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## ***Copyright News You Can Use*** **By Andrew Berger**

### **Protect Yourself with These Tips**

Here are some simple copyright tips to use in your business. They deal with:

- a. your terms and conditions;**
- b. the importance of registration;**
- c. suggestions about registration;**
- d. preventing the unauthorized use of your work;**
- e. your copyright notice;**
- f. winning the battle of the forms;**
- g. work for hire pricing; and**
- h. policing your copyrights.**

**1. Terms and Conditions.** Whenever you give someone the right to use your copyrighted work, you need to set limits. Make them clear so they can be easily enforced. Here are some examples:

- If you want your client not to post your work on the Internet, include in your invoice or license agreement “no electronic or online use;”
- If you want to restrict your client to one-time use in a magazine, write “one time use in print only;”
- To prevent your client from using your work for other purposes, state “use for [describe the agreed-upon purpose] only; you must negotiate and pay for all other uses in advance.”

**2. The importance of registration.** You would never let your children out in the cold of winter without the protection of proper clothing. Yet most creators allow their copyrights to circulate without the protection of registration.

Registration increases your bargaining power enormously when dealing with an infringer. If your work has not been timely registered and is infringed, you are entitled to a lost license fee. That fee is the amount the infringer would have paid you if it had negotiated a price before using your work. That sum is almost never enough to justify the time and expense of litigation. You are also entitled to recover the profits, if any, the infringer made that arise from the unauthorized use. But proving those profits is often difficult and expensive.

In contrast, a timely registration allows you to recover from the infringer in a court proceeding up to a maximum of \$150,000 in special or statutory damages for

each work infringed, if the infringement was willful or intentional. You may also be able to collect your attorneys' fees. An infringer facing a statutory damage claim is much more likely to settle rather than face substantial exposure at trial.

**A timely registration** is one made any time **before** the work has been infringed, or if it has been infringed, **within three months** of the work's initial publication.

**3. Suggestions about registration.** To ensure your works are timely registered, make it a routine practice. For example, you may want to register at the end of each month everything you created during the month. The cost of registration is a bargain at \$30, especially in view of the benefits it brings. Take advantage of group registration opportunities. You can register a group of unpublished works together with one \$30 fee. You can also register all the published photographs you created in a calendar year for one \$30 fee. When registering a group of works, you should, in addition to using Form VA, fill out what is called a "continuation sheet" on Form "GR/PPH/CON." You can find all the forms online at [www.copyright.gov](http://www.copyright.gov). By listing on that continuation sheet each work you are registering, you avoid any dispute in litigation whether a particular image **was** registered.

**4. Preventing unauthorized use.** Some clients will use your work and only later reach agreement with you about terms of use and payment. The terms may be more generous than you contemplated and the payment may be less. To avoid that situation, when you deliver your work to a potential client, you should state in a covering note:

"Until we have agreed to the terms under which you will use [describe the work] and have paid me the agreed-upon fee, you have no rights to make any use of this work. Any unauthorized use constitutes a willful infringement."

If your client ignores this warning, it will increase your chances of collecting substantial statutory damages (assuming a timely registration) in a later court proceeding.

**5. The importance of your copyright notice.** Infringers often try to limit their damages by claiming innocence. They will argue they gained possession of your work from a third party who never told them the copyright belonged to you. You eliminate a claim of innocence by embedding your work on its face or back with your copyright notice. The notice contains the symbol ©, your name as copyright owner and the year of first publication. Because that notice tells the world that you are the copyright owner, an infringer cannot claim that it was unaware of your rights.

The Digital Millennium Copyright Act or DMCA may also help. If the infringer has removed your copyright notice from your work in an attempt to facilitate or conceal its infringement, the infringer may have violated the DMCA. A court may assess the infringer as much as \$25,000 for each violation.

**6. Win the battle of the forms.** Your terms and conditions will in most cases differ from those of your clients. When you send your client your terms, you may receive a form back from your client that contains additional or contradictory terms. For instance, your form may be silent about web use; but your client's form may authorize that use. If you take no action after receiving your client's form, you may be stuck with its additional and different terms. To ensure you win the battle of the forms, cross out each provision on the face of your client's form that you disagree with and initial the right hand margin next to each cross out. Then return the marked up form to your client.

**7. Before you agree that your work is for hire.** When you create a copyrighted work for a client as an independent contractor you own the copyright. The only way your client will gain copyright ownership is if you sign a writing stating that the work is for hire. The writing has to use the words "work for hire" or their equivalent, like "all rights in perpetuity." Once you sign that writing you are forfeiting all rights to the work forever. Whatever the value of your work now, it may be far more valuable in the future depending on a wide variety of circumstances that are often unpredictable. Therefore, you may want to capture some of that potential value now by charging a premium before agreeing to a work for hire arrangement.

**8. Use search engines to uncover infringement.** Internet search engines permit you to examine billions of web pages in seconds. You should periodically use this technology to police the use of your work to ensure it is not being infringed.

**In sum,** you may easily apply these tips with little expense. They will not only protect your copyrights but add to your bottom line. If you have tips of your own, please pass them along and I will post them in a future newsletter.



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