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ENFORCEABILITY OF WAIVERS OF PROSPECTIVE LIABILITY

BY JAMES V. IRVING, ESQUIRE



People and businesses providing physically risky activities for a fee often attempt to limit their liability by requiring each participant to sign an agreement which purports to absolve the business in advance from claims arising from injury to the participant. Such agreements, known as waivers, releases and exculpatory agreements, are enforceable in most jurisdictions, but not in Virginia.

Business invitees visiting ski slopes and amusement parks are probably familiar with the "Waiver of Liability" forms participants are asked to sign before the fun begins. Typically they recite the physical risk inherent in the activity, acknowledge having been warned of the danger, and recite that the business owner cannot guarantee their safety. Finally, there is a paragraph, usually in bold print, by which the participant absolves the business owner of any and all liability for any injury that the participant may suffer in the undertaking.

More than 20 years ago, Robert Hiett agreed to participate in the swimming leg of a triathlon sponsored by the Lake Barcroft Community Association in Fairfax County. As part of the entry process, Hiett signed a required Waiver of Liability form which stated, in part, "I...waive, release and forever discharge any and all rights and claims for damages which I may have or may hereafter accrue to me against the organizers and sponsors... for any and all injuries suffered by me in said event."

At the start of the swim, Hiett dove into the lake, struck his head on a fixed object in the water and incurred an injury that rendered him a quadriplegic. Hiett filed suit in the Fairfax Circuit Court, where Judge Thomas Middleton dismissed his claim, ruling that absent fraud, duress, illiteracy or the denial of an opportunity to read the form, the Waiver of Liability agreement was a valid, enforceable contract.

In Hiett v. Lake Barcroft Community Ass'n, the Supreme Court overturned the trial court's ruling allowing Hiett's claim to go forward. Citing a case from 1890 which opined that prospective releases left the releasing party "at the mercy" of the other party's own negligence, the Court noted that public policy "has long prohibited prospective releases of personal injury damages." Subsequent Virginia decisions have affirmed the right

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of parties to contract to prospectively release claims for property damages as well as indemnification from liability to third parties for such damages. However, the bar against waivers for prospective personal injury damage remains alive in the Commonwealth. While Virginia's is a minority view, most, if not all states prohibit waivers of liability based on willful or wanton misconduct, gross negligence or intentional acts. Exculpatory agreements may be subject to additional limitations in Virginia and other jurisdictions. For example, in at least one state, a parent lacks the legal authority to waive his or her minor child's future causes of action for personal injuries.

In Virginia, many proprietors of physically risky ventures continue to require participants to sign waivers of personal injury claims, perhaps assuming that, enforceable or not, the existence of such an agreement may be a deterrent to a law suit. These agreements do create an additional hurdle, and they continue to have merit as waivers of other claims—to demonstrate the participant knew and assumed the risk—and because they may become more broadly enforceable if the law changes.

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COPYRIGHT LAW 101

BY ASHLEY R. DOBBS, ESQUIRE



Every business has intellectual property that is entitled to protection and from which it can potentially derive profit. One such area is copyright law; although there is often confusion about (1) what exactly is

protected by copyright law, (2) how the copyrights are secured, and (3) who exactly is the owner when a copyrightable work is created by an independent contractor or subcontractor.

Copyright Protects Tangible Expressions of Ideas

Copyright law protects “original works of authorship that are fixed in a tangible form of expression.” It is limited to these specific 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; and architectural works. But, these categories should be interpreted broadly.

Does Your Business Own Any Copyrightable Works?

Copyright protection isn't just for authors and artists. Does your business produce, create or record any of the following in a tangible form, paper or digital? Then you most likely have copyrightable works.

- Architectural plans
- Blogs
- Cartoons
- Demonstrations
- Magazines
- Marketing materials
- Multimedia presentations
- Newsletters
- Program curricula
- Slideshows
- Training materials
- Websites
- Articles
- Books
- Computer software
- Graphic art
- Maps
- Motion pictures
- Newspapers
- Podcasts
- Publications
- Trade journals
- Photographs

Not Everything is Protected by Copyright

It's important to note is what is NOT protected by copyright law. Only the actual expression of an author is protected, not the underlying idea itself. Copyright protection does NOT extend to:

- Ideas
- Methods, processes
- Systems

- Ideas or procedures for doing, making, or building things
- Scientific or technical methods or discoveries
- Business operations or procedures
- Method of operation
- Improvisational speeches
- Unwritten or unrecorded performances
- Titles, names
- Short phrases, slogans
- Familiar symbols
- Variations of typographic ornamentation, lettering, or coloring
- Listings of ingredients
- Standard calendars
- Charts
- Tape measures and rulers
- Lists or tables taken from public documents
- Blank forms for recording rather than conveying information

What Rights Does Copyright Provide?

Copyright means the owner has the exclusive right to do and authorize others to do the following to the original work:

- reproduce or copy;
- prepare derivative works;
- distribute copies to the public by sale, license, or lending;
- perform the work publicly or by means of a digital audio transmission; and
- display the work publicly.

However, these rights are subject to certain statutory exceptions, such as “fair use” and parody. The copyright owner may be entitled to recover certain statutory and civil damages and other remedies for infringement of these rights if the work is registered with the U.S. Copyright Office.

Who is the Owner of the Copyright?

A work is protected from the time it is fixed in its tangible form. The owner is the person who created the work. When a person is an employee and the work is in the scope of their employment, the work is considered “work for hire” and the owner is the company. However, if a person is an independent contractor creating work for a company, the owner is the person UNLESS certain conditions are met: (1) there must be a written agreement indicating that the work is being created for the company by the contractor as a “work for hire” AND (2) the work must fall into one of the following categories:

- contribution to a collective work
- part of a motion picture or other audiovisual work
- translation
- supplementary work
- compilation
- instructional text
- test and answer material
- atlas

Notice of Copyright

It is to your benefit to put a copyright notice on a work, although it’s no longer required under U.S. law. The notice precludes any infringer from claiming they didn’t know the work was protected. An example of the proper form is: © 2012 Author’s Name

How to Secure a Copyright

Copyright in a work is secured automatically when the work is created in a fixed medium. No publication or registration or other action is required to secure copyright. However, there are definite advantages to registration, including the right to recover statutory damages for any infringement of the work.

Filing fees range from \$35 - \$65 per work, although under certain circumstances group registrations may be possible. If

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you wish to secure a copyright registration, either visit www.copyright.gov or find an intellectual property attorney to assist you.

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