

HMSA Teen Video Awards Contest

COPYRIGHT INFORMATION



Production of a video raises many interesting legal issues. Two important legal topics are Copyright Law and Rights of Privacy and Publicity. We will discuss both issues below.

When your team creates a video for the HMSA Teen Video Awards Contest, you will be creating a copyrighted work. The team will probably own the work together, as joint authors, unless you agree in writing to some other arrangement. So, for example, if the team writes the screenplay for the video, the team will own a copyright in the screenplay. If the team actually films the video, the team will then own the copyright in the video, too. To participate in the awards contest, you will need to agree to license your work to HMSA so that they can use and show the work for the awards contest.

You need to understand your rights in the video. Equally important, you need to understand the rights of others when you make a video. A video often involves the creative efforts of many people. So, you will want to have releases signed by all the people who are not on the team who participate in the video, assigning their rights to the team, or otherwise providing you with a license or release to use their work.

For example, if your friend is not on the team and works for you as a cameraperson, that friend should sign a release assigning his or her rights to the team. If you have a friend act in the video, you will need a release and assignment from him or her. If your friend is a minor (under age 18), you will need the approval of his or her parent.

If you want to use copyrighted material that belongs to someone else, you will need a release from them. So, for example, if you want to show a photograph in your video, you will need the permission of the owner of the copyright in the photograph (that may or may not be the same person as the owner of the physical photograph). If you want to use music in your video, you will need the permission of the owner of the copyright in the composition (generally the composer or his or her representative) and the owner of the copyright in the recording (generally the performer or his or her record company). In other words, you will generally need two separate grants of permission to use music in your video.

The following summarizes Copyright Law and the Rights of Privacy and Publicity. You may also want to research these issues on the Internet. The Copyright Office website is a good source of such information:

www.copyright.gov. Much of the following information comes from that site. Nolo Press also publishes a good book on this topic: *Getting Permission – How to License and Clear Copyrighted Materials Online and Off* by Richard Stim, at www.nolo.com.

After the general discussion that follows, we provide a variety of sample releases that you may wish to use. **Ultimately, you must be responsible for deciding what legal releases you need to secure.** HMSA cannot provide you with legal advice on this or any of the other topics discussed in this document. The information and release forms provided here are simply information and general advice about the law. For specific advice geared to your specific situation, you should consult with a lawyer knowledgeable in the area of copyright and entertainment law.

COPYRIGHT LAW

WHAT IS COPYRIGHT?

Copyright is a form of protection provided by the laws of the United States (title 17, U.S. Code) to the authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the 1976 Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

- To reproduce the work in copies or phonorecords;
- To prepare derivative works based upon the work;
- To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- To perform the work publicly, in the case of literary, musical, dramatic, and choreographic works; pantomimes; and motion pictures and other audiovisual works;
- To display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works; pantomimes; and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- In the case of sound recordings, to perform the work publicly by means of a digital audio transmission.

(over)

Subject to certain limited exceptions, it is illegal for anyone to violate any of the rights provided by the copyright law to the owner of copyright.

Copyright protection subsists from the time the work is created in fixed form. The copyright in the work of authorship immediately becomes the property of the author who created the work. Only the author or those deriving their rights through the author can rightfully claim copyright.

Two General Principles

- Mere ownership of a book, manuscript, painting, or any other copy or phonorecord does not give the possessor the copyright. The law provides that transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright.
- Minors may claim copyright, but state laws may regulate the business dealings involving copyrights owned by minors. For information on relevant state laws, consult an attorney.

WHAT WORKS ARE PROTECTED?

Copyright protects “original works of authorship” that are fixed in a tangible form of expression. The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device. This means typing a work into your laptop computer is sufficient to fix the work in a tangible medium. Copyrightable works include the following categories:

- Literary works.
- Musical works, including any accompanying words.
- Dramatic works, including any accompanying music.
- Pantomimes and choreographic works.
- Pictorial, graphic, and sculptural works.
 - Motion pictures and other audiovisual works.
 - Sound recordings.
 - Architectural works.

These categories should be viewed broadly. For example, computer programs and most “compilations” may be registered as “literary works;” maps and architectural plans may be registered as “pictorial, graphic, and sculptural works.”

WHAT IS NOT PROTECTED BY COPYRIGHT?

Several categories of material are generally not eligible for federal copyright protection. These include among others:

- Works that have not been fixed in a tangible form of expression (for example, choreographic works that have not been notated or recorded, or improvisational

speeches or performances that have not been written or recorded).

- Titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents.
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration.
- Works consisting entirely of information that is common property and containing no original authorship (for example: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources).

HOW TO SECURE A COPYRIGHT

Copyright Secured Automatically Upon Creation

The way in which copyright protection is secured is frequently misunderstood. No publication or registration or other action in the Copyright Office is required to secure copyright. There are, however, certain definite advantages to registration.

Copyright is secured automatically when the work is created, and a work is “created” when it is fixed in a copy or phonorecord for the first time. “Copies” are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm. “Phonorecords” are material objects embodying fixations of sounds (excluding, by statutory definition, motion picture soundtracks), such as cassette tapes, CDs, or LPs. Thus, for example, a song (the “work”) can be fixed in sheet music (“copies”) or in phonograph disks (“phonorecords”), or both.

TRANSFER OF COPYRIGHT

Any or all of the copyright owner’s exclusive rights or any subdivision of those rights may be transferred, but the transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent. Transfer of a right on a nonexclusive basis does not require a written agreement.

Copyright is a personal property right, and it is subject to the various state laws and regulations that govern the ownership, inheritance, or transfer of personal property as well as terms of contracts or conduct of business. For information about relevant state laws, consult an attorney.

Transfers of copyright are normally made by contract.

IDEAS, METHODS, OR SYSTEMS

Ideas, methods, or systems are not subject to copyright protection. Copyright protection, therefore, is not available for: ideas or procedures for doing, making, or building things; scientific or technical methods or discoveries; business operations or procedures; mathematical principles; formulas or algorithms; or any other concept, process, or method of operation.

Section 102 of the copyright law, title 17, United States Code, clearly expresses this principle: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

MOTION PICTURES AND AUDIOVISUAL WORKS

Motion pictures are audiovisual works consisting of a series of related images that, when shown in succession, impart an impression of motion, together with any accompanying sounds. They are typically embodied in film, videotape, or videodisk. Copyright in a motion picture is automatically secured when the work is created and "fixed" in a copy. The Copyright Office registers claims to copyright and issues certificates of registration but does not "grant" or "issue" copyrights. Only the expression (camera work, dialogue, sounds, etc.) fixed in a motion picture is protectible under copyright. Copyright does not cover the idea or concept behind the work or any characters portrayed in the work.

MUSIC

You need to be very careful if you are going to use music in your video. You cannot simply add musical background from your favorite CD. To incorporate most popular music into a video, you need permission from several copyright owners involved. The composer owns rights in the musical work itself. The performer and the studio own rights in the sound recording. The sound recording is separate and distinct from the musical composition and will often have a different copyright owner (except, of course, where the performer is also the composer of the song).

The easiest way to secure music for a video may be to have a friend compose and perform the music for the video. You will still need appropriate permission from your friend to use his or her music, of course.

MUSICAL COMPOSITIONS

The copyright law provides for copyright protection in "musical works, including any accompanying words," which are fixed in some tangible medium of expression. Musical works include both original compositions and original arrangements or other new versions of earlier compositions to which new copyrightable authorship has been added.

The owner of copyright in a work has the exclusive right to make copies, prepare derivative works, sell or distribute copies, and perform the work publicly. Anyone else wishing to use the work in these ways must have the permission of the author or someone who has derived rights through the author.

Classical music from before 1900 is generally in the public domain and can be used by anyone.

SOUND RECORDINGS

The copyright law also provides for copyright protection in sound recordings. Sound recordings are defined in the law as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." Common examples include recordings of music, drama, or lectures.

Copyright in a sound recording protects the particular series of sounds "fixed" (embodied in a recording) against unauthorized reproduction and revision, unauthorized distribution of phonorecords containing those sounds, and certain unauthorized performances by means of a digital audio transmission.

Generally, copyright protection extends to two elements in a sound recording: (1) the contribution of the performer(s) whose performance is captured and (2) the contribution of the person(s) responsible for capturing and processing the sounds to make the final recording.

Just as a book is not the same as the novel it may contain, a sound recording is not the same as a phonorecord. A phonorecord is the physical object in which works of authorship are embodied. The word "phonorecord" generally includes cassette tapes, CDs, LPs, 45 rpm disks, as well as other formats. The sound recording is the work contained on the phonorecord.

DERIVATIVE WORKS

A “derivative work,” that is, a work that is based on (or derived from) one or more already existing works, is copyrightable if it includes what the copyright law calls an “original work of authorship.” Derivative works, also known as “new versions,” include such works as translations, musical arrangements, dramatizations, fictionalizations, art reproductions, and condensations. Any work in which the editorial revisions, annotations, elaborations, or other modifications represent, as a whole, an original work of authorship is a “derivative work” or “new version.”

A typical example of a derivative work is one that is primarily a new work but incorporates some previously published material. This previously published material makes the work a derivative work under the copyright law.

To be copyrightable, a derivative work must be different enough from the original to be regarded as a “new work” or must contain a substantial amount of new material. Making minor changes or additions of little substance to a preexisting work will not qualify the work as a new version for copyright purposes. The new material must be original and copyrightable in itself. Titles, short phrases, and format, for example, are not copyrightable.

Examples of Derivative Works

The following examples show some of the many different types of derivative works:

- Television drama (based on a novel).
- Motion picture (based on a play).
- Novel in English (a translation of a book originally published in Russian).
- Sound recording (long-playing record in which two of the 10 selections were previously published on a 45 rpm single).
- Sound recording (long-playing record in which several of the previously released tracks have been remixed with new instrumentation).
- Sculpture (based on a drawing).
- Drawing (based on a photograph).
- Book of maps (based on public domain maps with some new maps).
- Lithograph (based on a painting).
- Biography of John Doe (which contains journal entries and letters by John Doe).
- Drama about John Doe (based on the letters and journal entries of John Doe).
- Words and music (some of the words are from the Bible).
- Words and musical arrangement (arrangement is based on a piece by Bach).
- Musical arrangement (based on a work by Bach).

Copyright Protection in a Derivative Work

The copyright in a derivative work covers only the additions, changes, or other new material appearing for the first time in the work. It does not extend to any preexisting material and does not imply a copyright in that material.

One cannot extend the length of protection for a copyrighted work by creating a derivative work. A work that has fallen in the public domain, that is, which is no longer protected by copyright, may be used for a derivative work, but the copyright in the derivative work will not restore the copyright of the public domain material. Neither will it prevent anyone else from using the same public domain work for another derivative work. In any case where a protected work is used unlawfully, that is, without the permission of the owner of copyright, copyright will not be extended to the illegally used part.

Who May Prepare a Derivative Work?

Anyone may prepare a derivative work based upon material in the public domain. For copyrighted works, however, only the owner of the copyright has the right to prepare, or to authorize someone else to create, a new version of that work. The owner is generally the author or someone who has obtained rights from the author.

WORK MADE FOR HIRE

Under the 1976 Copyright Act as amended (title 17 of the United States Code), a work is protected by copyright from the time it is created in a fixed form. In other words, when a work is written down or otherwise set into tangible form, the copyright immediately becomes the property of the author who created it. Only the author or those deriving their rights from the author can rightfully claim copyright. Although the general rule is that the person who creates a work is the author of that work, there is an exception to that principle: the copyright law defines a category of works called “works made for hire.” If a work is “made for hire,” the employer, and not the employee, is considered the author. The employer may be a firm, organization, or individual. To understand the complex concept of a work made for hire, it is necessary to refer not only to the statutory definition but also to its interpretation in cases decided by courts.

JOINT AUTHORSHIP

Typically, a motion picture, audio visual work, or commercial sound recording will be a work of joint authorship by a number of contributors. Section 101 of the Copyright Act defines a joint work as “a work prepared by two or more authors with the intention

that their contributions be merged into inseparable or interdependent parts of a unitary whole.” Section 201, on ownership of copyright, states that “authors of a joint work are co-owners of copyright in the work.” Legislative history elaborates: “Under the bill, as under the present law, co-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits.”

Although joint owners of a copyright may independently and concurrently license any of their rights in the work, such licenses are necessarily nonexclusive unless all of the joint owners join in the grant. Thus, in the absence of contractual restrictions, each of the joint authors of a sound recording could grant a different record company the right to distribute the sound recording, subject only to a duty to account to the other joint authors for their share of the profits. Of course, the general practice in the record industry is for all the performers and other contributors to sign work-made-for-hire agreements as well as to assign all of their rights to a single record company, which then has the exclusive right to distribute and otherwise exploit the sound recording.

PUBLICITY AND PRIVACY

In preparing your video, in addition to copyright law, you need to be familiar with rights of privacy and rights of publicity. You should not use the name or likeness of any person unless you are sure that such use will not violate his or her rights.

RIGHTS OF PRIVACY

A person’s right to control the use of his or her name or likeness is, in some ways, similar in effect to the right of a company to control the use of its trademarks. For example, the Hawaii Supreme Court has noted: “A radio personality’s name may have substantial commercial value for advertising purposes which exists apart from his services as an announcer. The exclusive use by the first appropriator of a name with this value will be protected.” The origin of these rights is quite different, however. Trademark law is generally based upon the need to protect the consumer from confusion in the marketplace. Rights of Privacy and Publicity are based on the rights of the individual.

Traditionally, there have been four separate rights of privacy: the right to be free from intrusive invasion of privacy, the right to prevent public disclosure of private facts, the right not to be portrayed in a false light, and

the right to prevent an invasion of your privacy by appropriation of your identity for commercial purposes. The last of the four is similar to the Right of Publicity, which we will discuss on page 6.

The right to be free from an intrusive invasion of privacy protects you from eavesdropping and hidden microphones in private places. Generally, this is a common law right. Hawaii’s Constitution, however, recognizes an express right to privacy.

The right to prevent public disclosure of private facts is triggered by the disclosure of private facts that would be highly offensive to a reasonable person. This right can be violated even if the facts are true – this right protects against the public disclosure of embarrassing private facts. Not all facts are embarrassing or protected. Facts that have been held protected include medical history or mental health records. This right can conflict with constitutional freedoms of speech and press. The courts try to balance an individual’s claim to privacy with the press’s need to report facts of genuine public interest.

The third right of privacy, the right not to be portrayed in a false light, often overlaps with the law of defamation. Indeed, some courts have rejected this right, holding that it adds nothing to the law of defamation. A claim for false light invasion of privacy requires a showing of publication of a false statement or representation about the plaintiff, which would place the plaintiff in a false light that would be highly offensive to a reasonable person. Public figures must show “actual malice.” Defamation is very similar. It requires the publication of a false statement of fact about the plaintiff, which is understood in such a way as to tend to harm the reputation of the plaintiff. Again, public figures must show “actual malice,” that is, that the defendant knew the statement was false, or acted with a reckless disregard for the truth or falsity of the statement. Private individuals can prevail simply by showing that a defendant negligently made the false statement. Truth is a defense to both defamation and false light privacy claims.

The fourth right of privacy is the right to prevent an invasion of your privacy by appropriation of your identity for commercial purposes. Violation of this right occurs when the defendant, without permission, uses some aspect of the plaintiff’s identity or persona in such a way that plaintiff is identifiable from defendant’s use, and defendant’s use causes some damage to plaintiff’s peace of mind and dignity, with resulting injury measured by plaintiff’s mental or physical distress and related damages.

Hawaii recognizes the common law cause of action for invasion of a right of privacy where the defendant uses the plaintiff’s name or picture without permission in advertising the defendant’s product.

RIGHT OF PUBLICITY

The Appropriation Right of Privacy is similar to the Right of Publicity, the inherent right of every person to control the commercial use of his or her identity. They are, in effect, two sides of the same coin. The Right of Publicity says only you have the right to profit commercially from the use of your identity. The Appropriation Right of Privacy is the flip side of that, which states it is an invasion of your privacy for someone else to use your identity for commercial purposes without your permission.

The Right of Publicity is not just for celebrities. You need to be careful if you are using pictures in your video of happy consumers enjoying snacks at your snack shop, even if they are not celebrities. Everyday folk have just as much right to control the use of their identity for commercial purposes as do celebrities, even if the issue does not arise as often for them.

While the lines may sometimes be blurry, it is clear that use of a person's photograph for a news event is more likely to be protected than use for an advertisement. So, you should be aware that even if the evening news can use a video of news events – perhaps your friendly actor coming out of your snack shop – if you use the same video for commercial advertisements, you may run into problems.

How do you avoid these potential problems? The simplest way is to have a release signed by every person whose photograph or likeness appears on any materials you publish, which grants you the permission to use their likeness for your purposes. If you hire a videographer to shoot stock video for use in your materials, generally the videographer will secure model releases. As part of your agreement with the videographer or other contractor providing content for your materials, you want to add a requirement that they provide a model release for each person whose voice or appearance is captured in the video.

RELEASES

Following are a variety of releases that you may find helpful.

- The **Music (Synch) License – Composer Form** may be appropriate for permission from a composer to use his or her music in the video.
- The **Music (Master Use) License – Performer Form** may be appropriate for permission from a performer to use his or her performance of music on the video. Remember that copyright protection generally extends to two elements in a sound recording: (1) the contribution of the performer(s) whose performance is captured and (2) the contribution of the person(s) responsible for capturing and processing the sounds to make the final recording. The original recording is called a “master,” so this type of license is often called a “Master Use” license. So, if you hope to use a commercial recording in your video, you may need the permission of both the performer and his or her record company. Often, the record company has the right to grant such permission for both the company and the performer under contract with the record company. If you are going to have a friend perform for you, and you will record his or her work, you may only need your friend's permission to use the performance. (You will still need the composer's permission to use his or her song, of course, unless it is a classical or folk song in the public domain.)
- The **Production Agreement and Release Form** may be appropriate for those who assist in the production of the video.
- The **On-Screen Release Form** may be appropriate for those who act in the video or provide voice-overs.
- The **Location Release Form** may be appropriate for those who provide access to private locations for filming.
- The **Materials Release Form** may be appropriate for those who allow use of other copyrighted materials in the video, such as photographs or sculptures.