

Get It Right

A Lesson on the Basics of Copyright Law

Intellectual Property (IP) rights include patents, copyrights and trademarks or service marks. While trademarks and service marks have their roots in common law and fall under both state and federal law, copyrights and patents are strictly federal matters. Copyright can be further distinguished from its sister, IP rights, in that copyright is said to subsist from the time the work is created in a fixed form. In other words, while a writer of a book, for example, may have a copyright in such work, in order to enforce the IP rights associated with that work, the writer must register the work for copyright protection with the Library of Congress' Copyright Office.

Copyright, as you will see, is a bundle of rights afforded to the authors of "original works of authorship" under the Copyright Act of 1976, as amended, Title 17 U.S.C. §§101-810; 1001-1010. Authors of "original works of authorship," include literary, dramatic, musical, artistic and certain other intellectual works. A copyright owner's bundle of rights generally enables the owner to have the exclusive right to do, and to authorize others to do, the following:

- © To reproduce the work in copies;
- © To prepare derivative works based upon the original copyrighted work;
- © To distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, license 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.

WHAT WORKS ARE PROTECTED?

Copyright protects "original works of authorship" that are fixed in a tangible form of expression. If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date. The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape or microfilm. Copyrightable works, while viewed broadly, include the following categories:

- © Literary works, such as the latest John Grisham book, computer programs and most compilations;
- © Musical works, including any accompanying words, such as Nat King Cole's classic "Unforgettable";

- © Dramatic works, including any accompanying music, such as the Broadway musical sensation *The Producers*;
- © Pantomimes and choreographic works, such as the infamous rendition of "One" in the Broadway hit *A Chorus Line*;
- © Pictorial, graphic, and sculptural works, such as maps and architectural plans;
- © Motion pictures and other audiovisual works, such as the historic *Gone With the Wind*;
- © Sound recordings, such as the latest chart topper on the Billboard 100; and
- © Architectural works, such as a famous building by I.M. Pei.

Creative or not, there are several categories of work that are generally not eligible for federal copyright protection. These include:

- © 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; and mere listings of ingredients or contents;
- © Ideas, procedures, processes, systems, methods or operations, concepts, principles, discoveries or devices, regardless of the form in which they are described, explained, illustrated or

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embodied in such work, as distinguished from a description, explanation, or illustration; and

- © Works consisting entirely of information that is common property and containing no original authorship, such as standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources.

Works made for hire are also protectable under federal copyright law. In this instance, while an author may create the work, the copyright belongs to someone else.

A work made for hire is a work prepared by an employee within the scope of his or her employment or a work specially ordered or commissioned, provided the parties expressly agree in a written document signed by both of them that the work shall be considered a work made for hire.

SECURING A COPYRIGHT

Copyright is secured automatically upon creation of the work; the rights to enforce it are not. 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 a copyright; however, the advantageous bundle of rights commonly associated with a copyright are not available to the owner of the work without the registration of the work.

REGISTRATION

Why register a work for federal copyright protection? Copyright registration is a legal formality that makes a public record of the basic facts of a particular copyright. In theory registration is not a condition to copyright protection; in reality trying to prove copyright ownership and an author's entitlement to the protection afforded by the Copyright Act is an uphill, costly battle without registration. Therefore, the copyright law provides several inducements or advantages to encourage copyright owners to register their works of original creation. Some of these advantages include:

- © Registration establishes a public record of the copyright claim.
- © Before an infringement suit may be filed in court, registration is necessary for works of U.S. origin.
- © If made before or within five years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the Copyright Certificate.
- © If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.
- © Registration allows the owner of the copyright to record the registration with the U. S. Customs Service for protection against the importation of infringing copies.

WHAT IS A COPYRIGHT NOTICE?

A copyright notice is what it says. It puts the world on notice that the subject work is protected by federal copyright law. And while it may not stop others from infringing upon the work, it does serve as a deterrent. It is the responsibility of the copyright owner to place a copyright notice on his or her work and does not require advance permission from, or registration with, the Copyright Office.

The use of a copyright notice is no longer required under U.S. law, although it is quite beneficial. Because prior law did contain such a requirement, however, the use of notice is still relevant to the copyright status of older works. Regardless of the law on the use of copyright notice, it is important because it informs the public that the work is protected by copyright, identifies the copyright owner and communicates to others the year of first publication of the subject work. Furthermore, in the event that a work is infringed, if a proper notice of copyright appears on the published copy or copies to which a defen-

dant in a copyright infringement suit had access, then the court will give no weight to a defendant's claim of "innocent infringement."

A copyright notice should contain all of the following elements:

- © The symbol ©, the word "copyright" or the abbreviation "Copr.";
- © The year of first publication of the work. In the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic or sculptural work, with accompanying textual matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys or any useful article; and
- © The name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

An example of a copyright notice incorporating all of the three requisite elements is © 2005 IAITAM.

HOW LONG DOES A COPYRIGHT LAST?

The duration of the copyright depends on whether the work was created before or after January 1, 1978. In addition, that duration is further segmented by whether the work is a joint work or a work made for hire. In general, works created on or after January 1, 1978 have a copyright that endures for a term of the life of the author plus 70 years. In the case of a joint work created by two or more authors, the copyright endures for a term consisting of the life of the last surviving author plus 70 years after the death of such last surviving author. In the case of a work made for hire, the copyright endures for 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.

Works created prior to January 1, 1978, were subject to the copyright law existing at that time, which provided for a copyright duration of 28 years with a renewal option for a second 28-year period. Now, the law provides that if a work created prior to January 1, 1978 is in its first 28-year term, it may be renewed for an additional 47 years. The rationale behind the change in the law was that it was unfair for those copyrights that are under contract for reproduction to have their rights cut short before the end of the contract period. If a copyright is in its second 28-year term, it may be renewed for an additional term of 19 years. In either case, the new renewal terms enables those works to enjoy a copyright protection period of 75 years. This change in the law ensures an author and his dependents and heirs the fair economic benefit of the copyrighted work.

Copyright law is complex and ever-changing. The debate on how long a copyright should last is as old as the oldest copyright statute and will continue to be open to debate as long as there is a copyright law. It will also rage on in the global economy we live in, where oftentimes an author enjoys better copyright protection abroad than he does in his own backyard.

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