



A copyright is a form of legal protection provided to the authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works. Owners of a copyright have the exclusive right to reproduce and distribute the work. What many do not realize is that registration of a work is not necessary to secure a copyright. A copyright is secured automatically when the work is created. A copyright does not protect ideas, procedures, systems, or methods of operation, although it might protect the manner in which they are expressed.

A copyright usually resides with the author of the work. Therefore, if a company hires an outside consultant or vendor to create Web content or prepare marketing materials, it must be sure that the copyright for such content is properly transferred to the company. This can be achieved through a contract with the consultant or vendor, making any content a “work for hire.” In order to be secure in the protection of a company’s copyright, all employees should sign an agreement ensuring that a copyright for the works they create while employed by the company belongs to the company.

Although companies are becoming quite savvy about the type of material contained on their Web sites, all too often they reproduce articles, graphics, drawings and paintings of others thinking that if they have given attribution to the copyright holder, they have not infringed upon the writer’s or artist’s work. That’s not true. One can only disseminate copyrighted materials of others with their express written permission. So, if a company reproduces the works of others on its Web site without written permission, it is likely infringing on another’s copyright. Companies should obtain permission before providing links to other sites and make sure that the linked site does not contain materials reproduced without the permission of the artist. In fact, the United States Supreme Court recently ruled that providing a link allowing Internet users to download pirated music could itself constitute copyright infringement.

Although it is not legally necessary, it is wise to post a copyright notice on one’s Web site. The notice will make it less likely that others will copy the posted material and may allow for recovery of larger damages if the material is copied. The copyright notice should contain the word “copyright” or the copyright symbol, the date the work was published and the name of the copyright holder.

### **Software Licensing**

The importance of software licensing is often overlooked and misunderstood by companies. Oftentimes, employees believe that they can download necessary programs from the Internet, bring a copy from home or borrow a copy from a co-worker’s computer and use that software from their desks. This activity may constitute a copyright infringement by the employee for which the penalties can be severe. In fact, statutory damages for each instance (or each piece of software copied) of non-willful infringement is \$30,000 under the Copyright Act, and \$150,000 for each act of infringement found to be willful.

Companies would be well-served by putting mechanisms in place to avoid the pitfalls of licensing non-compliance. A written policy should be distributed to all employees informing

them not to download any software onto their computers without authorization. In addition to having each employee sign such a policy at the time of hire, the policy should be sent periodically as a reminder to employees. Record keeping is often overlooked when purchasing computer equipment. Copies of software licenses and invoices for all software should be kept in one location. In the event of a software audit or an accusation of infringement, having all documentation easily accessible will save the company valuable time and resources. Finally, the company should purchase audit programs to monitor the software on its machines and appoint someone in the company who does not have budget control over software purchases to make annual or periodic checks of the audits to ensure licensing compliance.

In the area of software licensing, organization and diligence are critical to avoiding expensive problems down the road. Setting up controls is a worthwhile investment.

### **Trade Secrets and Proprietary Information**

Companies are sometimes surprised to learn that what they consider to be their most important asset—their equivalent to the *Coca Cola* formula—does not qualify as a “trade secret” because it was not protected from disclosure. If proprietary information is not handled in an appropriate manner, the courts will not protect it. Simple measures can be taken to demonstrate, when necessary, that a company properly guarded its trade secrets. Take the example of a group of specifications the company considers to be proprietary information that is not readily accessible elsewhere. Ask a variety of questions including: Who has access to the documents? Are they stamped “Confidential”? Are they protected on the computer system with a password accessible only by employees with a need to access them? Are non-disclosure agreements in place with any vendors or consultants who need access to them? Are the documents kept in a secure location?

Claims alleging trade secret violations typically arise when an employee leaves a company and goes to work for a competitor. For this reason, it is important to have signed confidentiality agreements with employees. Depending upon the level of the employee and his or her job duties, the company may want to consider a reasonable post-employment restrictive covenant, including a non-compete clause or non-solicitation of customers, vendors, or employees. Any employee involved in company innovations should sign an agreement to assign to the company all intellectual property developed by him or her while employed by the company. Failure to draft a confidentiality or non-compete agreement correctly can render it invalid. That’s why legal counsel should review these agreements.

### **Insurance and Legal Considerations**

Considering the price of litigation these days, technology start-ups might want to seek protection for intellectual property risks by purchasing insurance. While most commercial general liability policies do not cover liability for intellectual property risks, a knowledgeable agent or broker can help entrepreneurs find the coverage they need for their particular industry. Many insurance companies offer specialized policies for technology companies including Internet liability and

media liability coverage. These policies frequently offer varying levels of protection for trademark and copyright infringement.

Starting a business is an exciting prospect but one that should be entered into with as much information as possible. That means researching all the risks including those involving a company's intellectual property. Take the time to contact an insurance agent or broker and legal counsel to discuss intellectual property risks and the measures that can be implemented to avoid a potential catastrophe in the future.

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