

COPYRIGHTS - SHOULD THEY BE REGISTERED?

The Berne Convention Implementation Act of 1988, effective March 1, 1989, amended U.S. copyright law to implement United States adherence to the Berne Convention for the protection of literary and artistic works.

Prior Law. Under prior U.S. copyright law, an author retained ownership from the moment of the work's creation until it was published. Once published, the author continued to maintain ownership only if the work had the proper statutory notice. Further, copyright registration was a prerequisite to filing any legal action for copyright infringement.

Berne Convention. Under the Berne Convention there is automatic copyright protection without registering, depositing copies with the Copyright Office or using copyright notices. The problem developed by the Berne Convention is that it is no longer possible to examine a source document and conclude, based on the omission of a copyright notice, that it is in the public domain since notice is no longer required.

Registration remains a prerequisite for U.S. authors prior to filing a federal infringement action. Registration is not required when a non-U.S. author brings an action. For all authors, copyright registration must be obtained within three months of first publication or prior to commencement of an infringement action to recover statutory damages and attorneys' fees. Therefore, there remains a big incentive, even for non-U.S. authors, to obtain early registration.

Because of the advantages of registration, our firm continues to recommend registration of copyrights and the use of copyright notices.

Copyright Protection. The originality of the author's expression is the essence of the proprietary interest. Copyright protection does not generally extend to facts or ideas. Section 106 of the Copyright Act grants the copyright owner the exclusive right to do the following: (1) to reproduce the copyrighted work; (2) to prepare derivative works based upon a copyrighted work; (3) to distribute copies of the copyrighted work to the public or on sale or other transfer of ownership, by rental, lease or lending; 4) to perform the copyrighted work publicly in the case of literary, music or dramatic or choreographic works, pantomime or motion pictures or other audio visual works; and 5) to display the copyrighted work publicly, in the case of literary, musical or dramatic and choreographic works, pantomimes, pictorial, graphic or sculptural works including individual images, motion picture or other audio visual works.

Copyright Ownership. Only the author or those deriving rights through the author can rightfully claim copyright protection. In the case of works made by employees ("Work for Hire"), the employer and not the employee is presumptively considered the author. The authors of a joint work are co-authors of the copyright unless there is an agreement to the contrary. Work performed by outside parties such as advertising agencies, photographers, etc. are generally considered to be owned by the third party unless there is some type of assignment or "work for hire" agreement.

Software. Copyright registration of computer software is generally accomplished through filing the first and last twenty-five pages of the work, together with a page containing the copyright notice. Generally this means the filing of part or all of the source code. Many authors resist the filing of source code and rely instead on the filing of the object code for registration. The Copyright Office will accept object code for registration but only if the author submits a written statement certifying the object code was derived from the copyrightable source code. Software authors may also explore the patentability of their software. We recommend the filing of object code for software copyrights.

Architectural Works. Prior to 1990, the Copyright Act did not generally afford protection to architectural works. Buildings were considered “useful articles.” The U.S. Congress passed the Architectural Works Copyright Protection Act of 1990 to help comply with the requirements of the Berne Convention. This Act protects the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings, but exempts pictorial representations. See 17 U.S.C. § 101.

Conclusion. Copyrights should still be registered for protection. Our firm regularly files applications for copyright registrations and can also work to teach company personnel to file their own applications. We also work on infringement issues, work for hire agreements, assignments, and licenses.

If you have any questions, please call Kevin J. Collette at 206-654-2252.