

Cislo & Thomas LLP[®]
presents

The Manager's Guide to Intellectual Property

SECOND EDITION

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CHAPTER 5

Copyrights

What Is a Copyright?

Copyright protection exist ‘in original works of authorship fixed in any tangible medium of expression.’ (17 U.S.C. § 102). Thus there are three requirements for copyright protection:

1. It needs to be the right type of “work” as discussed below.
2. “Originality” is required. The “originality” requirement excludes from copyright protection such items as simple geometric shapes, short phrases, and the famous “happy face.”
3. The work must be “fixed in a tangible medium.” This excludes from copyright protection mere ideas that have yet to be recorded, works such as oral presentations that are not recorded, and a whiteboard presentation that can easily be erased.

Copyright protection is available for both published and unpublished works.

Copyright protection exists from the time a work is created in fixed form. It is automatic. No registration is required, although there are important advantages of registration, as discussed below.

What Works Can Be Protected by Copyright?

Copyrightable works include the following:

- literary works, including books, manuscripts, plays, poems, software, databases, manuals, scripts, e-mails, tweets, blogs, and proposals
- musical works and sound recordings, including any accompanying words
- dramatic works, including any accompanying music
- pictorial, graphic, and sculptural works, including toys
- motion pictures and other audiovisual works
- architectural works
- websites

What Does Copyright *Not* Protect?

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

- titles such as book titles; names such as band 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, methods, systems, processes, concepts, principles, discoveries or devices, as distinguished from a description, explanation, or illustration (i.e., protects expression, not mere ideas)
- works consisting entirely of information that is common property and containing no original authorship (e.g., standard calendars,

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height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources)

- useful articles, except that ornamentation or design elements that are separable from the useful article may be copyrighted (e.g., a copyrightable vase does not lose copyright protection because it is used as a lamp)

Who Owns the Copyright?

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.

In the case of works made for hire, the employer and not the employee is considered to be the author. Section 101 of the copyright law defines a “work made for hire” as a work prepared by an employee within the scope of his or her employment, or a work specially ordered or commissioned for use as

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

Work by a nonemployee is a work made for hire only if both parties expressly agree in a signed written agreement and it is one of the above identified works. If it is not a work for hire, which is

often the situation, then a written assignment of copyright ownership is needed. Thus if a nonemployee is used to create a work, it is important to get copyright ownership specified in writing; otherwise the nonemployee owns the copyright. For example, if an outside contractor is used for writing software or creating an advertisement, a written agreement is needed to transfer ownership of the copyright.

The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary. Each can license the copyright, but generally has to share with the co-owner the returns from licensing.

Mere ownership of a book, manuscript, painting, or any other copy does not give the possessor any rights in the copyright of the work. The law provides that transfer of ownership of any material object that embodies a protected work does not convey by itself any rights in the copyright.

How Long Does a Copyright Last?

The term of copyright for a work depends on several factors, including whether the work is published and, if so, the date of first publication. As a general rule, for works created after January 1, 1978, copyright protection lasts for the life of the author plus an additional 70 years. For a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first.

What Are the Rights of the Copyright Owner?

The owner of a copyright has the exclusive right to do and to authorize others to do the following:

- Reproduce the work such as on a copy machine or distribute electronic copies on the Internet.
- Prepare derivative works such as a translation or make a movie from a book.
- Distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending.
- Perform the work publicly in the case of literary, musical, dramatic, and choreographic works; pantomimes; and motion pictures and other audiovisual works.
- Display the work publicly.

What Is Copyright Infringement?

As a general matter, copyright infringement of a copyrighted work occurs by reproducing, distributing, performing, publicly displaying, or making the work into a derivative work without the permission of the copyright owner. Copyright infringement can easily be avoided—do not copy. For example, if you are a jewelry designer, do not copy a jewelry item that looks like a bee if that is a design you want to produce. Instead, create your own design based on your artistic interpretation of a real bee.

How to Give Notice of Copyright

The use of a copyright notice is not required under U.S. law, although it is beneficial. Use of the notice

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may be important because it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication. Furthermore, in the event that a work is infringed, if a proper notice of copyright appears, then weight may not be given to a defendant's claim of innocent infringement in mitigation of damages.

The notice for visually perceptible copies should contain the following three elements:

1. the symbol © (the letter C in a circle), the word *copyright*, or the abbreviation *Copr.*
2. the year of first publication of the work (The 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.)
3. the name of the owner of the copyright in the work, or an abbreviation by which the name is recognizable, or a generally known alternative designation of the owner

Example: © 2011 *John Doe*

The author or copyright owner may wish to place a copyright notice on any unpublished copies of an unpublished work that leave his or her control.

Example: Unpublished work © 2011 *Jane Doe*

Should Copyright Be Registered?

Copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. However, registration is not a condition of copyright protection. That said, even though registration is not a requirement for protection, the copyright law provides several advantages to encourage copyright owners to register their copyrights. Among these advantages are:

- Registration establishes a public record of the copyright claim.
- Some courts may require registration for works of U.S. origin before an infringement suit can be filed.
- Registration before or within five years of publication establishes a presumption in court of the validity of the copyright and of the facts stated in the certificate.
- Registration within three months after publication of the work or prior to an infringement of the work makes all potential remedies available to the copyright owner in a court action, including statutory damages and attorney fees, which often are the most valuable remedies. Otherwise, only an award of actual damages and the infringer's 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.

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Sample of a Copyright Registration Certificate

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Maria A. Pallante

Acting Register of Copyrights, United States of America

Registration Number
TX 7-320-620

Effective date of
registration:
September 17, 2010

Title _____

Title of Work: Comet

Completion/Publication _____

Year of Completion: 1993

Date of 1st Publication: April 1, 1993

Nation of 1st Publication: United States

Author _____

▪ Author: Parsons Corporation

Author Created: computer program

Work made for hire: Yes

Citizen of: United States

Domiciled in: United States

Copyright claimant _____

Copyright Claimant: Parsons Corporation

100 West Walnut Street, Pasadena, CA, 91124, United States

Rights and Permissions _____

Organization Name: Sheldon Mak & Anderson

Name: Norman R. Van Treeck

Email: nvantreeck@usip.com

Telephone: 626-796-4000

Address: 100 Corson Street, Third Floor

Pasadena, CA 91103 United States

Certification _____

Name: Norman R. Van Treeck

Date: September 17, 2010

Applicant's Tracking Number: 20589

International Copyright Protection

There is no international copyright that protects an author's writings throughout the entire world. Protection against unauthorized use in a particular country depends on the national laws of that country. Most countries do offer protection to foreign works under certain conditions, and these conditions have been greatly simplified by international copyright treaties and conventions.

Avoiding Copyright Infringement

Copyright infringement is easy to avoid. DO NOT COPY. For example, if you want to have a picture of the Empire State Building on a website, take your own picture or license a stock photo. The copyright maxim applicable is "Copy the original, do not copy the copy."

For software, it is permissible to have software that performs the same function as someone else's software. Both Word and WordPerfect are useful for word processing. However, copying the source code of a software program is generally not allowed.

The Risk of Open Source Software

The term "open source" with regard to software is software that is released to the public with source code so that the public can use it in software programs. It is available without payment. It is used by programmers as a convenient way to have software perform certain functions without the laborious task of writing code.

However, it typically comes with a license that limits rights in the software program that incorporates the open source code. For example, any patent rights and copyrights in the software program may be dedicated to the public because of the license that accompanies the open source software.

FAQs

Does failure to put a copyright notice on a work result in loss of a copyright?

No, it does not for any recently created work (although it can result in loss of copyright for works published prior to 1976). Failure to include a copyright notice can affect the remedies available against an infringer.

Does failure to register a copyright on a work result in loss of a copyright?

No, but it does affect the remedies available against an infringer.

How is a copyright different from a patent or a trademark?

Copyright protects original works of authorship, while a patent protects inventions or discoveries. Ideas and discoveries are not protected by the copyright law, although the way in which they are expressed may be. A trademark protects words, phrases, symbols, or designs identifying the source of the goods or services of one party and distinguishing them from those of others.

What is a “poor man’s copyright”?

A “poor man’s copyright” refers to the practice of sending a copy of your own work to yourself by

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registered mail. There is no provision in the copyright law regarding any such type of protection, and it is not a substitute for registration. The poor man's copyright is an urban myth.

Is a copyright good in other countries?

The United States has copyright relations with most countries throughout the world, and because of these agreements, the United States and these countries honor the copyrights of one another's citizens. However, the United States does not have such copyright relationships with every country.