

Trademarks and Copyrights -- What United Methodist Communicators Need to Know About Intellectual Property

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[Disclaimer]

- These are only general principles
- This isn't legal advice
- Each case turns on its own facts
- I can't advise you unless you are a client as shown by a signed, written agreement between us

What Is a Copyright?

- A right provided to the authors of “original works of authorship” including literary, dramatic, musical, artistic, and software programs
- Copyright protects the form of *expression* rather than the subject matter of the writing.
- It does not protect ideas – only the *expression* of ideas

[Rights Provided § 106]

1. To make copies
2. To distribute copies
3. To display the work publicly
4. To make “derivative works” and
5. To perform the work publicly

With some exceptions, others need permission do these things

[Notice of Copyright]

The symbol © (the letter "C" in a circle), or the word "Copyright" or the abbreviation "Copr.," the year of first publication of the work, and the name of the copyright owner

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Benefits & Timing of Registration

1. "Statutory damages"
2. Attorney's fees
 - IF registered in 3 months of publication
 - If unpublished -- IF registered or preregistered before infringement begins & registered by earlier of 3 mos. of publication or 1 mo. of infringement's discovery

[Examples of Risks]

- Sony got \$675,000 for 30 songs
- Capitol Records obtained a nearly \$2 million judgment on 24 songs
- Can be liable if you “materially contribute” to another’s infringement or have the right & ability to supervise plus a direct financial interest
- Your attorneys’ fees can be many \$1000s

[Types of Authors]

- Creator or author of the work
- Corporate or commissioning party of a Work-for-Hire
- Joint authorship
- Anonymous and Pseudonymous

[Licenses]

- Exclusive licenses must be in writing
- If you simply want permission to create the derivative work and don't care if others could do the same thing (a non-exclusive license), the license would not have to be in writing
- Regardless, it's always better to get it in writing

[Types of Works]

- Movies, videos, recordings, sheet music, online works
- artwork, graphics, books, articles, poetry, photos, speeches, sermons
- Letters, other original writings
- Translations
- **Unauthorized derivative work NOT protected**

[Works for Hire]

- Employees' creations within the scope of their employment OR
- Specially commissioned works of a particular kind with written agreement (collective work, audiovisual, translation, compilation, instructional text, etc.)
- Copyright in works by independent contractors not automatically yours!

How to Get a License

- CCLI.com, CVLI.com, Swank.com, WillowCreek.com, Criterionpicusa.com, copyright.com (Copyright Clearance Center)
- Publisher, network, author
- WorshipCast license from churchca.com
- ASCAP.com, BMI.com, SESAC.com
- *Getting Permission* by Richard Stim (nolo.com)
- *Solving the Puzzle of Church Copyright Compliance* by Susan Fontaine Godwin (churchca.com)

Cautions

- Check the terms of the license
- Check the properties the agency represents
 - no single agency covers everything
- Check FAQs on websites
- Check that your use is covered (broadcast on TV, webcast, performance, distributing photocopies, making a video, using recordings, synchronization, recording sessions)

[Infringement]

- Court must find
 - Infringing work is "substantially similar" to copyrighted work, and
 - Infringer had access to the copyrighted work
 - No clear rules for deciding "substantial similarity"
 - Courts look for similarities in appearance, sound, words, format, layout, sequence, and other elements of the works

[Fair Use Defense - §107]

- Allows limited copying of copyrighted works for “criticism, comment, news reporting, teaching..., scholarship, or research“
- The copyright holder’s rights are not diminished where the user is not-for-profit or doesn’t realize monetary benefit from the use
- NOT a “bright line” test – case by case
- “not a license for corporate theft....”

[Factors Considered]

- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality of the portion used
- Effect upon potential market for or value of copyrighted work
- Fact-intensive analysis

[Purpose/Character of the Use]

- Same use as original?
- Was intellectual labor & judgment used in creation?
- Nonprofit purpose?
- Transform work into different form?
- NOT fair use
- Favors fair use
- Favors fair use but not sole criterion
- Favors fair use

[Nature of the copyrighted work]

- Creative work?
- Factual work?
- Less likely to be fair use
- More likely to be fair use

Amount/Substantiality Taken

Not likely to be fair use

- Entire Work (rearranging entire musical work; performing entirety of *Jesus Christ Superstar*)
- “Heart” of the work
- Important to work as a whole (taking 1 entire homily of 46 in a work)
- Verbatim copying (mere rearrangement of sections not fair use)

More likely fair use

- Less than entirety
- Not verbatim, but paraphrased
- Different organization of material

Effect on the market

- Does use impair marketability?
- Would reasonable person expect to pay?
- Does it impair the value of the work?
- Not fair use – if monetary loss were required, nonprofit copyrights would be essentially worthless

Religious Services Exemption §110(3)

- performance of
 - nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or
 - display of a work
- in the course of services at a place of worship or other religious assembly

“Dramatico-musical” means oratorios, cantatas, musical settings of mass, choral services **not** musical plays or motion pictures

Does **not** cover web-casting of service, or social, educational or fund-raising performances

What Exemption Doesn't Cover

- Copying protected works
- Publishing protected works
- Examples
 - Copying protected lyrics and passing them out to congregation *not* exempted
 - Publishing protected work on church website & broadcasting service *not* exempted
 - Display of nonsequential images of AV work v. showing sequential images
 - Sequential singing of all songs from *Jesus Christ Superstar* is a dramatic performance & not exempted

Instructors and Pupils

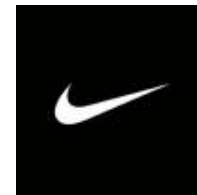
- Exemption §110(1) - Performance or display in course of face-to-face teaching of nonprofit educational institution in a classroom, unless by means of an unlawful copy
- Exemption §110(2) – Transmissions of performance of nondramatic literary or musical work or limited portions of any other work that is not marketed primarily for that purpose (e.g. textbooks) – subject to many restrictions
- Coursepacks clearance services: CCC (copyright.com) and XanEdu (xanedu.com)

Educational Fair Use Guidelines

- Do not have the force of law but are persuasive to courts
- See Copyright Circular 21; get from copyright.gov
 - Brevity (complete article under 2500 words or excerpt of not more than 1000 words)
 - Spontaneity – including inspiration of individual teacher at a given time & not consistent use
 - Cumulative effect – limits number of pieces & times
 - Must include the copyright notice of author

What Is a Trademark?

- Word, name, symbol, or "device," used in trade with goods or services to indicate the source of the goods or services and to distinguish them from the goods or services of others
- Basic Facts about Trademarks”
(<http://www.uspto.gov/web/offices/tac/doc/basic/>)
- Trademark v. Service Mark



[Advantages of Trademarks]

- Trademarks are usually the only business asset you have that can appreciate in value over time
- Trademarks can work effectively across borders, cultures, and languages
- Famous marks can be recognized as brands even when the native population speaks a different language and reads a different alphabet

Advantages (cont'd)

- Potentially infinite lifespan with renewals (as long as the mark is used)
- COLT (registered in 1889)
- QUAKER (1895)
- PEPSI-COLA (1896)
- MERCEDES (1900)



Strength of Trademarks

Spectrum of distinctiveness

- Fanciful or coined - MOZILLA

- Arbitrary –



- Suggestive



- Descriptive – NUTRITIONAL GRAIN

Secondary Meaning

- Weak marks can acquire distinctiveness through use
- Evidence:
 - Proof of advertising
 - Proof of sales
 - Proof of long use over time
 - Proof of customer recognition

[Trademark Types]

- Visual
 - Words
 - Slogans (JUST DO IT)
 - Alpha-numeric
 - Non-English words and characters
 - Non-Roman alphabet words and characters
 - Position / Location (location of tab on shirt)

[Trademark Types (cont'd)]

- Visual (cont'd)
 - Logos and other designs
 - Shapes and Three-dimensional objects (like perfume bottles)
 - Colors (like Owens-Corning's pink insulation)



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Trademark Types-Trade Dress

- Combination of features
- Used for product or service
- That is distinctive



[Trademark Types (cont'd)]

- Motion
- Tastes
- Tactile
- Auditory
 - Music
 - U.S. Registration No. 2315261 (Intel)
 - U.S. Registration No. 3034331 (McDonald's)
 - U.S. Registration No. 2799689 (AOL)

[Trademark Types (cont'd)]

- Auditory (cont'd)
 - Sounds
 - U.S. Registration No. 3020512 (“wild cat growling”)
 - U.S. Registration No. 2827972 (“cricket chirping”)
 - Voices
 - U.S. Registration No. 2790126 (“You’ve Got Cash”)

[Trademark Types (cont'd)]

- Olfactory-Smells and Scents
 - U.S. Registration No. 2560618 (bubble-gum scent)
 - U.S. Registration No. 2596156 (strawberry scent)
 - U.S. Registration No. 2463044 (cherry scent)
 - U.S. Registration No. 2568512 (grape scent)

[Infringement & Dilution]

- Marks don't have to be identical to be infringing – standard is "likelihood of confusion"
- Multipart test weighing several factors
 - Similarity of marks
 - Similarity of goods
 - Similarity of customers
 - Similarity of channels of trade

Assignments, Licenses, Pledges

Trademarks, like tangible forms of property can be:

- Bought and Sold (“Assignments”)
 - Acquisition of a business
 - Acquisition of a specific product line
- Pledged (as security, like a mortgage) to secure loans to a business
- Licensed (like renting or leasing)
 - Character merchandising (entertainment, movies, television)
 - Sports endorsements and sponsorships

[Domain Names]

- MINISTRY.com *does not equal* ministryCOM™
- You must use the domain as a trademark (& ideally register it)
- Infringement is rampant
- Cybersquatting is pervasive

[Types of Infringement]

- Cybersquatting: Use of an Internet web site "domain name" that is confusingly similar to the owner's brand.
- Phishing: Emails that fraudulently obtain personal financial information for exploitation
- META tags, embedded or hidden text: Using marks in text hidden to the user but locatable by search engines
- Key words, sponsored links, banner advertising
- Pop-up ads: programs downloaded on consumers' computers that initiate when the user goes to brand owner's web site

Ways to Address Domain Name Infringement

- Anti-Cybersquatting Act 17 USC 1125(d) - Elements:
 - Bad faith intent by infringer to profit
 - Registers, traffics in or uses a domain name that is
 - Confusingly similar to owner's mark
- Uniform Dispute Resolution Procedure
- Buy the infringing domain from the infringer