Questions of Copyright:
Another Weapon in Your Intellectual Property Arsenal

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STARTING UP:
Practical Advice for Entrepreneurs

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In the last two columns we have talked about two categories of intellectual property law: trademark law, which protects a name, phrase or symbol that is associated with a company's goods or services, and patent law, which protects an invention or idea. Copyrights are a third weapon in a company's intellectual property arsenal.

What is a Copyright? Copyright protection is available under Federal law for any "original work of authorship fixed in any tangible medium of expression." Originality requires that the work be created through the independent effort of the author. Copyrights exist in written works (books, manuals, letters), computer programs, databases, paintings, and audio and video works. Abstract ideas, processes, methods of operation, facts, or utilitarian objects are not susceptible to copyright protection, but may sometimes be protected by trade-secret law or patent law.

Protection of Expression. Copyright protects only the manner in which an idea is expressed, not the idea itself. As a result, the protection of copyright is not absolute because third parties may independently develop the same idea or "reverse engineer" a product to determine how it is made.

What Rights Does a Copyright Owner Have? A copyright owner has the exclusive right to copy, publicly perform and distribute the copyrighted material and to prepare derivative works. Copyrights can be transferred, and any or all of these rights can be licensed.

Fair Use. Not all copying is prohibited. For example, there is a "fair use" defense to a copyright infringement action. This permits copying for purpose of scholarly research, commentary and similar activities. The courts apply a multifactor test that looks at the purpose of the copying, the amount of material copied and the impact of the copying on the market for the copyrighted work. Fair use is a somewhat limited defense.

When is a Copyright Created? A copyright comes into existence at the time an original work is authored; e.g., as I am writing this article, or as your child writes a letter to Santa Claus.

Registration of Copyright. Registering the copyright with the Library of Congress is not required to have a copyright. However, with certain exceptions, you must register the copyright before you can bring a lawsuit for copyright infringement. A court will award you the "actual damages" that you can prove you incurred as a result of an infringement. For infringements occurring after you register a copyright the court may award "statutory damages" of up to $20,000 ($100,000 in the case of a willful infringement) plus attorneys' fees without proof of actual injury. Registration is a simple and inexpensive process--you file a short form, pay a very modest fee and deposit a copy of the work. In the case of computer software there are special rules that allow you to file only a portion of the computer code. For further information on registration go to the Copyright Office at http://www.copyright.gov/

Copyright Notice. Prior to 1989, it was necessary to put a copyright notice on a work in order to obtain a copyright in a published work. This requirement was eliminated when the United States joined the Berne Convention, the major international copyright regime. However, you should still use a copyright notice because there are certain benefits that can be obtained if a notice is used (such as the ability to avoid a "innocent infringer" defense). The following form is recommended: "Copyright [year of publication], [Name of copyright owner], All Rights Reserved". Use the © symbol in place of the word “Copyright” if the copyright has been registered.

Who Owns a Copyright? In general, the author of an original work is the owner of the copyright. There are two main exceptions to this rule. First, an employer is the owner of the copyright on a work created by an employee in the course of his or her employment.

If the creator of a work is not your employee, that person will own the copyright unless the work is within one of the nine statutory categories of works known as "works for hire" and there is a written agreement that provides that the work will be owned by the company that commissions it. Some of "works for hire" categories include a contribution to a collective work, a translation, a compilation, an instructional text and tests. If the work does not fall into one of these categories, the only way in which you can obtain ownership of the copyright is to obtain an assignment in writing from the nonemployee author.

How Long Does a Copyright Exist? Under current law 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 an anonymous work, a pseudonymous work, or 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. Works copyrighted under older law may be protected for different periods.

Emerging Issues. Traditional copyright concepts have been put to the test by advances in computer and information technology. For example, once it was determined that computer programs were entitled to copyright protection, a series of court cases extended the scope of copyright protection for computer programs to such an extent that it threatened to protect the "idea" instead of the "expression". Recently, that trend has started to be reversed. There are specific rules for the “deposit” of computer source code with the Library of Congress which permits portions of the source code to be “redacted” or “blacked out”.

Multimedia is an emerging area. It combines photography, music, film, text and computer programs, each of which had its own industry customs for licensing and exploitation of the rights granted by copyright. Making sure that these rights mesh in a multimedia product can be a difficult task. In addition, advances in computer technology now enable multimedia presentations to be created on personal computers rather than in professional studios with equipment costing hundreds of thousands of dollars. As a result there are many more persons capable of producing infringing materials.

Copyright issues are looming large on the Information Superhighway. How is the effort of authors going to be protected and rewarded if it is possible to scan materials into a computer, and transmit them across the country or around the world in a matter of seconds?

I hope you find this overview of copyright law to be helpful. By the way, Boston Business Journal and I hereby grant you the right to copy and distribute this article, as a whole, so long as you identify the source and do not charge for it.

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