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The Copyright Notice— Do You Need It or Not?

By Pamela Curran

Nothing is more endearing to me than seeing “Chaz 2015 ©” in childlike handwriting at the bottom of artwork by my 10-year-old nephew. When he created three-dimensional artwork for me using colors and arrangements to my specifications, I was pleasantly surprised (this kid’s got talent) and more than happy to fill his young arteries with the fat and cholesterol contained in an ice cream treat. More importantly, as it looked to me that he had turned an original idea or creative thought (which no one can protect) into a tangible medium of expression,¹ I told him he must sign this original masterpiece and add the well-known copyright symbol “©”, with the year and his name—together comprising the copyright notice. What was his response before complying? It was the most

often used three-letter word by those five feet and under: WHY?

No Notice Required But We Use It Anyway

Well, actually it is a good question. For over 25 years now, U.S. law no longer requires the placement of a copyright notice on a work for the work to receive the basic protection afforded by the federal Copyright Act of 1976.² This protection includes a “bundle of rights” giving a copyright owner the exclusive right to copy (or authorize others to copy), distribute, sell, display, perform, or modify the copyrighted work.³ This bundle of rights

applies regardless of whether or not the © is placed on the work. Instead, we lawyers often now say, and in a rather Shakespearian tone, copyright protection with its corresponding bundle of rights simply “springs upon creation.”

In other words, copyright protection attaches at the time the creative thought is transformed and embodied in a tangible work—automatically.⁴ No notice is required. Rights to control the work (i.e., the copyright) attach through and upon the act of creating a three-dimensional piece of artwork, composing notes into a song, or coding that results in a computer program, not when a copyright notice or symbol is placed on the work. Kind of a cool concept and, what’s more, the current law actually makes a lot more sense than the old



law. However, lawyers emphatically continue to advise clients to use the copyright notice and symbol. Now, back to that three-letter question, “Why?” Here is the answer:

Non-legal Reasons:

- Old habits die hard and the structure of the Copyright Act, due to many significant amendments since 1870, can be confusing since use of the copyright notice is still relevant to the copyright status of older works. Best to err on the side of overprotection.
- Simply, it looks good and official.
- It shows pride in ownership or, in the words of my nephew, “Look what I created!”
- It costs nothing to add the notice to a work.

Legal Reasons:

- By far the most important reason, the copyright notice tells the world that the work is protected by copyright and

someone has the right to control the copyrighted work.

- It can prevent confusion by those who may believe, wrongly, that a work without a copyright notice is not protected and free to copy or use.
- It conveys other important information to the world, namely, the identity of the copyright owner and the date ownership is claimed.
- It eliminates the “I-did-not-know” defense (the “innocent infringement”) thus maximizing damages. It is difficult to argue an innocent position when the copyright notice is clearly affixed to the work.
- It provides protection in those few foreign countries that still require a copyright notice for protection.

Correct Form of Copyright Notice

In addition to advising clients to use the copyright notice (even though not required), we go one step further and emphasize that the *correct form* of the copyright notice be used. The correct form of notice consists of the

following three items in the following order: *copyright notice, year of publication, and name of claimant.*⁵ The following are all acceptable forms of a copyright notice in the United States:

© 2015 Messerli & Kramer P.A.
Copyright 2015 Messerli & Kramer P.A.
Copr. 2015 Messerli & Kramer P.A.

Note that my nephew inverted the order of these items, but being independent, he did not let me supervise his work. Nonetheless, for all practical purposes, notice to the world has been served.

However, for protection in foreign countries under certain treaties and conventions to which the United States is a party, the correct form is important. The United States is a member of two leading copyright treaties, the Universal Copyright Convention and the Berne Convention. To guarantee protection for a copyrighted work in member countries, use of the word “Copyright” or the abbreviation “Copr.” in lieu of the symbol ©, which although fine for U.S. protection, may not be acceptable under these treaties. Therefore, the first option above, using the symbol ©, is universally acceptable and always the most prudent.

Because of these treaties and conventions, it is also prudent to add after the copyright notice the tag statement “*All Rights Reserved*,” or “*Protected Under U.S. and International Copyright Laws*,” such as:

©2015 Messerli & Kramer P.A. All Rights Reserved.

©2015 Messerli & Kramer P.A. Protected Under U.S. and International Copyright Laws.

This notifies the world that the work may also be protected under the laws of foreign countries.

If contributions were made during several years, use commas to separate nonconsecutive years and en dashes (slightly longer than a hyphen) to indicate contributions over several consecutive years, e.g.: “© 2012, 2013–2014, 2015 Messerli & Kramer P.A.”

And note, for sound recordings, a “p” (for phonographs) in a circle is used like the symbol ©.

Placement of the Notice

The U.S. Copyright Office has in-depth regulations concerning the position and methods of affixation of the copyright notice depending upon the type of work as many different types of works are subject to copyright.⁶ The rule of thumb is the copyright notice should be placed on copies in such a way that it gives reasonable notice of the claim of copyright. The notice should be legible to an ordinary user of the work under normal conditions of use and should not be concealed from view upon reasonable examination.⁷

For example, for books, the copyright notice is placed typically on the title page or the page immediately following the title page. For websites, the copyright notice is placed typically at the bottom of the home page. Checking Copyright Office circulars and regulations for proper placement for a particular type of work is always advised and easy.

Additional Statements and Information

Today, it is common to find additional statements and information addressing copyright in a legal notice contained, for example, in a link on a website or at the beginning of a movie. These quite often include statements and information on how the copyright can or cannot be used (the copyright warning) and whom to contact for use. The information and warning may be as simple as:

For requests to use this copyright-

protected work in any manner, email xxx@xxx.com or call xxx.xxx.xxxx.

The warning may also include warnings as to civil damages or criminal penalties. For example, when viewing movies at the theater or at home, we commonly see warnings that make it clear that unauthorized copying and distribution is not permitted.

Use the Notice but Consider Additional Rights through Federal Registration

Although copyright protection “springs upon creation” and begins when the materials are first reduced to tangible form, regardless of a copyright notice, obtaining a federal copyright registration can provide additional protections mostly through stronger statutory damages remedies. Generally, for a work that is timely registered at the time a suit is commenced, a copyright owner does not have to prove actual damages, which can be difficult, but can instead elect damages based on the statutory amount, which currently is up to \$30,000 per work infringed and up to \$150,000 for a willful infringement.⁸

Under the Copyright Act itself, registration is a prerequisite to filing a copyright infringement claim.⁹ In addition, as stated above, registration is required to recover statutory damages. Therefore, the effective date of registration (and when that date actually occurs has become debatable) can impact both standing to sue and entitlement to statutory damages. To complicate matters further, and for informational purposes beyond the scope of this article, in some circuits, an application alone may be sufficient for bringing an infringement claim. Therefore, checking the prevailing case law of the applicable jurisdiction before advising a client on federal registration, especially in the context of a possible infringement claim, is advised.

The downside of federal registration is that the work becomes public because the copyright owner is required to file a portion of the work. Whether to seek a federal registration is made on a case by case basis depending on the nature of the work involved, how it is used, and a client’s enforcement strategy.

The Copyright Notice in a Nutshell

In sum, what you need to know about the copyright notice is the following:

- The copyright notice is not required but provides a vital role in preventing confusion and should be used.
- Always use the form “© 2015 Jane Doe. All Rights Reserved.” as a default to preserve protection available in foreign countries party to a treaty to which the U.S. is also a party.
- Check the Copyright Office regulations for proper placement of the notice on particular types of work.
- Consider adding additional statements and warnings to provide further education and notices to third parties that the owner is serious about controlling its rights to the work.
- Weigh the benefits of obtaining a federal registration for a copyright to provide statutory damage remedies against the risk of making the work, or a portion of it, public, as well as timing considerations.

¹ 17 U.S.C. contains the Copyright Act of 1976 which extends copyright protection to “original works of authorship fixed in any tangible medium of expression,” such as literary, dramatic, musical, pictorial, graphic, sculptural, and motion picture works. 17 U.S.C. § 102(a). Originality is a threshold requirement and it has been held that only a “modicum” of originality is required. Also, protection is not extended to the extent an original work incorporates public domain material.

² Notice was required under the Copyright Act of 1976, but eliminated when the United States adhered to the Berne Convention, effective March 1, 1989.

³ 17 U.S.C. § 106.

⁴ 17 U.S.C. § 102(a). Also, formal registration of the work with the Copyright Office—which requires the deposit of a copy of the work, an application, and payment of a fee—“is not a condition of copyright protection.” 17 U.S.C. § 408(a).

⁵ 17 U.S.C. § 401.

⁶ For the complete regulations, see 37 C.F.R. 201.20, “Methods of Affixation and Positions of the Copyright Notice on Various Types of Works,” at www.copyright.gov/title37.

⁷ Copyright Office Circular 3 available at www.copyright.gov.

⁸ 17 U.S.C. § 504(c).

⁹ 17 U.S.C. § 412.



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