Copyright Registration Practice for the Non-Copyright Attorney

By Elise M. Stubbe

"The Congress shall have Power . . . To Promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ." [1]

In the age of the Internet and digital copy technology, it's not surprising that more and more authors, artists, musicians and songwriters, among others, are seeking to obtain copyright registration of their works. And it also should not come as a surprise that one of your current or future clients could soon present you with their work and ask you to register it with the Copyright Office. What do you do? Before you run to the library and feverishly flip through copyright law treatises, consider this article that offers a basic overview of copyright registration and the issues you need to consider before proceeding.

What is a Copyright?

A copyright is a bundle of exclusive rights given to an author for a limited time that are designed to protect his "original work of authorship [that is] fixed in any tangible medium of expression now known or later developed" from infringing uses by others.[2] However, the current Copyright Law is a far cry from the first statutory copyright, the Statute of Anne circa 1710, which merely contemplated protection of the right to copy a particular work (literally a "copyright").[3] Today's Copyright Law, as modified in 1976, encompasses rights far greater than just the right to make a copy of a work. Rather, today's law allows for no less than six exclusive rights that belong to each artist. To be protected, however, the work must be an "original work of authorship" or a work

created by the author on his own that has some "minimal degree" of creativity.[4] There can never be copyright protection for an idea, concept, discovery, system, process, procedure, principle or discovery.[5] Similarly, words and short phrases like names, titles and slogans[6] or utilitarian elements are not protectible.[7]

Once an original work of authorship has been fixed in a tangible form, it is automatically protected against infringement for a certain period of time and is vested with numerous exclusive rights.[8] Works of authorship include literary works; musical works (including words); dramatic works (including music); pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[9] The exclusive rights granted to a copyright owner include the right to reproduce the work, prepare derivative works based upon the work, distribute copies of the work to the public, perform the work publicly and to display the work publicly.[10]

Why Should an Author Register His Work and How Do I Register It?

While protection for a work inures from the moment of fixation, registration of a work is required before an author can bring an infringement action in court.[11] Thus, in order to enforce the exclusive rights that come with the creation of a work in court, an author must register the work with the Copyright Office. However, before diving into the registration process, you must obtain a few answers from your client to some important questions.

First, did one or several people help the author create the work? If so, they would probably be considered co-authors and must either give your client an assignment of their rights or your client must share the ownership of the copyright with the other authors. Second, was one of the other authors the spouse of your client? If so, the copyright is considered community property under Louisiana law and any profits derived from it are subject to division in the event of divorce.[12] Third, is the author or one of the authors a minor? The Copyright Law does not prohibit minors from registering or owning copyrights. Rather, it defers to state law regarding the property of minors.[13] In Louisiana, a minor's income derived from his own "labor and industry" is considered his property and is not subject to the parental usufruct.[14]

Another important question is whether the work was a "work made for hire" because this affects the term of the registration as well as the ownership. The Copyright Act defines a work made for hire as a "work prepared by an employee within the scope of his or her employment." A second category of works defined by the Act as works made for hire are works that are commissioned or requested by a hiring party for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a supplementary work, as a translation, a compilation, instructional text, a test, an answer to a test or an atlas. Here, the parties must have a written agreement that the work is to be considered a work made for hire.[15] If the work is a work made for hire, then the copyright belongs to the employer or commissioning party, not the employee or commissioned party.

For independent contractors who are commissioned to do work that is not one of the nine types enumerated in Section 101, the Supreme Court set forth several factors, based upon agency law, to use when determining whether the independent contractor is an employee working in the scope of his employment such that the work would be considered a work made for hire and, thus, belong to the hiring party.[16] Specifically, the court looks to "the hiring party's right to control the manner and means by which the product is accomplished, the skill required," the instrumentalities' and tools' source, the work location, the length of the parties' relationship, how the hired party is paid, the tax treatment of the hired party, and the provision of employee benefits, among other things.[17]

You also should ask your client whether the work is anonymous or pseudonymous as this affects the registration term.[18] Another question to ask is whether the work has been published and, if so, when.[19] The Copyright Act defines "publication" as the distribution of copies or phonorecords, in the case of sound recordings, to the public by sale or other transfer of ownership, as well as rental, lease or lending.[20] Public performance or display of work does not constitute publication for purposes of the Copyright Act. Finally, you should enquire as to whether this current work is a derivative work of another pre-existing work. If it is a derivative work of someone else's work, your client should have obtained permission from the other person before preparing the derivative work, and certainly before registering the derivative work.

Once you have answered these questions, it is time to complete the application. All forms are available at *www.copyright.gov* and can be "filled in" in PDF form. You also can save these forms as PDF files on your computer and amend them later. Each category of works of authorship has its own long form and short form. The long form is used when the work involved has multiple authors, it is a work made for hire, or it is a derivative work. The short form is used when there is one author, it is not a work made for hire and it is a non-derivative work. If you are an authorized representative of your client, you can sign the application for them. If not, you should have the client sign the application.

It is also relatively inexpensive to seek a copyright registration as the fee for an application is only $30. Since the fee is so low, however, it is Murphy's Law that the wait for the registration is inversely long. Currently, the Copyright Office is dealing with a seven- to eight-month delay, if not more, in registrations. In situations where you are contemplating litigation against an infringer and you have not registered the copyright, which is a pre-requisite to any infringement action, you can seek expedited service. Be aware that the same Murphy's Law applies that since the wait is now so short, the fee is inversely high:

expedited service costs $580 per registration. But, with expedited service, a staffer personally walks your application from each department and the registration should be complete within 10-15 business days.

Finally, you must include a "deposit" copy or copies of the work with the application.[21] For unpublished works, you must include one complete copy of the work or phonorecord.[22] If the work has been published already, you must include two copies of the "best edition" of the work.[23] A "best edition" of the work is circularly defined as the edition "which the Library of Congress determines to be most suitable for its purposes."[24] However, the rules of the Copyright Office clarify that the "best edition" of the work is the edition of the highest quality.[25]

Duration of Copyright Registration

Congratulations! You have successfully registered your client's copyright, but now they want to know how long it will last. The answer to this question depends upon what type of authorship is involved as well as when it was created. For a work created by a single author on or after Jan. 1, 1978, regardless of whether

the work was published, the copyright term consists of the author's life plus 70 years after his death.[26] For joint works prepared by two or more authors that is not a work made for hire, the copyright will last for a term of the life of the last living author plus 70 years after his death.[27] Anonymous and pseudonymous works are treated differently since the authors, and thus their dates of death, are not known. Instead, the Act sets terms of 95 years from the year of first publication or a term of 120 years from the year of its creation, whichever expires first.[28] Works created and published before Jan. 1, 1978 (the effective date of the 1976 Copyright Act) are subject to a much more confusing analysis that should only be undertaken by an attorney who regularly practices in the field of copyright law.

Conclusion

Copyright registration can be an intimidating topic but, with some careful research and thought, you too can provide your clients with this invaluable service.

FOOTNOTES

1. U.S. Const. art. I, § 8, Clause 8.
2. 17 U.S.C. § 102(a).
3. James E. Hawes & Bernard C. Dietz, Copyright Registration Practice § 1.1 (2d Ed. 2002).
4. Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340, 346 (1985).
5. 17 U.S.C. § 102(b). Patent protection, rather than copyright protection, is appropriate for these types of works.
6. 37 C.F.R. § 202.1 (2002). Trademark law may apply to these words or phrases if they are used to identify the source of goods or services.
7. *See* Mazer v. Stein, 347 U.S. 201 (1954).
8. 17 U.S.C. § 102(a). Contrary to popular belief, registration of the work with the Copyright Office is not required for protection.
9. 17 U.S.C. § 102(a).
10. 17 U.S.C. § 106.
11. 17 U.S.C. §§ 411, 412.
12. *See* Rodrigue v. Rodrigue, 218 F.3d 432, 435 (5 Cir. 2000); [The court held that George Rodrigue, the creator of the famous "Blue Dog" pictures, retained the exclusive managerial control over the copyright, but the profits of the copyright are community property and, thus,

must be shared with his wife, Veronica Rodrigue, during the marriage and in indivision after their divorce.]

13. *See* Copyright Office, *Circular 1: Copyright Basics*, 2 (2002), available at*: www.copyright.gov/circs/.* The Copyright Office publishes a series of circulars with helpful, general information about a wide range of topics and are worth checking out.

14. La. Civ.C. art. 226.

15. 17 U.S.C. § 101. In contrast, no agreement vesting ownership in the employer is required where the work is created by an employee in the scope of his or her employment.

16. Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). *See also* 17 U.S.C. § 201(b).

17. Reid, 490 U.S. at 751-52.

18. See *infra*, "Duration of Copyright Registration."

19. This question is important because once the work is published, your client can start using a notice of copyright on it. 17 U.S.C. § 401(a). Notice must consist of three elements: the symbol © (or the word "Copyright" or "Copr."); the year of first publication; and the name of owner of the copyright. 17 U.S.C. § 401(b). For phonorecords, instead of using the ©, you should use Ⓟ. 17 U.S.C. § 402(b)(1). Publication also affects the depository requirement, discussed later in this article.

20. 17 U.S.C. § 101.

21. 17 U.S.C. § 408. You should take note that §407 is a *mandatory* archival depository requirement for published works regardless of whether you intend on seeking registration. Thus, works that are published must be deposited with the Library of Congress within three months of publication. However, works submitted for archival purposes under § 407 frequently satisfy the § 408 deposit requirement for registration.

22. 17 U.S.C. § 408(b)(1).

23. 17 U.S.C. § 408(b)(2).

24. 17 U.S.C. § 101.

25. 37 C.F.R. § 202.19(b)(1)(iii) (2002).

26. 17 U.S.C. § 302(a). In 1998, Congress passed the Sonny Bono Copyright Extension Term Act (CETA) that extended the term after the author's death from 50 years to 70 years, among other changes. Eric Eldred, a publisher, challenged the law before the U.S. Supreme Court. The court held that the CETA was a valid exercise of Congress' authority under the Commerce Clause and brought the U.S. in line with other nation's copyright terms. *Eldred v. Ashcroft*, 537 U.S. 186, 204-05 (2003).

27. 17 U.S.C. § 302(b).

28. 17 U.S.C. § 302(c).

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