COPYRIGHT and VIDEO PRODUCTION

By Kohel Haver, Attorney, Portland Oregon 

In my experience with public access video production, there are two reasons why it is important for a video producer to be familiar with the basic principles of copyright law:

1. You want to know how to protect your work - to control what others might do with it.

2. You want to know how to use someone's material either with permission, or how much can you use without asking permission.

The basic premises -

Original video works, as well as all the individual components (video and non video) are protected by copyright. The Copyright Act's exclusive rights provision gives Producers the right to control unauthorized exploitation of their works in whole or in part

Copyright law is a "federal" law and the law does not vary from state to state. Producers should avoid using any content owned by others to avoid lawsuits, but moreover to be able to keep your attention on the production of good work not on legal problems.

What Kind of Work is protected by Copyright?

Copyright protection is available for original "works of authorship." Copyright does not protect ideas or concepts only tangible expression. The Copyright Act states that works of authorship include the following types of works which are all of interest to the video producer:

Literary. Novels, nonfiction prose, poetry, newspaper articles and newspapers, magazine articles and magazines, screenplays, staging notes, and compilations etc.

Musical. Songs, advertising jingles, instrumentals and the underlying noted work. Which can also become a Sound Recording of music or sounds synchronized to the video.

Dramatic. Plays, screenplays, teleplays, and skits. If you film a play, you'll need permission.

Pantomimes and choreographic. Ballets, modern dance, jazz dance, and mime works.

Graphic and sculptural. Photographs, posters, maps, paintings, drawings, graphic art, display ads, cartoon strips and cartoon characters, statues are frequently incidental to the video production – a painting can appear in the film and be a template for a set design.

Motion pictures and other audiovisual works. Movies, documentaries, travelogues, training films and videos, television shows, television ads, and interactive multimedia works.

Part 1. Obtaining Copyright Protection

Copyright protection is automatic when an "original" work of authorship is "fixed" in a tangible

medium of expression. Since 1989 registration is not required but it is **very** helpful.

What is Fixed: A work is "fixed" when it is made "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

Copying a video file into the computer memory has been found by a court to be of sufficient duration for it to be "fixed". An author can "fix" words, for example, by writing them down, typing them on an old-fashioned typewriter, dictating them into a tape recorder, or entering them into a computer.

Example: Betsy's video "The Herding of Cats" is original in the copyright sense so long as Betsy did not create her video by copying existing material - even if it's the twenty-seventh video to be produced on the subject of cat herding.

Only minimal creativity is required to meet the originality requirement. No artistic merit or beauty is required. Justice Holmes said in the 1903 case *Bleistein v. Donaldson Lithograph* warned against using aesthetic criteria in a legal question. As the court put it “the policy judgment that encourages the production of wheat also requires the protection of a lot of chaff.” In modern terms - we give copyright protection to the film "Gigli."

A work can incorporate preexisting material and still be original. When preexisting material is incorporated into a new work, the copyright on the new work covers only the original material contributed by the author.

Example: Producer's video work incorporates a number of photographs that were made by Photographer (who gave Producer permission to use the photographs in the video work). The video work as a whole owes its origin to the Producer, but the photographs do not. The copyright on the video work does not cover the photographs, just the material created by Producer. If Producer 2 came along and wanted to use the work of Producer 1 he'd have to get permission from both Producer 1 and the Photographer. If he wanted only to use the photographs he'd only have to ask the Photographer

Scope of Protection

The law separates the "idea" from the "expression of the idea". Copyright protects against "copying" the "expression" of a work but not the "idea" of the work. The difference between "idea" and "expression" is one of the most difficult concepts in copyright law. The most important point to understand is that the protection of the "expression" is not limited to exact copying whether it is the literal words of a novel or the shape of stuffed bear. Copyright infringement extends to new works, which are "substantially similar".

A copyright owner has exclusive rights in the copyrighted work: These rights are the exclusive domain of the copy

Reproduction Right. The reproduction right is the right to copy, duplicate, transcribe, or imitate the work in fixed form (including streaming video on the internet).

Modification Right. The modification right (also known as the derivative works right) is the right to modify the work to create a new work. A new work that is based on a preexisting work is known as a "derivative work."

Distribution Right. The distribution right is the right to distribute copies of the work to the public by sale, rental, lease, or lending.

Public Performance Right. The public performance right is the right to recite, plays, dance, act, or show the work at public place or to transmit it to the public. In the case of a motion picture or other audiovisual work, showing the work's images in sequence is considered "performance." Some types of works, such as sound recordings, do not have a public performance right.

Public Display Right. The public display right is the right to show a copy of the work directly or by means of a film, slide, or television image at a public place or to transmit it to the public. In the case of a motion picture or other audiovisual work, showing the work's images out of sequence is considered "display."

Right to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

In addition, certain types of works of "visual art" also have "moral rights" which limit the modification of the work and the use of the author's name without permission from the original author. For the most part this covers fine art paintings, limited edition prints and sculptures.

Anyone who violates any of the exclusive rights of a copyright owner is an infringer.

Example: Producer scanned Photographer's copyrighted photograph, altered the image by using digital editing software, and included the altered version of the photograph in a video work that Producer sold to consumers. If Producer used Photographer's photograph without permission, Producer infringed Photographer's copyright by violating the reproduction rights the photograph), the distribution right (selling the altered photograph in his work) and the right to create derivative works (the altered work is derivative of the original).

A copyright owner can recover actual damages or, in cases where the work was properly registered, attorney costs and statutory damages (which can be as high as $150,000) from an infringer. In addition, courts have the power to issue injunctions (court enforced orders) to prevent or restrain copyright infringement and to order the impoundment and destruction of infringing copies. If a work is registered within 3 months of publication, the registration will relate back to publication and there will be no unregistered gaps.

How long does Copyright protection Last?

The term of copyright protection depends on three factors: who created the work, when the work was created, and when it was first distributed commercially. For copyrightable works created on and after January 1, 1978, the copyright term for those created by individuals is the life of the author plus 70 years. The copyright term for "works made for hire" (see below) is 95 years from the date of first "publication" (distribution of copies to the general public) or 100 years from the date of creation, whichever expires first.

What is a *work for hire*? Generally, the person who creates the work owns the copyright. But, if the work is created by employee within the scope of his or her employment, the employer owns the copyright because it is a "work for hire." The copyright law also includes another form of "work for hire": it applies only to certain types of works, which are specially commissioned works. These works specifically include audiovisual works, which will include most video projects. The work for hire laws prevents the Director of Photography from claiming a separate copyright in her work. It also covers the wardrobe, special effects, makeup and set designers. A work for hire can be created by a contract that has those words *work for hire* on it.

Part 2. Using work belonging to someone else there are also two paths:

A. **Ask permission.** Asking permission creates a license, the legal word for permission. You can get permission from the artist, the person who has the rights to the work you want to use. Be careful that the person giving you permission has the rights to grant to you.

B. **Don't ask permission. Taking work without permission is a little more risky.** You could be sued and be liable for damages up to $150,000 per infringement or you could get away with it.

Copyright infringement occurs when someone uses the work without permission and without a recognized defense for using the work without permission. It is a legal claim under federal law because copyright is a federal statute. A federal law is a law of the country, which is applied in same way in all the states, different from a state law, which may be unique to an individual state. To succeed on a copyright infringement claim, plaintiff must show: 1) ownership of a valid copyright and 2) the unauthorized copying of constituent elements of the work that are original.

"Unauthorized copying can be established when the plaintiff can show both that 'the defendant has access to the copyrighted work' and that 'the accused work is substantially similar to the copyrighted work'.

To determine whether there is 'substantial similarity' between two works, courts will "use the 'ordinary observer' test, that is 'whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value."

Its easy to make the mistake - how to avoid problems

Current technology makes it easy to combine material created by others - film and television clips, music, graphics, photographs, and text - into a video product. ***The technical ease of copying these works does not give you the legal right to do so.*** If you use copyrighted material owned by others without getting permission you can incur liability for hundreds of thousands or even millions of dollars in damages.

Most of the third-party material you will want to use in your video product is protected by copyright and likely belongs to someone else. Using copyrighted material without getting permission - either by obtaining an "assignment" or a "license"- can have disastrous consequences. The owner of the copyright can prevent the distribution of your product and

obtain damages from you for infringement, even if you did not intentionally include his or her material. In addition you might be held liable to pay for other party's legal fees.

Permission to use material is called a license. A license is typically limited in scope, amount or duration. An assignment is generally understood to transfer all of the intellectual property rights in a particular work, although an assignment can be more limited in scope.

Consider the following example:

Productions, Inc. created an interactive video training work called ***You Can Do It***. A freelance writer wrote the script. ***You Can Do It*** includes an excerpt from a recording of Julie Andrews singing *Climb Every Mountain*. It ends with a photograph of Britney Spears shown above the words, "Good luck."

In this example, if the Productions staff did not obtain permission to use the recording of *Climb Every Mountain* or the photo of Britney Spears, ***You Can Do It*** infringes three copyrights: the copyright on the song, the copyright on the Julie Andrews recording of the song, and the copyright on the photograph. Productions is also infringing Britney Spears' right of publicity (which is separate from copyright) by the commercial use of her image. Furthermore, if Productions did not acquire ownership of the script from the freelance writer, (Productions could have a "work for hire" agreement with the writer thereby shifting ownership of the script to them) Productions does not have clear title to *You Can Do It*, and distribution of *You Can Do It* may infringe the writer's copyright in the script. Any of the copyright owners whose copyrights are infringed may be able to get a court order preventing further distribution of this video product.

Popular Misinformation about Copyright

There are a number of myths out there concerning the necessity of getting a license. Here are five. Don't make the mistake of believing them:

Myth: "The work I want to use doesn't have a copyright notice on it, so it's not copyrighted. I'm free to use it."

Copyright notice is the familiar c in a circle, the year and the name of the person claiming a copyright interest in some work. It used to be required if one wanted to claim copyright interest in a work. Most published works contain a copyright notice. However, for works published after 1989 use of copyright notice is optional. The fact that a work doesn't have a copyright notice doesn't mean that the work is not protected by copyright.

Myth: "I don't need a license because I'm using only a small amount of the copyrighted work."

It may be true that *de minimis* copying (copying a small amount) is not copyright infringement. Unfortunately, it is rarely possible to tell where *de minimis* copying ends and copyright infringement begins. There are no "bright line" rules.

Copying a small amount of a copyrighted work is infringement if what is copied is a qualitatively substantial portion of the copied work. In one case, a magazine article that used

300 words from a 200,000-word autobiography written by President Gerald Ford was found to infringe the copyright on the autobiography. Even though the copied material was only a small part of the autobiography, the copied portions were among the most powerful passages in the autobiography. Copying any part of a copyrighted work is risky. If what you copy is truly a tiny and non-memorable part of the work, you may get away with it (the work's owner may not be able to tell that your work incorporates an excerpt from the owner's work). **However, you run the risk of having to defend your use in expensive litigation.** If you are copying, it is better to get permission or a license (unless fair use applies). You cannot escape liability for infringement by showing how much of the protected work you did not take.

Myth: "Since I'm planning to give credit to all authors whose works I copy, I don't need to get licenses."

If you give credit to a work's author, you are not a plagiarist (you are not pretending that you authored the copied work). However, attribution is not a defense to copyright infringement. It makes you a polite thief but a thief, none the less.

Myth: "My video work will be a wonderful showcase for the copyright owner's work, so I'm sure the owner will not object to my use of the work."

That might be true but it is smarter to let the artist know how you intend to flatter them before you whack the “hornet’s nest”. Do not assume that a copyright owner will be happy to have you use his or her work. Even if the owner is willing to let you use the work, the owner may want to charge you a license fee. Content owners view video as a new market for licensing their material. The Harry Fox Agency and other music licensing agencies have sued over the distribution of their music on the service.

Myth: "I don't need a license because I'm going to alter the work I copy."

Generally, you cannot escape liability for copyright infringement by altering or modifying the work you copy. If you copy and modify protected elements of a copyrighted work, you will be infringing the copyright owner's modification right as well as the copying right. There are myths about how much you can take or have to change a work to make it okay to steal it. None of that is true.

When You Don't Need a License – When the use is fair

You don't need a license to use a copyrighted work in three circumstances: (1) if the work you use is in the public domain; or (2) if the material you use is factual or an idea; (3) if your use is "fair use". Fair Use is a concept that came from case law and became part of the Copyright Law in the revision in 1978. The term has come to mean an unauthorized use of copyrighted material from which no infringement action would survive considering what work was used, how it was used, how much it was used and the final effect of the use on the market for the original.

Public Domain

You don't need a license to use a public domain work. Public domain works are works no longer protected by copyright because the work is outside the term of copyright protection and therefore

no one can claim the exclusive rights of copyright for such works. Public domain also describes work, which was never able to attain copyright protection, work of the federal government, and work, which does not have enough to it to be eligible for copyright protection and facts. There is no protection. Under the current law original works older than 1923 are no longer eligible for protection. The plays of Shakespeare are in the public domain. Actually works enter the public domain in several ways: the term of the copyright may have expired, the copyright owner may have failed to "renew" his copyright which was required under the Copyright Act of 1909, or the copyright owner may have failed to properly use copyright notice (which was of importance only for works created before March 1, 1989, at which time copyright notice became optional). The rules regarding what works are in the public domain are too complex for this primer, and they vary from country to country. The rule of thumb is that is the original work you are using is older than 1923 it is likely in the public domain.

No protection for Facts

You don't need a license to copy facts from a protected work. The copyright on a work does not extend to the work's facts. This is because copyright protection is limited to original works of authorship, and no one can claim originality or authorship for facts.

No protection for Government Works

The copyright law specifies that works of the government are not eligible for copyright protections. But in this modern world be careful that works that appear to be works of the government really are the works of the government and not merely licensed to the government. Good example is that say the US Department of the Interior wants a video about some protected area. This time, in a cost cutting effort they hire a production team to make the video and also only license and pay for) the rights to put that video on the www site and show in the interpretive center allowing the producer to sell the work elsewhere and try to shop it to PBS. Please read the license information on the tapes or when the material is broadcast. You can also make preliminary inquires on line directly from the copyright office.

No protection for Common Story Ideas (legal term *scenes a faire*)

Shakespeare said "There is nothing new under the sun". You may have heard that every film has been derived from only a dozen stories. Sometimes it feels that way. If we let one person own or control an idea, we would stifle all the creative interpretations of that theme. While you will need permission to perform a play, you won't need it for work that you create that is original to you. You don't need a license to copy the ideas from a protected work. The copyright on a work does not extend to the work's facts and the idea of a story is considered a fact. You need to be careful in distinguishing the facts, ideas, unprotectable basic plot premises or *scenes a faire* from what is protectable. A story about lovers from feuding families, ending in tragedy might be *Romeo and Juliet, West Side Story* or your story about people in your neighborhood. Is it The Taming of the Shrew, Kiss Me Kate or Ten Things I hate about you?

Fair Use

You don't need a license to use a copyrighted work if your use is "fair use." Unfortunately, it is difficult to tell whether a particular use of a work is fair or unfair. Determinations are made on a

case-by-case basis by considering four factors:

Factor #1: Purpose and character of use. The courts are most likely to find fair use where the use is for noncommercial purposes. Commentary is fair use, news reporting is fair use, scholarly work is fair use, use in a classroom is fair use, but be careful about passing around copies to the students. Case law (*Basic Books v. Kinko's*) has shown that course packs, copies made from various sources and sold to students for use, as a course book substitute may not be fair use.

Factor #2: Nature of the copyrighted work. The courts are most likely to find fair use where the copied work is a factual work rather than a creative one. In video this can be tricky, a film of a migrating bird, while factually recording the activity of the bird does not vitiate the copyright interest in the original filmmaker or photographer.

Factor #3: Amount and substantiality of the portion used. The courts are most likely to find fair use where what is used is a tiny amount of the protected work. If what is used is small in amount but substantial in terms of importance - the heart of the copied work - a finding of fair use is unlikely. This might include 15 seconds of a 5-minute act.

Factor #4: Effect on the potential market for or value of the protected work. The courts are most likely to find fair use where the new work is not a substitute for the copyrighted work. If it can be shown that the public is not only confusing your work with the original, but also buying yours instead because it is les expensive you have a real problem. Show that "review" music videos that show the entire video, although a critique is also part of the show rely on fair use but are frequently disappointed by the failure of that argument.

SOME ONLINE COPYRIGHT RESOURCES

Government Rights Protection
copyright.gov Copyright Office website: get copyright forms here.
uspto.gov Trademark Office website: Information and searchable databases.

Academic Sites for Fair Use Information
law.cornell.edu Good general site for copyright information and more.
fairuse.stanford.edu excellent general information site for fair use information.

Interesting Fun Fair Use Sites
illegal-art.org interesting site exploring "fair use"
negativland.com Site advocating fair use and copyright anarchy. "N©!"

Licensing Groups
ascap.com and bmi.com are music licensing orgs (performance rights)
harryfox.com Music licensing (sync rights) mostly done by individual publishers now.

Getting the Goods
nolo.com good reliable source for legal self help books.
hdcuts.com DV and HD royalty free (but not fee free) stock footage
footagebank.com/home.asp

thoughtequity.com/video/home.do