



An Author's Guide to Copyright Protection

How To Protect Your Books, Magazine Articles, Pictures, Sound Recordings, Video Tapes, Web Pages, Software and Other Important Items of Intellectual Property

This document was prepared in order to answer the questions frequently asked by our friends and clients concerning copyright protection.

The Origin of Copyright

Copyright, as a concept, is derived directly from the U.S. Constitution. Article 1, Clause 8 of Section 8 of the Constitution provides the basis for this protection in order to:

“promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries.”

Congress utilized this authority most recently for the benefit of authors by enacting the federal statute known as the Copyright Act of 1976, effective January 1, 1978.

Copyright protection, therefore, is constitutionally sanctioned and statutorily established. It is a privilege that permits a creator to prohibit others from copying a work or obliges others to pay royalties for its use. This protection is available for many different types of artistic endeavors. Copyright may be obtained for almost any form of the written word including books, magazines, plays, reports, web pages and even computer programs. Copyright may also be procured for many nonverbal expressions of creativity including music, paintings, photographs, sculptures, motion pictures, maps and architectural drawings.

By statute, copyright arises upon the creation of a work. As soon as the work is reduced to a **fixed form** by, for example, writing out a story on paper or recording a song on a tape, the author owns a valuable copyright.

Placing the Correct Notice in the Correct Place

The first important step that an author needs to take to protect his or her copyright is to place the correct copyright notice in the correct location on the work. While the placement of a notice upon the work is no longer required, the failure to do so gives an “innocent” infringer the right to claim, as a defense

to a charge of infringement, that he or she did not know that the author or owner claimed a copyright in the work. If this defense is accepted, the infringer is excused from the payment of damages for any infringement prior to the time of receiving actual notice of the author's copyright. Accordingly, we strongly recommend the placement of a proper notice on any work worth protecting.

A copyright notice capable of preserving the author's rights has the following three components:

1. **The word “Copyright” or a legally acceptable abbreviation such as “Copyr.” or the universal symbol ©.** While the copyright statute requires only the word “Copyright” or the © symbol, we advise our clients to use both the word and the symbol when space is available to ensure the sufficiency of the notice both in the United States and overseas.
2. **The year date of creation or publication of the work.** Creation of the work occurs when the work is first written down, recorded, printed, painted or otherwise put in fixed form. Publication occurs when copies of the work are first sold or otherwise distributed. In many cases, both events occur within the same year, but it is possible for a work to be created in one year and published several years later. In such cases, an attorney should be consulted before the notice is placed on the work since it may have a significant effect upon the author's rights.
3. **The name of the owner of the copyright.** In most cases, the owner is also the author of the work.

If there is a possibility that the work will be distributed in South America, the notice must also contain the phrase “All Rights Reserved” to receive protection under relevant treaties between the United States and Latin American countries. Since intended areas of distribution may change over time, we instruct clients to include this phrase when using the long form of copyright notice.

The correct **long** form of the copyright notice for a work created and published in 1997 by an author whose name is “XYZ” would read as follows:

Copyright © 1997 XYZ
All Rights Reserved.

The correct **short** form of the copyright notice for the same work would read as follows:

© 1997 XYZ

The proper location of the copyright notice is very important and varies from item to item.

Examples of Proper Notices and Locations

The following examples illustrate the proper notice and location for several common types of works:

1. Books and Pamphlets

- a. Form of Copyright Notice – Preferably the long form as follows:

Copyright © 1997 XYZ
All Rights Reserved.

- b. Location of Copyright Notice – For books and booklets the copyright notice is placed on the title page, on the inside of the title page or on the first page following the title page. It should not be placed in any other location.

2. Magazines and Periodicals

- a. Form of Copyright Notice

Copyright © 1997 XYZ
All Rights Reserved.

- b. Location

- i) For Magazines – Preferably right under the title block at the top of the front page. See, for example, the copyright notices in *The Wall Street Journal* and *The New York Times*.
- ii) For Periodicals – Preferably on the front page, the inside of the front page, the first page following the title page or, least preferably, on the masthead page.

3. Computer Programs

- a. Form of Copyright Notice

Copyright © 1997 XYZ
All Rights Reserved.

Note – Many computers do not generate a ©. A “C” is **unacceptable** as a substitute for the international symbol ©. Therefore, it is recommended that the word “Copyright” **always** be included in a copyright notice associated with software.

- b. Location – The copyright notice should appear in the first screen (i.e., title screen) of the program as it comes up on the computer. The copyright notice should also be printed in ordinary English exactly as shown above in the source code printout from the software and located near the very beginning, preferably after the title, which should also be in ordinary English. This is true even if the rest of the printout is in machine-readable code only. In addition, it is advisable to place a copyright notice on the label attached to the diskette, CD or cassette.

4. Sound Recordings (audiotapes, records, compact discs, etc.)

- a. Form of Notice

P1997 XYZ
All Rights Reserved.

- b. Location – On the record or cassette label, preferably under the title.

5. Visual Works (e.g., photographs, paintings, graphic design, videocassettes, motion pictures)

- a. Form of Notice

Copyright © 1997 XYZ
All Rights Reserved.

For videotape cassettes, this notice should include additional language to reflect the license granted to the purchaser (e.g., for home viewing only) and to recite the federal penalties for misuse.

- b. Location – With regard to photographs and paintings and the like, the copyright notice should appear on the front side, in a corner in a size sufficiently large so that the unaided eye can read it. With regard to videotapes and movies, the copyright notice should appear at the beginning, preferably on or immediately after the title frame.

6. Jewelry, Greeting Cards, Product Packaging

- a. Form of Notice – © XYZ

Location – Wherever it is visible and legible.

7. Mask Works for Computer Chips

- a. Form of Notice – M XYZ or MASK WORK XYZ

Location – Wherever it is visible and legible.

Note: Registration of a Mask Work within two years is **mandatory** if protection is desired under the Semiconductor Chip Protection Act of 1984. Unlike the Copyright Act, the duration of protection under this act is limited to 10 years.

8. Worldwide Web Pages

a. Form of Notice

Copyright © XYZ
All Rights Reserved.

b. Location – At bottom of first frame.

Timing

At the very least, the notice should be placed on a work before it is published. “Publication” under the copyright law occurs when copies of the work are sold or otherwise distributed to third parties who are free to give or sell them to others. Therefore, **before any** copies of **any** work are sold, a copyright notice **should** appear on the work.

The recommended practice is to place the notice on the work **immediately** after creation. This has some significant benefits, particularly if the author will be showing the work to potential publishers or distributors. By adding the copyright notice immediately upon creation, the author can avoid the problems of innocent infringement previously discussed. If the author then registers the copyright, he becomes the beneficiary of a substantial arsenal of statutory rights for dealing with infringement.

For these reasons, we advise our clients to add a copyright notice **immediately** upon creation of the work.

Items Not Protectable Under Copyright Law

Certain items are not eligible for copyright protection. Such nonprotectable items include:

• Ideas

It is a common misconception that ideas are copyrightable. As the Supreme Court has recently said, “No author may copyright facts or ideas. The copyright is limited to those aspects of the work termed ‘expression’ that display the stamp of the author’s originality.” Copyrights only protect the form of the expression, not the idea itself. Ideas, if they are protectable at all, are only protectable by U.S. patents, contractual agreements or as trade secrets.

• Book Titles

The titles of books are not copyright protectable by themselves. For example, *Gone With the Wind* is not protectable as a title apart from the book. If a book is published **periodically** as an updated serial, however, the title may be protected as a trademark.

• Functional Articles

Copyright protection is not available for functional articles. For example, one cannot obtain copyright protection for a mannequin, although such protection is clearly available for a

statue. Copyright protection may be clearly available, however, if the artistic aspect of the work is separable from the functional. For example, copyright protection is not available for a swimsuit but could be obtained for the design on the material from which the swimsuit was made. Functional designs can sometimes be protected under patent law.

• Insufficient Creative Content

Copyright protection is not available if the work does not contain the requisite minimum level of creativity. For example, a painting may not be registrable if it is merely a combination of commonly used shapes such as concentric circles in a border. Whether a work is sufficiently creative to be entitled to copyright protection is not a question that should be answered without consulting an attorney experienced in copyright law.

As a general policy, it is best to treat your work as though it is copyright protectable, unless informed otherwise, and be sure to include the proper copyright notice discussed previously.

Registration

We have learned thus far that an author can **protect** his or her copyrights in a work simply by placing the proper copyright notice on the work in the proper location. What the author cannot do, however, without taking an additional step, is **enforce** his or her copyright. To be able to stop an act of copyright infringement, the author must register his copyright with the United States Copyright Office.

There is no particular time at which copyright registration must be made, but waiting for more than five years after publication or waiting until after the copyright is infringed leaves the author with very limited rights.

Unless the copyright is registered **before** an act of infringement, the copyright holder cannot seek statutory damages or attorney’s fees. We recommend that an author register his or her copyright upon creation of the work or, at a minimum, within three months after first publication. Registration of a published work is obtained by completing a copyright application and submitting it to the U.S. Copyright Office with one or more copies of the work and the appropriate fee. If the application is in proper form, the Copyright Office will issue a registration certificate with a unique number. Registration may be sought either before or after publication, but most authors prefer to register their work after publication since changes in the work may occur prior to publication. If the application is accepted, the owner’s rights will last for the lifetime of the author plus 50 years or, in the case of a “Work Made for Hire,” 75 years from the date of publication or registration, whichever is first.

Works Made for Hire

A great deal of litigation has been generated by disputes concerning copyright ownership. The problem typically arises when an individual is commissioned to prepare materials for another individual or corporation. For example, an individual enters into an agreement to produce a computer program for a company. Who owns the copyrights to the program in such situations? A recent U.S. Supreme Court decision has made it very clear that if the creator was an employee of the company, the company owns the program, but if the creator was an independent contractor, the copyrights belong to the independent contractor. If the employer made a creative contribution to development of the product, however, it belongs jointly to the employer and independent contractor. For this reason, it is imperative for an employer to have written employment agreements with “creative” employees who may claim copyright ownership in work products developed by these employees. Similarly, each time an employer hires an independent contractor, it is important to have a clear written agreement with that individual or organization stating who will own the copyright in the resultant product.

Similar problems arise when two or more people collaborate on a single work. Under U.S. copyright law, both parties are

considered to be authors of the entire work and either may exploit the work as he or she sees fit without the permission or participation of the other. A well-drafted agreement between co-authors should eliminate the problem of competing interests in the same work.

In Conclusion

The mechanics of obtaining copyright protection are straightforward.

- Place the proper copyright notice on the work in the correct location.
- Expeditiously register the work with the U.S. Copyright Office.
- Address ownership issues upfront.
- Prepare clear, carefully drafted agreements to control the relationship between all employees, independent contractors, publishers, agents and co-authors.

By following the outlined steps above, an author can avoid 90 percent of the problems and heartache associated with copyright. If you have any questions concerning copyright, please give us a call.



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