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intellectual property law

What You Need to Know about Rights and Permissions

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Wait for me. I'll go with ...

I wanna get away!

I definitely wanna get away!

First – the small print

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But legal jargon aside and to cut to the core of it, I will raise many questions today, the answers to which are known only by the judge and/or the jury, either of which may be second guessed by the appellate panel, but not by me.

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First Amendment to the US Constitution

Congress shall make no law . . . abridging
the freedom of speech, or of the press . . .

But the free speech right is not without limitations . . .

First among them is a result of our copyright laws . . . but there are several other limitations at work.

With respect to each, you must spot the issue and then determine how best to address it.

Whose job is it?

Yours

Unless you negotiate otherwise

At least five reasons to negotiate the rights clearance obligation away:

- You haven't done it before
- It's not your area of expertise
- You don't have the contacts
- You don't know the customary terms or the language
- You don't have the cash

What are your other options?

- Publisher clears the rights, but you pay
- Publisher clears, and advances the cost
- Publisher clears, and you split the cost
- Publisher clears and pays the cost

Expect a balance of burden and control

- The party who pays the bill should reasonably expect to retain some control over the cost
 - by establishing a budget/ceiling
 - or by retaining a veto over the final selection

But you're not done yet . . .

- Don't forget the reps and warranties
- And the accompanying indemnity obligation
- It won't do you much good to shift the obligation to clear rights and secure necessary permissions if you remain primarily liable for defending any claim that it wasn't done properly

What are the potential causes of action?

- Copyright infringement
- Breach of scholarly integrity
- Defamation
- Violation of a privacy right
- Misappropriation of right of publicity
- Trademark infringement
- Unfair or deceptive advertising
- Misappropriation of trade secrets

Copyright Basics

- Covers original expression fixed in a tangible medium
- Protection is automatic and instantaneous
- Neither registration nor notice are required
- Posting on the internet does not inject a work into the public domain
- A bundle of 6 monopoly rights
- Remedies for infringement
 - exposure to public contempt
 - injunctive relief
 - actual damages proved
 - (with timely registration)
 - statutory damages
 - attorney fees and costs

Copyright Basics

What are your options?

- Extract the unprotected facts and ideas and express them in your own words
- Rely on fair use
- Secure permission

Copyright Basics

Another layer of rules for scholars

- Plagiarism is a concern . . . and it is not the same thing as copyright infringement
- Attribution is the thing . . . it may be essential, and it may not be sufficient
- It's not just expression, but also underlying ideas, that are protected
- Fair use will not shield you
- Different expectations in different fields of study
- Authorship for copyright purposes is not the same as authorship for purposes of scholarship

Copyright Basics

Special terms and language for:

- Third-party photos
 - Editorial use vs. commercial use
 - Royalty-free vs. rights managed vs. commissioned
 - Limitations on use
- Music
 - Use of song lyrics in text
 - Other uses in multimedia works
- Art
 - Overprotection is the rule (Bridgeman Art v. Corel)
 - Fair use is systemically underutilized
 - CAA has published best practices

Defamation Basics

- Concerned with injury to reputation
- Law varies from state-to-state
- Elements
 1. Unprivileged publication
 2. Of a defamatory statement of fact
 3. That is false
 4. That is of and concerning an identifiable living plaintiff
 5. That causes damage to the plaintiff's reputation, and
 6. That is made with the requisite degree of fault (at least negligence)

Defamation Basics

- Knock out one of the required elements and the claim goes away
 1. Unprivileged publication
 2. Of a defamatory statement of fact
 3. That is false
 4. That is of and concerning an identifiable living plaintiff
 5. That causes damage to the plaintiff's reputation, and
 6. That is made with the requisite degree of fault (at least negligence)

Defamation Basics

- Juries tend to be sympathetic to plaintiffs and so the media loses at trial in 60% of the cases
- Verdicts are reversed or reduced on appeal, but the cost is not recovered (and the cost will almost certainly be in the six-figure range)
- Even where there is insurance, the defendant will bear the first \$50k-\$300K of expense
- If your indemnification obligation is triggered by an “allegation” as opposed to the “final and non-appealable verdict of a court of competent jurisdiction,” this will be your check to pick up

Invasion of Privacy

- Concern is not with injury to reputation but instead with outrageous or highly offensive conduct
- Also based on state law
- Four forms (not all states recognize each form):
 1. Publication of private facts
 2. Intrusion into seclusion
 3. False light
 4. Misappropriation of the right of publicity

Misappropriation of the right of publicity

- About half of the states make this a property right that is transferrable and that survives death
- Unauthorized use of someone's name, likeness, or persona for commercial purposes (not all for-profit uses, but only promotion of unrelated product or service)
- Comes into play with book blurbs and testimonials and with unauthorized biographies

Trademark Basics

- Distinctive source identifier
- Two interests protected
 - Property right of owner
 - Right of the public not to be confused as to source
- Fair use
- Nominative fair use
- Claiming rights vs. avoiding infringement



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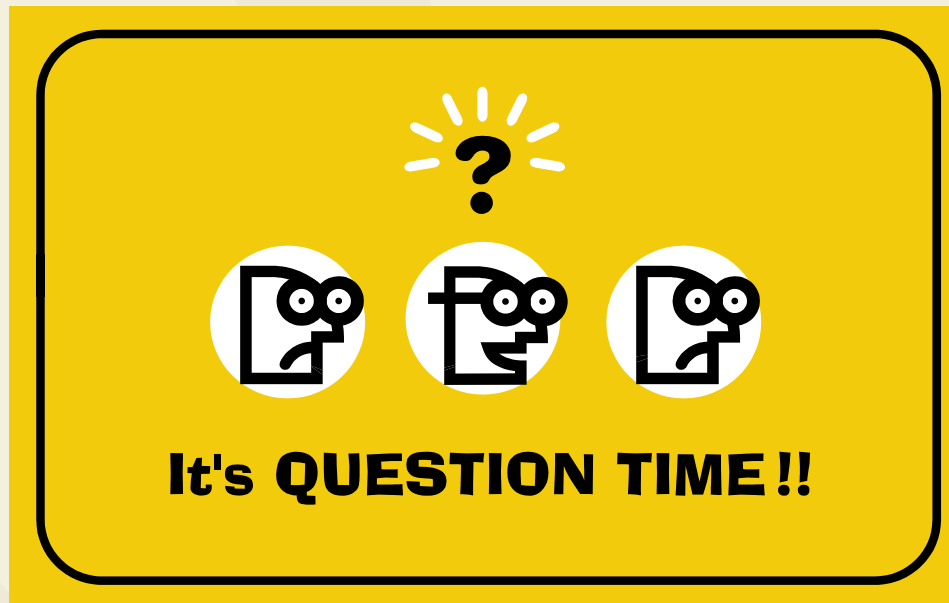
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Questions for me



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