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How Well Are You Positioned to Protect Your Copyrights?

"Copyrights exist upon creation of the work." You've heard this a million times. Then what is "copyright registration" and why is it important?

Often people do not realize that unless you register your copyright, you cannot pursue an infringer of your work and you will lose the opportunity to obtain statutory damages (damages assessed by the court if proving actual damages is too difficult) and attorney's fees.

By understanding the purpose of copyright registration and being aware of the dangers of not registering, many can avoid costly litigation and ultimate disappointment when attempting to collect damages for copyright violations.

First, it is important to know about the basics.

- **What is copyrightable?** It is common knowledge that copyright law protects works of expression such as books, fine art, music and photographs. But many other works are eligible for protection also, such as software, presentations, Web sites, architectural drawings and much more.

- **What is the difference between copyright and copyright registration?** Once you create a work of expression in a tangible form, your copyrights are inherent in that work.

Registering your copyright, which is done through the U.S. Copyright Office (www.copyright.gov), is required in order to enforce your copyrights should your work be used or copied without your permission. And no, sending the work to yourself does not count.

- **What happens if work is not registered?** If your work is infringed and if you do not hold a registration for the copyrights in your work, you must seek regis-



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tration in order to maintain a lawsuit. An expedited registration process is available but for a much higher fee.

More important, your only recovery will be any actual damages you can prove – no statutory damages or attorney's fees. Therefore, the costs of enforcing your copyrights can be huge with little prospect for a return. Alternatively, if you register your copyright in a timely way, the situation is entirely different in terms of cost, damages and leverage.

Consider the following hypothetical situation. Company A and Company B are both consulting firms that have carefully developed presentations for their clients. Company A has not registered the copyright in its presentations, Company B has.

Both companies find out that their presentations were copied by a competing consulting company, Company C.

Company C has received \$20,000 in fees from its clients thus far for the using the infringing presentations.

Assuming the presentations warrant copyright protection and that the copying is proven, here is how the situation might play out.

Company A (not registered):

- Cannot file suit in federal court without first applying for an expedited copyright registration at a cost of approximately \$1,300 (expedited filing fee, special processing fee and attorney's fees);

- Cannot obtain attorney's fees or statutory damages because it did not register before the infringement began. Company A must hope that it can show lost profits or defendant's profits as damages in order to obtain any monetary recovery;

- Cannot obtain maximum negotiation leverage to settle the matter without seek-

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ing an injunction or continuing the lawsuit. Copyright litigation (including seeking a preliminary injunction) is expensive. But without the threat of the potential infringer having to pay attorney's fees and without statutory damages available, the monetary threat to Company C is decreased;

- Even if Company A wins the case, it may lose financially or may not be able to pursue even a valid claim because of the cost of litigation against the infringer.

Company B (registered):

- Can immediately file suit. Its cost to register was roughly \$300 (\$45 plus attorney's fees if it did not do it itself);

- Can elect statutory damages in lieu of proof of damages to Company B or profits to Company C and is eligible to recover attorney's fees incurred in prosecuting the claim because it registered before the infringement began;

- Has great leverage in negotiating. Faced with the prospect of damages, plus Company B's attorney's fees, plus their

own attorney's fees, the financial risk to Company C is great. Company C may be more willing to come to the table to negotiate short of Company A seeking an injunction or pursuing a lawsuit;

- If, as the fact pattern suggests, Company B is successful at a trial on the infringement claim, it also has the opportunity to recover its attorney's fees and therefore the cost of litigation has not prohibited Company B from moving forward with its claim.

Company A may come out with a judgment preventing Company C from infringing on its work, but will also be saddled with the legal costs of pursuing the claim. The fact that Company A has to prove damages will also increase the cost of litigation.

Company B, however, by registering its work, is in a position to elect statutory damages if proof of actual damages is difficult or too costly. In addition, Company B knows that if it prevails in the lawsuit, its

attorney's fees can be covered. In an instance where infringement occurs, clearly the company that registers is better off.

Obviously, no situation is as absolute as the hypothetical, and there are a number of other possible factors and outcomes, but you get the idea. If your company has created work that qualifies for copyright protection, you should register that copyright as soon as possible.

Otherwise, you are putting yourself at a distinct disadvantage if your work is ever used without your consent.

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