

Should You Copyright It?

What the U.S. Constitution calls the “writings” of “authors” are protected by copyright to promote literary and artistic creativity. These writings cover more than the written word and include technologies never envisioned by the men who wrote the nation’s basic governing document. Works eligible for copyright include

- literary works, including non-fiction writings,
- pictorial, graphic, and sculptural works,
- video recordings and other audiovisual works, including computer animated simulations and motion pictures,
- sound recordings,
- computer programs,
- constructed buildings (in addition to the architectural plans for them), and
- compilations of works and derivative works such as a motion picture based on a novel.

Web site content—including text, photos, artwork, music, screen savers, and other moving images—can be protected under one or more of these categories.

A copyright only protects particular expressions of ideas, not the ideas themselves, which can only be protected by patents or as trade secrets (see *The Industrial Physicist*, August 2000, pp. 26–27). To have copyright protection, a work must be “original,” that is, not copied from another source. Also, the work must not be so elementary that it lacks sufficient creativity to be copyrightable. The copyright owner basically has the exclusive rights to reproduce the work, distribute reproductions, display or perform the work publicly, make derivative works, and authorize others to do any of these things.

The individual or joint authors of a work initially own the copyright. But unlike the patent rights to an invention—which initially belong only to the individual inventors—the employer of someone who creates a copy-

righted work or a party who commissions such a work may automatically be deemed to be the “author” of a “work made for hire.” A work is deemed made for hire if it is prepared by an employee as part of his or her job, or is one of 10 specific types of

1978, is that the copyright lasts for the life of the author—or the last surviving author—plus 70 years. However, if a copyright is transferred or licensed, the author or the specified heirs can terminate that grant of rights 35 years after the agreement is signed, which may adversely affect the right to reproduce, perform, or distribute then-existing derivative works. The copyright in a work made for hire lasts for 95 years from publication or 120 years from creation, whichever is shorter. Transfers or licenses of such works are subject to early termination during the last 20 years of the copyright term.

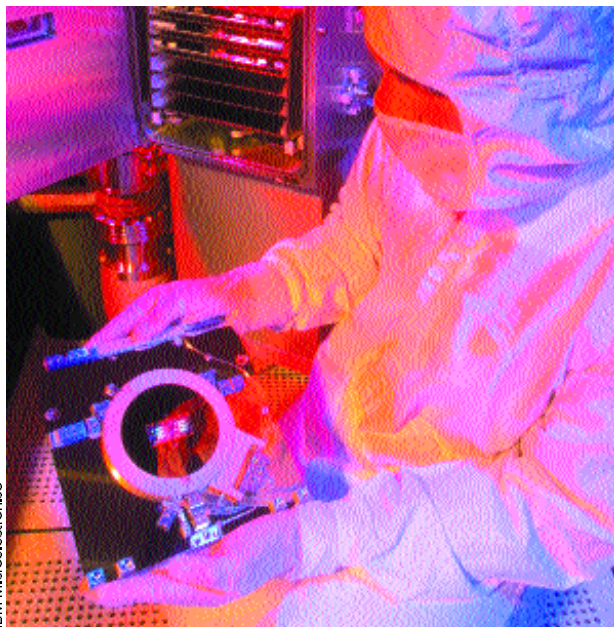
All copyright transfers must be in writing. It is not mandatory to record a transfer in the Copyright Office, but doing so gives notice of the transfer to possible subsequent transferees, who are then legally deemed to know of the transfer.

Copyright notices

No copyright notice is required for an unpublished work. However, you should affix a copyright notice to all publicly distributed copies in an easily noticed location. A copyright notice usually consists of all the following three elements: either the symbol ©, the word “Copyright,” or the abbreviation “Copr.”; the year you first circulated the work; and the name of the copyright owner, a recognizable abbreviation of the name, or a generally known nickname, pseudonym, or trademark.

On works created on or after March 1, 1989, a copyright notice is no longer mandatory. You may wish to use a copyright notice anyway because an innocent infringer, relying on the absence of notice, is not liable for damages before receiving notice of the copyright. Any person who uses or removes a copyright notice with fraudulent intent is subject to a fine.

You can register a copyright in any published or unpublished work at any time during the period of copyright by depositing in



A technician examines a mask, which acts like a photographic negative when tiny circuit patterns are printed on chips in the lithography process. The mask work can be registered in the Copyright Office.

works specially ordered or commissioned, such as a translation or a contribution to a magazine or other collective work. Most importantly, a work by an independent contractor is a work made for hire only if both parties sign a written agreement saying so.

Procedure

The moment you create and fix a copyrightable work in a tangible form—such as by writing it down, putting it into a computer, or recording it on film or tape—it automatically enjoys federal copyright protection. This is true whether or not it has been published or registered with the U.S. Copyright Office.

Copyright duration varies. The general rule for a work created on or after Jan. 1,

the Copyright Office two complete copies of a published work (or one copy of an unpublished work), an application, and a fee of \$30. Failure to register the copyright does not invalidate it, although suing an infringer generally requires registration. Also, you cannot recover attorney's fees or statutory damages—which a judge can award without proof of monetary loss—for an infringement that began before registration unless you registered the copyright within three months after first publication.

Because copies sent to the Copyright Office may end up in the public collections of the Library of Congress, registering a claim to copyright in an unpublished work may destroy its trade-secret protection. This situation is similar to the effect of applying for patent protection on a secret invention. However, a copyright registration can provide protection against a broader class of infringers than trade-secret protection. You should carefully consider which type of protection

would better suit your needs.

Copyright infringement generally is the unauthorized use or copying of the work. It is frequently difficult to prove copying, so the copyright owner usually tries to prove that the alleged infringer had "access" to the work and that the two works have "substantial similarity" from the viewpoint of an ordinary observer. Then the burden of proving independent creation shifts to the alleged infringer.

Some activities not considered copyright infringement include

- the use of the basic idea,
- the independent creation of an identical work without copying,
- the sale or limited public display of a physical copy of a work by the copy owner,
- "fair use" of the work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. Fair use involves factors such as whether the use is for a nonprofit educational purpose,

the subject is factual, the amount of material used is insubstantial, the potential economic detriment is small, and the use is for a purpose different from the original,

- use under one of several specified "compulsory licenses," such as a piece of music licensed for one recording which must be licensed for all recordings,

- transitory digital communications by an online service provider, such as serving as a conduit for e-mail, and

- making a copy of a computer program solely for purposes of maintaining or repairing a computer containing it.

Federal law makes willful copyright infringement for profit a criminal offense. Penalties are a fine of up to \$25,000, imprisonment not exceeding 1 year, or both, for a first offense. For a second or subsequent offense of certain types, penalties are a fine of up to \$250,000 for individuals and \$500,000 for organizations, a prison term of up to 10 years, or both. Fines and imprisonment can be imposed for

willful copyright infringement by electronic means, such as by putting someone else's work on the Internet without permission, even if it is not done for profit.

Civil remedies are also available to the holder of any exclusive rights in the copyrighted work. These remedies include

- an injunction against future copyright infringement,
- impounding and destruction or other disposition of all infringing reproductions and the articles used to make them,
- actual damages suffered by the copyright owner,
- any additional profits resulting from the infringement,
- at the copyright owner's election, statutory damages, instead of actual damages and profits, for all infringements of any one work from \$750 to \$150,000, in the judges discretion,
- full costs, including a reasonable attorney's fee, and
- a civil fine imposed by the U.S. Customs Service against the importers of counterfeit goods.

International protection

International treaties are important in copyright because they offer protection almost worldwide. The United States has copyright relations with about 160 countries, about 130 of which (including the United States) are members of the Berne Convention, which provides for automatic copyright protection in its member nations. In addition, the United States is a member of the Buenos Aires Convention, which only requires a notice such as "All Rights Reserved" to enforce a copyright.

The United States also has implemented some new international copyright treaties that are effective for the most part on Oct. 28, 2000. These pacts prohibit the direct or indirect circumvention of technological measures to control access to a copyrighted work; knowingly providing false copyright management information (such as the title, author, and copyright owner); intentionally removing or altering such information; or distributing, importing, or publicly performing works knowing that copyright informa-


tion has been removed or altered. Criminal penalties for a violation range up to \$1 million, and there also are civil remedies.

Semiconductor chips

A separate federal law gives the owner of a semiconductor-chip design—known as a mask work—exclusive rights to reproduce it and to import and distribute chips embodying it (see figure, page 31). The mask work must be original when considered as a whole and not commonplace. This protection starts when you register the mask work in the Copyright Office or you first commercially exploit the mask work anywhere, whichever is earlier. It continues for 10 years, but only if you make the mandatory registration within two years of the first commercial exploitation.

You may use a nonmandatory notice of protection consisting of the words "mask work," the symbol *M*, or the symbol M, and the name of the owner or a recognized abbreviation. There are no criminal penalties for mask work infringement. The civil remedies are substantially the same as those for copyright infringement, except that maximum statutory damages are \$250,000. This law specifically permits reverse engineering, distribution, use of authorized chips, and innocent infringement.

Conclusion

Copyrighting a work offers protection that is automatic and enforceable almost worldwide, and this protection can last well beyond the creator's lifetime. However, although registering a claim to U.S. copyright is relatively inexpensive, many works cannot qualify for copyright, or obtaining one will not give you meaningful protection. Moreover, a copyright registration may destroy a work's trade-secret protection. To sort out all of these considerations, you might benefit from the advice of an attorney familiar with copyright law. 

B I O G R A P H Y

William M. Borchard is a partner in the law firm of Cowan, Liebowitz & Latman in New York, New York (wmb@cll.com).