



Technology & Intellectual Property

Legal Trends

First Quarter 2007

Copyright Protection 101

By Kevin Oliveira

The concept of the copyright is among the oldest recognized forms of protecting intellectual property in the United States. Copyright protection is provided under a clause of the U.S. Constitution, and the Copyright Act of 1976. The federal statute protects an array of works of original authorship including books, articles, newspapers, architectural drawings, audiovisual materials, television programming, music, movies, drawings, paintings, sculptures, software, web content and other creative, intellectual or artistic works.

A copyright exists the moment a work is created in a fixed form and ownership of the copyright is immediately vested in the author who created the work. In addition, copyright protection is available for all works regardless of whether they have been publicly distributed.

You are not required to file with any government agency or registrar for a copyright to be recognized. However, a copyright registration secured from the U.S. Copyright Office protects the work more completely by granting certain advantages to the owner. In addition, copyright registration is often required to adequately enforce a copyright owner's rights.

Copyright law prohibits others from adopting or infringing upon the artistic expression contained in any work that has been fixed in a tangible form. It can only protect the ideas as stated and as they are expressed. For example, the specific description of an espionage agent who works for the benefit of the state would be protected under the law but the general concept of such a character would not be protected.

It is also important to note that copyright does not provide exclusive rights for the use of common elements that are combined to produce a comprehensive work. As a consequence, if you created an artistic work depicting lions, the copyright would protect the specific method of depicting the specific lions. However you could not bar others from creating art depicting lions. Likewise, by tabulating factual materials, no copyright is granted or exclusivity provided for in the specific facts. However, a copyright does exist for the editing choices and for the methods of format and display.

Copyright protection exists for a limited time period and the period depends on the date that the work was first created and made public. For works created and published before 1977, the copyright term is generally 95 years (but may require notice of copyright to be included with the publication). For works expressed and published after 1977, the copyright term is generally equal to the life of the author plus a term of 70 years. For works of corporate authorship, the term of copyright is the shorter of 95 years from publication or 120 years from creation.

Under the law that was in effect before Jan. 1, 1978, copyright protection was secured or lost at the time a work was published depending upon whether or not all copies bore the copyright notice. If the work was first published with a valid copyright notice ("© AUTHOR 197__" or another similar marking), an author could claim copyright protection. If the work was published without a copyright notice, it is possible that the work is now in the public domain and, that no copyright may be claimed.

Although copyright registration is not a condition for copyright protection, the legal formality of application for, and receipt of, a federal copyright registration does offer

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New E-Discovery Amendments

By Jonathan Frieden

A recent article on Law.com lists the new electronic discovery amendments to the Federal Rules of Civil Procedure among the principles shaping the continued development of the role of in-house counsel.

The article suggests that after the most recent Federal Rules amendments became effective on December 1, 2006, "Electronically Stored Information (ESI) became discoverable and must now be preserved and produced like paper documents." However, most federal court practitioners have been dealing with electronic discovery issues for years.

The new amendments to the Federal Rules have only codified, and made uniform, practices evolving from various District Courts. Practitioners familiar with those procedures have had no trouble adjusting to the amendments but it may be worthwhile to briefly discuss some of the most important changes:

- The court's Scheduling Order may now include "provisions for disclosure or discovery of electronically stored information." Fed. R. Civ. P. 16(b).
- Parties must now discuss "any issues relating to disclosure of electronically stored information, including the form or forms in which it should be produced." Fed. Civ. P. 26(f). They must also provide, as part of their initial disclosures, "a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment . . ." Fed. R. Civ. P. 26(a)(1)(B).
- Rule 26(b)(2)(C) has been amended to implement a "two-tier" system by which a responding party may identify electronic

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several benefits to a copyright owner. These benefits include:

- The establishment of a public record of the copyright claim and providing of constructive notice of a claim of ownership to the public.
- The ability to file a copyright infringement claim in federal court is established.
- If made before or within five years of publication, prima facie evidence of the validity of the copyright and of the facts stated in the certificate of registration.
- If made within three months of the publication or prior to the infringement of the work, the ability to seek an award of statutory damages and attorneys' fees available.
- The ability to record the registration with the U.S. Customs Service to protect against the importation of infringing copies.

Beyond these legal benefits, there is a significant practical advantage to holding registrations for copyrights when selling a business. Most potential acquirers of businesses with substantial copyright assets will attribute a higher value to a business with documented copyright registrations. A registration "legitimizes" or formalizes the value of the business assets. In addition, many potential acquirers demand registration certificates as a part of due diligence. Having previously acquired these certificates is beneficial in closing a transaction quickly.

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sources of information that are "not reasonably accessible," without incurring substantial burden or cost. The court may still order production if the requesting party makes a showing of good cause.

- Rule 37(f) now provides a "safe harbor" for certain failures to provide ESI. It provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine good-faith operation of an electronic information system."

Though ESI discovery procedures are important to all businesses, they are particularly significant to e-commerce businesses, since they are likely to have a much broader array of ESI than traditional brick and mortar establishments. In any event, it is an issue with which both general counsel and litigation counsel must be intimately familiar.

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