

# Copyright Law - What Web Businesses Need To Know

By J Fisher

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The World Wide Web is full of materials that are proprietary in nature. It is probably safe to say that virtually everything that you access through your web browser is the property of someone else. Yet, this material can be instantly accessed and most of it can be downloaded and adapted with the click of a mouse.

But this instant access and copying potential that is presented by the technology involved in the World Wide Web is deceiving. It creates the impression that everything is free for the taking. But it is not.

The Copyright Laws have been in existence for a very long time. The World Wide Web is a new frontier. Many people have the impression that the Web is a new frontier to which the copyright laws, and other intellectual property laws do not apply. For this reason my law practice has seen a marked increase in the number of clients who come to me for advice when someone has copied and used materials that the client has created.

Online businesses, and in fact anyone who surfs the Internet, need to have a basic understanding of Copyright Law. They don't necessarily need to know all of the ins and outs of Copyright Law. But they need to know enough to do two things...(1) keep them from violating the rights of others and incurring potential damages, and (2) take the necessary steps to best protect the information that they create or otherwise have rights to and which they make available on the Web.

This Article is intended to give the reader the "101" version of Copyright Law, in layman's terms and to answer some questions and dispel some ordinary myths about copyright law.

What is protected by the copyright laws? Just about everything that you see when you access the Internet is protected under the Copyright Laws. This is true even if it does not include a copyright notice. You must assume that all information that you see is protected.

Does someone have to file a copyright application in order to claim a copyright? No. Copyrights arise upon fixation in a tangible medium of expression. There are legal definitions concerning when something is "fixed." It is enough to know that everything that you access on the Internet has been fixed. It is certainly a good idea to register a copyright and I'll get into the reasons for this later. But registration is not necessary to confer right. Fixation is.

Does a copyright notice have to be on the work in order to gain protection? No. Again, it is a good idea to place a copyright notice on all works. But it is not a prerequisite to having a copyright. This

was not the case historically under United States Copyright Law. It used to be that an owner could lose protection if the work was published without a copyright notice. This law changed a number of years ago. You can no longer assume that something will not be protected under the copyright laws simply because it does not contain a copyright notice. You must assume that everything is protected.

What am I prohibited from doing with copyrighted works? Another way of asking this question is “what rights can the owner of a copyright enforce against me.” The owner of a copyrighted work has seven exclusive rights that it can enforce. Violation of any one of these rights by another party is an “infringement” of the owner's rights. In layman’s terms, you cannot copy or reproduce the work, change the work or prepare another work based upon that work, display the work, distribute copies of the work, distort or mutilate the work or perform the work.

Can I download the work to my hard drive? No. I would argue that this constitutes copying. This area of the law is evolving, but this is certainly the safe answer. You absolutely cannot download someone’s page and modify it to fit your own needs. This is easier to detect than you may think based upon the background html or other programming codes. So don’t do this.

What can happen to me if I violate someone’s copyright? You can be sued. Violation of copyright laws can also lead to criminal prosecutions. Violating materials can be seized, and a whole host of other bad things can be done to you. If you are sued, damages can be assessed against you based upon the damages that are proved. The copyright owner can also assert a right to receive statutory damages and attorney fees if they have followed the right steps to secure these rights. Statutory damages can be awarded even if the owner cannot prove any actual damage. Statutory damages can be in an amount of \$25,000.00 per violation. If the owner can prove that you willfully violated his copyright, statutory damages can be as high as \$100,000.00. You may also be required to pay the owner’s attorney fees. This amount can be awarded even if no actual damage was caused to the owner.

What can I do if I see something online that I want to use for my own purposes? You can contact the owner of the site and find out who owns the copyright on that material. You need to get their permission in writing to use the material. The trick here is determining who actually owns the copyright to the work and has the right to grant this permission.

Who owns the copyright to MY web site? If you developed the site yourself, you probably do. As the owner, you could file a copyright application and take steps to protect your rights. The answer to this question is not as simple if you had someone else develop your site. If an employee developed the site, you probably own the copyright. If you had an outside party develop your site that is an independent contractor, the presumption is that they are the owner of the copyright. WHAT? You may be asking. Yes. Believe it or not, even if you paid to have someone else develop your site, the party that developed the site may be the owner of the copyright. If you entered into an agreement with that party, you may have provided by the agreement that you own the copyright.

The copyright act provides that a party that is contracted to develop something is the owner of the copyright, unless, in certain specific types of works, the parties have agreed in writing that the work was done as a “work for hire” and that the party commissioning the work is the owner of the copyright. Many developers work on an informal basis without a contract. If that is the case, that developer is the copyright owner.

Most typical contracts that developers have customers sign are either silent on copyright ownership or provide explicitly that the developer is the owner of the copyright. Some developers will agree to give the client the copyright if they are asked. But that agreement **MUST** be in writing. Other developers insist that they maintain the copyright. The reason for this is so that they can utilize the

basic structure and layout of a page for other clients. Now they can't use your site in its exact form because that would probably require using your logo and your name to which you have rights. But they can replace the name and logo, and perhaps other material that you gave them such as picture files, and use the same basic structure for another client.

Even if the developer insists upon keeping the copyright, you want to make sure that you have the perpetual right to use the site. Some contracts tie the right to use the site into the web hosting services. You can use the site as long as it is used on the developer's server. But the license terminates when you try to move the site to another host.

Why do I need to file a copyright application? You might be asking yourself, all right, so you say that copyrights do not require a formal copyright application. So why should I bother? The primary reason is your ability to leverage someone who has ripped off your site. If you have filed a copyright application within 90 days after first publication or prior to any infringement, you are eligible to elect statutory damages and receive attorney fees from the infringing party. If not, you will be limited to receiving your actual damages. Statutory damages can be awarded even if your actual damages are minimal. Statutory damages can run as high as \$25,000.00 and \$100,000.00 if the infringement was willful. When combined with an attorney fee award, this gives you strong ammunition against a potentially infringing party. But you need to make a timely copyright application in order to secure these rights.

Do I need to place a copyright notice on my work? You don't need to. But it is highly recommended. A copyright notice makes it more difficult for an infringing party to say that their infringement was innocent or not willful. Up until several years ago, United States Copyright Law required the owner of a copyright to place a copyright notice on all published works. Publication without the proper notice would lapse the work into the public domain. Then, several years ago, the United State Copyright Laws were amended to conform with the International copyright treaty, the Berne Convention. Now, an owner does not lose its rights to a copyright for failure to place a notice on the published work.

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