In the practical sense, copyrights take the form of a legal protection, borne from the U.S. Constitution and regulated by the federal Copyright Act of 1976, that prevents the unauthorized copying of a work of authorship. Copyrights apply to *original works of authorship fixed in a tangible medium of expression* and cover both published and unpublished works.

Copyrights relate to literary and artistic creations, such as books, music, paintings and sculptures, films and technology-based works like computer programs and databases. In certain languages, like Spanish, copyrights are referred to as authors' rights (i.e. *derechos de autor*). While no exhaustive list of works protectable by copyright can be found in legislation or case law, there are common elements that determine whether a work is or not copyrightable.

Copyright protection extends only to expressions and not to ideas, facts, procedures, methods of operation, or mathematical concepts as such, although the way in which they are expressed might have protection. This means, that ideas are not protectable without being *fixed in a tangible medium of expression.*

Two other popular intellectual property rights are trademarks and patents, but all three are different and all three protect different rights. Copyrights protect original works of authorship, while patents protect inventions and discoveries, and trademarks protect words, phrases, symbols, or designs identifying the source of goods or services to distinguish them from the goods or services of others. Therefore, while all three of these rights, as well as the other intellectual property rights, will at some points interact with each other, all intellectual property rights protect different rights in different ways.



Copyright protection lasts for the life of the author plus seventy (70) years after the author's death, or if the work is a joint work that has multiple authors, for seventy (70) years after the last surviving author's death. Works that are *made-for-hire* and works with anonymous and pseudonymous authors have copyright protection for ninety-five (95) years from publication or one-hundred-and-twenty (120) years from publication, whichever is shorter.

# COPYRIGHT REGISTRATION: IS IT NECESSARY?

Original works of authorship are protected the moment they are created and fixed in a tangible medium of expression that is perceptible either directly or with the aid of a machine or device. Does a work need to be registered in other for the author to have copyrights over it? The short answer is no, copyrights exist from the moment the work is created, but it is not that simple. Although in the United States, copyright registration is voluntary, registration is necessary to enforce the exclusive rights granted by copyright law through litigation.

Registration creates a claim to copyright with the Copyright Office. Registration is simple and relatively inexpensive, it can also be filed by the author or owner of an exclusive right in a work, the owner of all exclusive rights, or an agent on their behalf, such as a lawyer. A certificate of registration creates a public record of the authorship and ownership of the work. This registration can be made at any point in time in the life of the copyright.

Registration provides several benefits, other than the, aforementioned, public record of copyrights. Before a lawsuit for copyright infringement may be filed in court, registration is necessary. Registration establishes *prima facie* evidence of the validity of the copyright and the facts stated in the certificate of registration when such registration is made before or within five years of publication of the work. When registration is made prior to infringement or within three months of the publication of a work, copyright owners are eligible to claim statutory damages, attorneys' fees, and costs, not just real damages. Registration authorizes the copyright owner to create a record with the U.S. Customs and Border Protection (CBP) that protects the copyright owner against the importation of infringing copies of the protected work.

# WHO CAN CLAIM COPYRIGHTS?

A work's copyrights belong to the author that created that work, at least initially. If two or more authors contribute to create a single work with the intention of merging their individual contributions into an inseparable unitary whole, these authors are considered joint authors and have an indivisible interest in the entire work. On the other hand, when multiple authors contribute to a collective work, each author's individual contribution is separate and distinct from the copyrights in the collective work as a whole.

Works *made-for-hire* are an exception to the general rule for claiming copyrights. As we already mentioned, the general rule allows the author of the work to claim copyrights over that work. When a work is *made-for-hire*, the party that hires the individuals that create the work, is considered the author and copyrights owner, and not the individuals themselves. In simple terms, the creator of the work is merely a tool for the person that hires them to create their works. How can you tell if a work is *made-for-hire*? The circumstances that exist at the time of the work's creation will determine.

There are two specific situations when a work is considered *made-for-hire*. The first situation is when a work is created by an employee as part of that employee's regular duties, created within the employee's "scope of employment." The second situation is when an individual is hired by another party in an express signed written agreement that states that the work is to be considered "work made-for-hire" and such work is specially ordered or commissioned for use either as a compilation, contribution to a collective work, part of an audiovisual work such as a motion picture, a translation, a supplementary work, an instructional text, a test, answer material for a test, or an atlas.

All copyrights can be transferred, individually or as a whole, or even parts of those rights. As a general rule, transfer of copyrights must be done in writing and must be signed by the owner of the rights being transferred, and these transfers can be registered in the Copyright Office, but much like the original registration, it is voluntary. Under limited circumstances, authors or their heirs can terminate a copyright transfer or license agreement to a third party after thirty-five (35) years. In order to terminate these agreements, the author or their heirs must serve an advance written "notice of termination" on the grantee or the grantee's successor-in-interest and must, as a matter of law, record a copy of that notice, in a timely manner, with the Copyright Office.

# WHAT RIGHTS DOES A COPYRIGHT OWNER GET?

Copyrights protect two (2) types of rights: Economic Rights and Moral Rights. Economic rights protect the owner's right to derive financial reward from the use of their works, while moral rights allow the authors to take certain actions to preserve their connection with their work. While economic rights can be transferred, in most countries, the transfer of moral rights is not allowed.

Copyrights grant the owner of the copyright with the exclusive right to (i) reproduce the work, (ii) prepare derivative works such as translations or adaptations, (iii) distribute copies of the work to the public by sale or other transfer of ownership, (iv) perform the work publicly, and (v) display the work publicly, as well as to authorize or prohibit others from doing the aforementioned.

The right of copyright owners to prevent others from making copies of their works without permission is the most basic right protected by copyright law, this is called the right of reproduction. The right of reproduction is usually tied together with the rights of distribution, rental, and importation, since without these exclusive rights as well, the right of reproduction would be of little economic value to the owner.

The exclusive right of the copyright owner to make derivative works, such as translation and adaptation, means that for any type of translation or adaptation of a copyrighted work, permission from the right owner is necessary. A translation is an expression of the work in a language other than the original version, while adaptation is the modification of a work to create another work, such as adapting a book to make a movie. These translations and adaptations are protected by copyright as well, therefore, in the most general sense, publishing a translation or adaptation of a work requires permission from the original work's copyright owner and the translated or adapted work's copyright owner.

A public performance is the performance of a work at a place where the public is, or can be present, or at a place that although not open to the public, has a substantial number of people, outside the normal circle of a family and close acquaintances, present. This exclusive right of public performance entitles the author to authorize or prohibit live performances of a work, which includes performance by means of a recording, such as the sound recording of a musical work being played over amplification equipment (e.g. at a bar).

Moral rights, on the other hand, include the right of attribution, the right to have a work published anonymously or pseudonymously, and the right of the integrity of the work. Moral rights are distinct and separate from the economic rights and as such, remain with the artist even after the they transfer their rights to a third party. The author of a work has the moral right to claim authorship of a work (attribution) and to object to any distortion or modification of a work, or other derogatory action in relation to a work, which would be prejudicial to the author's honor or reputation (integrity).

# THE COPYRIGHT NOTICE ©

That nice looking © next to original works is not just for show, it serves as part of a copyright notice. Since March 1, 1989 copyright notices are optional, as well as for unpublished works and non-U.S. works. A copyright notice is a statement that is placed on copies of a work to notify third parties that a copyright owner is claiming ownership of the work. A copyright notice has three (3) essential elements; (i) the copyright symbol © or abbreviation “Copr.”, (ii) the year of the work’s first publication, or creation if the work is unpublished, and (iii) the name of the copyright owner. This notice needs to be placed in the copies of the work in a way that gives third parties “reasonable notice” of the claim to the copyrights. Although voluntary, copyright notices are beneficial in that they put potential users on notice that the work’s copyrights are being claimed, identify the copyright owner at the time of first publication to the parties seeking permission to use the work, identifies the year of first publication to help the determine the term of the copyright in some cases, and prevents the work from being an ‘orphan’, which happens when prospective users cannot identify copyright owners.

# IS IT POSSIBLE TO USE A COPYRIGHTED WORK?

As a general rule, in order to use a copyrighted work, the interested party must seek permission from the copyright owner. However, copyright law has established certain limitations to the exclusive rights of the copyright owner, which make certain uses of a copyrighted work permissible without needing authorization from the owner. The copyright legislation sets forth over ten (10) different limitation to the exclusive copyrights granted, but most of them have extremely limited applicability, as such we will focus on *fair use* and *compulsory licenses*.

# FAIR USE

Fair use is the most well-known limitation to the exclusive rights in copyright law. Fair use was developed by the courts, in an attempt to balance the rights of the copyright owners with the interest of society to allow copying in certain circumstances. This limitation was developed under the premise that not all copying should be prohibited, especially in certain circumstances such as criticism, news reporting, teaching, and research. Under the Copyright Act, there are four (4) factors to be considered in order to determine whether an act of copying is considered fair use; (i) the purpose or character of the use, including whether the use is commercial in nature or for nonprofit educational purposes, (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (iv) the effect of the use upon the potential market for or value of the copyrighted work. These for factors lead to a very subjective analysis by the courts and often conflicting opinions, but a good example of fair use would be to quote a few lines from a song in a music review, as opposed to sending out the song with the review.

Most fair use analysis can be placed in one of two categories: (1) Commentary and Criticism, or (2) Parody. When commenting on, or critiquing, a copyrighted material, like writing a book review, fair use would allow you to reproduce some of the work. A parody is a work that ridicules another, usually well-known, work, by imitating it in a comic way. Both parody and satire use humor in commentary and criticism, but the reason that parodies are more likely to be considered fair use than satires, lies in the purpose that each one serves. Satire is “the use of humor, irony, exaggeration, or ridicule to expose and criticize people’s stupidity or vices, particularly in the context of contemporary politics and other topical issues,” while parody is “a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule.” The court, in the famous case of *Campbell v. Accuff-Rose Music, Inc.* (the case of Roy Orbinson’s “Oh, Pretty Woman” being used by 2 Live Crew in their parody-song “Pretty Woman”), stated that “parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” However, not all parody qualifies as fair-use, and an attempted parody that uses too much of the original composition and/or lyrics is less likely to qualify as fair use.

Fair use is one of the most important concepts in copyright law since it basically allows the use of copyrighted material for various purposes. The four (4) aforementioned factors will be considered in their totality to determine if there is a copyright infringement or fair use, but as a general rule, fair use, although still limited, offers the possibility of using copyrighted material without permission.

# COMPULSORY LICENSES

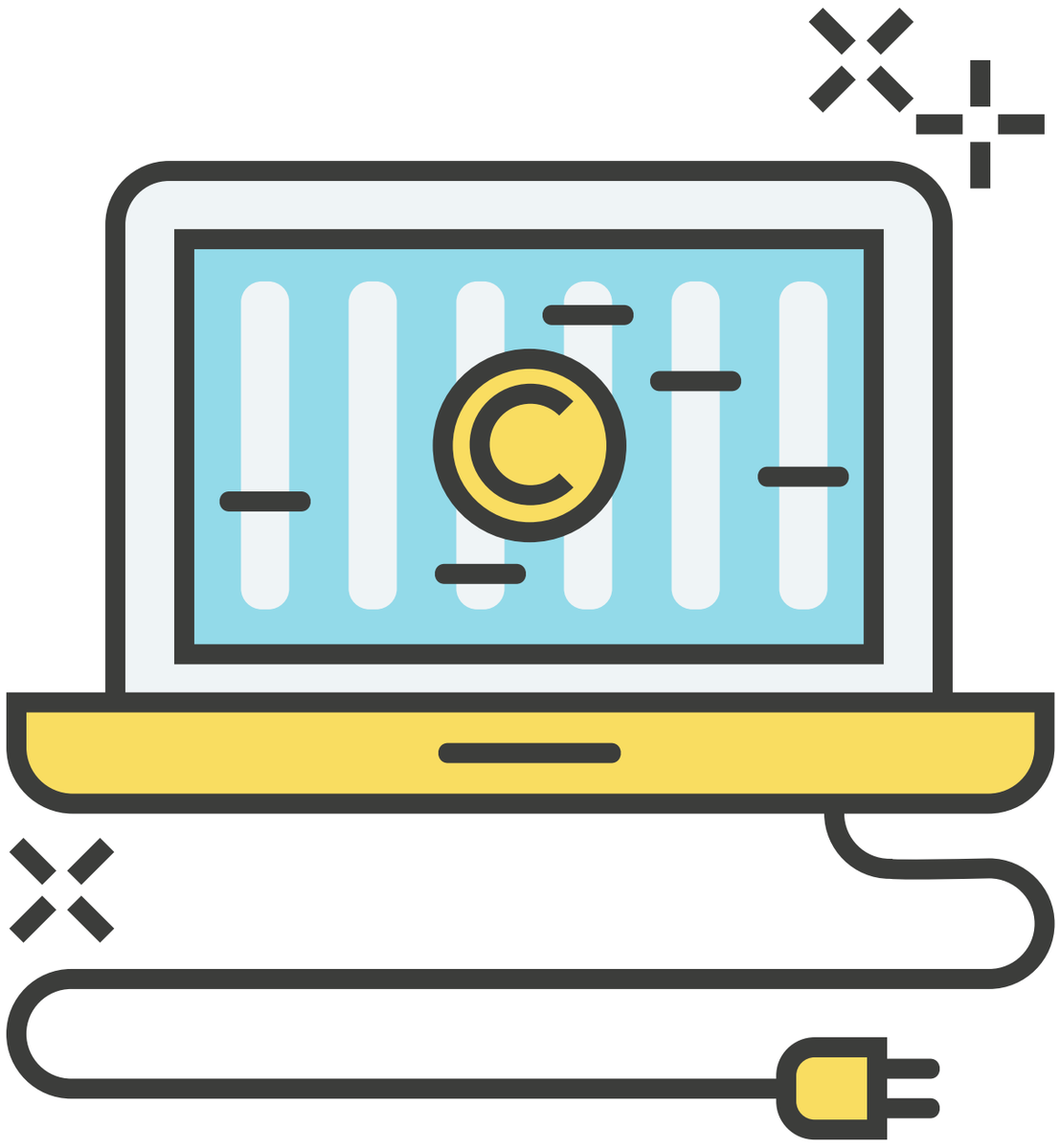
Compulsory licenses are another exception to the general exclusive right of a copyright owner to determine who can use the copyrighted material. Compulsory licenses allow third parties to copy, perform, or even distribute copies of certain works, without the copyright owner's permission, by paying a predetermined royalty. Compulsory licenses only apply in five (5) circumstances; (i) the production of a new sound recording based upon an existing nondramatic musical recording, (ii) the performance of a nondramatic musical recording in a jukebox, (iii) the simultaneous retransmission of television signals by cable television operators, (iv) the performance, display, and recording of certain works by public broadcasting entities, and (v) a temporary right to retransmit television signals via satellite to household satellite dishes. These compulsory licenses are commonly used by satellite television providers, cable providers, webcasters, and music companies.

For example, if a song has been recorded and distributed to the public, any party is entitled to record and distribute the song without obtaining the copyright owner's consent, provided they pay a fee and meet copyright law requirements. In order to take advantage of this compulsory license, a notice must be sent to the copyright owner along with a fee set by the U.S. Copyright Office, known as the statutory fee (which in music is 9.1 cents per song or 1.75 cents per minute of playing time, whichever is larger).

# COPYRIGHT INFRINGEMENT

Copyright infringement is using a copyright-protected work without permission. There are two essential people involved in a copyright infringement claim, the alleged rights holder, and the purported infringer.

If someone is infringing on your copyrights the first step would be to attempt an out-of-court resolution by contacting the infringer, whether personally or via lawyer, to notify them of the infringement. In Digital Millennium Copyright Act claims, this is done via takedown notice to the service provider. If negotiation does not work, legal action may be necessary. An undertaking might be an amicable solution, which implies that the infringer will license the work from you under the agreed terms. Courts can also grant injunctions which would force the person to stop using, or return the copies of, the infringed work. The court may also award damages, real or statutory. Statutory damages are usually between $750 and $30,000 per work, and can increase to $150,000 per work if the infringement is found to be willful (intentional), or decrease to $200 per work for “innocent” infringement if the work did not contain a proper copyright notice. Statutory damages are an important element of registration because the alternative type of damage award is “actual damages,” which must be proven in court and can be difficult to determine. Actual damages can include profit that the copyright owner lost as a result of the infringement as well as any additional profits the infringer received from the infringement. These actual damages are often difficult to prove, therefore statutory damages are beneficial to copyright owners since they eliminate the element of proving actual damages. Copyright owners are eligible for statutory damages if they register their work with the U.S. Copyright Office within three (3) months of publication of the work or before the infringement starts.



If someone is claiming you’re infringing on their copyrights the first step is to review the materials to determine the validity of the claim and determine whether the alleged infringement could fall under fair use or a compulsory license. If the use is deemed to be valid, whether by fair use, compulsory license, or agreement, best practice might dictate that a communication to the other party be made. If your content is in violation of someone’s copyright, the first step is to contact an intellectual property attorney and to take down the infringing content, since you could be exposing yourself to up to $30,000 of liability per infringed work.



# PUBLIC DOMAIN & EXPIRED COPYRIGHTS

Creative materials not protected by intellectual property law fall under the public domain, and as such, the public owns these works, not one individual rights owner. Anyone can use a work in the public domain without permission, but no one can own it. Of note, while works in the public domain belong to the public, collections of public domain material may be copyrighted if the person who created it has used creativity in the choices and organization of the material. There are three (3) main ways that works arrive in the public domain; (i) the copyright expires, (ii) the copyright owner deliberately places it in the public domain, or (iii) copyright law does not protect the type of work.

# TAKE AWAY

It is very easy to infringe on copyrighted material if you are not careful or knowledgeable about copyrights. When in doubt, it is best to consult someone with knowledge on the matter or avoid using material that may be infringing. If you feel your work has been infringed, there are legal solutions available, provided you protected your copyrights diligently. Copyrights registration, while not mandatory, is not complex or exceedingly expensive and can save artists a lot of heartache and money. It is always best practice to contact an attorney that has experience in intellectual property matters if any doubts arise.

At Oliveras Legal LLC we understand your passions and want you to have peace of mind so you can focus on your craft. Allow us to worry about the legal part and go out and create.

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**Contact us for more information or assistance with your particular case at oliveraslegal.com**

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