Copyrights: Who Owns Them?

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This is the third of my three columns on intellectual property. The first two covered patents (Jan, p. 10) and trademarks (Feb/Mar, p. 30). This article will cover copyright law and evolving problems related to changing technology.

What is a copyright?

A copyright is protection afforded authors of "original works of authorship" under US Code Title 17. Protection is provided to "literary, dramatic, musical, artistic and other intellectual works in fixed tangible form." The latter includes architectural, pictorial, graphic and sculptural works. A copyright gives the owner exclusive rights to reproduce, distribute and publicly perform or display the work. The owner has the right to sell, trade or otherwise transfer any of these rights.

Ideas, methods and systems are not eligible for copyright protection. This includes ideas or procedures for making or building things, scientific and technical methods and discoveries or any other concept or method of operation. Patent law covers these areas.

How is a copyright claimed?

Under the 1906 Copyright Act, publication was the key to obtaining a copyright. That requirement was eliminated by the 1976 Copyright Act, which provides that copyright protection starts when the work is created in fixed form. Any published work must be deposited with the Library of Congress, even if the copyright is not registered.

Copyright registration is not legally required, although it is advantageous. Using the copyright mark ("©") followed by the creation year and the holder's name has been optional since 1989. Using the mark to identify a creative work as one for which a copyright is claimed eliminates the possibility of an "innocent infringement defense."

Registering a copyright

Copyright registration is administered by the Copyright Office of the Library of Congress, which publishes more than 100 pamphlets on the process. Since these publications contain topical information, most have different lists of what can receive a copyright. Circular 40, on works in the visual arts, lists 26 families of works. One such family includes drawings, architectural plans and diagrams.

The registration process simply requires a completed application form, a copy of the work to be registered and a fee of $30 per registration. A series of related works by the same author may be submitted under a single title with one application. The process requires eight months, after which a Copyright Registration Certificate is issued.

Registration covers only works submitted. "Blanket protection" of works in a series is not available unless every work in the series is submitted.

In processing an application, the Copyright Office does not evaluate whether works are similar to other works. It also does not advise on possible copyright infringement. These are court matters.

Registration is required before the owner may litigate against an infringement. If the registration process was started before an infringement began, or within three months of the work's publication, the owner is entitled to statutory damages, plus legal fees, for infringement. Statutory damages range up to $100,000 without proving economic losses.

Creative services and work for hire

Most of us in the petroleum equipment industry use outside services for publication design, advertisements and photography. Who owns the copyrights to creative works of outsiders? Common law, copyright law and recent court cases generally provide a one-time-use limited license to those who commission and pay for creative works. Unless otherwise contractually specified, the works' creators own the copyrights.

Work classified as "work for hire" is the exception to the rule. Employee-created works are owned by the employer if created on company time with company resources. Copyrights to works created by employees on their own time belong to them, unless otherwise specified in a contract. To qualify as work for hire, outside party work must be directed and supervised by the client, and contractual assignment of copyrights to the client must be in place.

Work-for-hire clauses in the Copyright Act were clarified in a 1989 Supreme Court ruling in CNNV vs. Reid when the court defined "conventional employment." This decision resulted in some employers using a "back door" approach by putting a work-for-hire declaration on the artist's pay check after completion of the work. In 1995, a Federal Court decision

severely limited the legality of such practice.

Fair use of copyrighted works

The "fair-use" doctrine allows limited use of copyrighted works for teaching, reviewing, news reporting and scholarly research. Since 1992, this doctrine also applies to unpublished works.

Fair use usually is the first line of defense against infringement claims. Much case law is available. A 1991 Supreme Court case involved a publisher who had copied a residential telephone directory. The court ruled that the directory was not protected by copyright because its information was in the public domain and was not arranged in a creative manner—the listings were in alphabetical order.

While loading a program into a computer for review is legal under the fair-use doctrine, loading it into RAM can constitute copying under copyright law if the intent is reverse engineering of the program's code.

Copyrights and computer software

Recent case law covering computer technology is important to petroleum equipment industry members who are also in the computing and software business.

One of the first significant cases was won by Apple over Franklin Computers, who had copied Apple's ROM chips to make their computer compatible with Apple software. Franklin claimed that operating systems and the object code were not copyright protected, since they were embedded in ROM chips and thus were hardware. The court decided that embedded code qualified as software and was copyright protected.

Apple lost a case claiming that Microsoft infringed on its copyrighted user interface. The court found that individual elements of Apple's interface were functional rather than expressive. The court stated that the interface as a whole could be protected, but was not subject to the infringement litigation.

In the case of Computer Associates vs Altai, the court allowed "filtering" unprotectable elements from software and comparing what was left against copyright standards.

Copyrights for online works

Copyright Office Circulars 65 and 66 deal with online databases and other works. Online computer programs and databases can be copyrighted to the extent that they meet the expressive and creative requirements of the law. Since databases are frequently updated, group registration covering a 3-month period within a calendar year is available.

For all other online works, registration and copyright protection will only extend to expressive work in "fixed tangible form." Images and written materials may be individually or collectively protected, not because they are online, but as printed material.

The Copyright Office is developing a new system called Copyright Office Registration, Recordation and Deposit System. This system will allow electronic deposition of materials for registration. It does not cover copyrights for online works.

Proposed state legislation

We soon may be affected by new state legislation on copyrights. A Uniform Computer Transactions Act (UTICA) has been introduced to the Virginia, Maryland and Illinois legislatures. By April 2000, it is expected to be passed in Maryland and introduced in additional states. A February 4, 2000 article in the *LA Times*, "Software Makers Aim to Dilute Consumer Rights," labeled the legislation as anti-competitive and anti-consumer.

Originally, software companies like Microsoft sponsored the proposed legislation. It was proposed as an addition to the *Uniform Commercial Code* and was drafted by a committee of the National Conference of Commissions on Uniform State Laws, which was dominated by software publishers. The effort failed due to opposition from the American Law Institute, an earlier proponent of the legislation. Rather than let the proposal die, the committee recast it as a stand-alone act which would substantially change contract and copyright law pertaining to software.

Twenty state attorney generals, many consumer organizations and major corporations are lobbying against the proposed legislation. A group called For a Competitive Information and Technology Economy (4CITE) has established a web site at www.4cite.org as a clearing house for organized lobbying. The site provides much information about UCITA. A letter attributed to Caterpillar lists the first six of the following eight items as major problems with the proposed legislation. I added the last two items from the *LA Times* article. Under the proposed legislation:

- Software publishers can shut down user software remotely without court approval.
- Software publishers can prohibit software license transfer between companies (during a merger or acquisition).
- Unlimited warranty disclaimers will absolve publishers from damages from defective software even when they conceal defects that might harm the business.
- Software acquired by employees without authorization will end up binding the employer.
- Click-through terms in the software will overwrite those of a fully negotiated contract between the software publisher and the corporation.
- Publishers may write their own intellectual property law and circumvent well-established intellectual property principles and statutes.
- Software publishers will be able to exercise control over products developed with their software.
- Software publishers may squelch negative reviews of their products.

Passage of the proposed state acts can pose a

major dilemma for manufacturers who rely on software from outside publishers. Defective software could be distributed with impunity; expensive software licenses would become non-transferable, even during mergers and acquisitions; and more importantly, publishers could claim royalties on products developed with their software.

An entire industry has developed around small value-added businesses who provide templates or macros and other application software for statistical, database, graphic design and spreadsheet packages. As an example of potential problems, I have developed a petroleum equipment industry patent database using a commercial database product. I distribute files from my database to clients who own their own copy of the database program. Passage of UCITA in Illinois could put me at odds with the database program publisher.

Resources

Copyright provision details are available to creative service providers through their professional organizations. Since the stakes are significant under the work-for-hire provisions, these organizations lobby on behalf of their membership. The Library of Congress Copyright Office has much information and all registration forms at www.loc.gov/copyright. Since copyright provisions affect everyday activities, most bookstores carry titles covering copyrights. Also, many books and other information are available through Nolo Press and Findlaw at www.nolopress.com and www.findlaw.com.

Copyright legislation

Copyright law has evolved and has undergone many changes during the last century. Computer industry development resulted in protecting software and hardware. E-commerce has resulted in additional challenges and changes in law. Copyright law is based on the common law principle of moral rights, arising from the French doctrine of droit moral, which assigns personal rights to creators of works. In the US, these basic rights are protected by Article 1, Section 8 of the Constitution. Major copyright law changes affected the following legislation:

- 1906 Copyright Act: established protection terms of 28 years, with needed renewals by copyright holders or their heirs.
- 1976 Copyright Act: eliminated renewal requirements and revised protection term to be the creator's lifetime plus 50 years; and extended protection to software. Amended in 1988 to implement provisions of the 1986 Berne Convention, which was a treaty that standardized copyright protection among more than 100 countries.
- 1980 Computer Software Protection Act: provided that software is equivalent to other original works of authorship.
- 1984 Semiconductor Chip Protection Act: included "mask works," or multi-layer chip templates, as functional original works.
- 1990 Computer Software Rental Amendments: excluded computer software from the first-use doctrine, thereby preventing renting or lending.
- 1992 Copyright Automatic Renewal Act: provided for automatic renewal term of 47 years for pre-1978 copyrights.
- 1998 Copyright Term Extension Act: increased the protection period for pre- and post-1978 copyrights to creator's lifetime plus 70 years; set the terms of protection of works for hire at 95 years after publication or 120 years after creation, whichever is shorter.
- 1998 Digital Millennium Copyright Act: extended protection to e-commerce and changed some limited-use exceptions for software.

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