

Trademarks and Copyrights

Any symbol, such as a word, number, picture or design used by manufacturers or merchants to identify their own goods and distinguish them from goods made or sold by others, may be a trademark. There are three ways to protect a trademark:

1. **Without registration.** The common law provides that the first user of a marked product in a given geographic area is protected by law from anyone else using that mark in the same geographic area in a way that could be considered unfair competition. This rule applies without registering the mark simply by being the first one to use any particular mark. Notice is given to the public and any competitors not to use your mark simply by marking it with the symbol **TM**. This procedure is similar to protecting a copyright on a document simply by marking it appropriately. Registration is not required. To enforce this common law protection against somebody else using the same mark, you would have to prove in court that you used the mark first, it was marked with the symbol, and that the other person's use of the same mark damaged your business.

2. **Registration with the State.** Registering a mark with the Secretary of State's office protects the mark from being used by anyone else in that state for five years (after which registration can be renewed). A mark registered with the State can be marked with the designation "Registered Trademark" or "Reg". For more information about state registration, see the website of your State's Secretary of State.

3. **Registration with the US Patent & Trademark Office.** Registering a mark with the US Patent & Trademark Office in Washington, DC protects the mark from being used by anyone else in this country for ten years (which can be renewed). A mark registered with the US Patent & Trademark Office is marked with the symbol ®. For more information see www.uspto.gov.

Copyright. The owner of a copyright has the exclusive right to reproduce a protected work. The term work refers to any original creation of authorship produced in a tangible medium, and includes literary pieces, musical compositions, dramatic selections, dances, photographs, drawings, paintings, sculpture, motion pictures, radio and TV programs, sound recordings and computer software programs. A copyright becomes the property of the author the moment the work is created, and lasts for the author's life plus 70 years.

How does copyright differ from trademark protection?

Copyright protects original works of expression, such as novels, fine and graphic arts, music, audio recordings, photography, software, video, cinema, and

choreography by preventing people from copying or commercially exploiting them without the copyright owner's permission.

Copyright laws specifically do not protect names, titles or short phrases. That's where trademark law comes in. Trademark protects distinctive words, phrases, logos, symbols, slogans, and any other devices used to identify and distinguish products or services in the marketplace.

There are, however, areas where both trademark and copyright law may be used to protect different aspects of the same product. For example, copyright laws may protect the artistic aspects of a graphic or logo used by a business to identify its goods or services, while trademark may protect the graphic or logo from use by others in a confusing manner in the marketplace. Similarly, trademark laws are often used in conjunction with copyright laws to protect advertising copy. The trademark laws protect the product or service name and any slogans used in the advertising, while the copyright laws protect the additional creative written expression contained in the ad.

WHAT IS COPYRIGHT?

Copyright is a form of protection provided by the laws of the United States (title 17, U.S. Code) to the authors of "original works of authorship," including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the 1976 Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

- **To reproduce** the work in copies or phonorecords;
- To prepare **derivative works** based upon the work;
- **To distribute copies or phonorecords** of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- **To perform the work publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- **To display the copyrighted work publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- In the case of **sound recordings, to perform the work publicly** by means of a **digital audio transmission**.

WHO CAN CLAIM COPYRIGHT

Copyright protection exists from the time the work is created in fixed form. The copyright in the work of authorship **immediately** becomes the property of the

author who created the work. Only the author or those deriving their rights through the author can rightfully claim copyright.

WHAT WORKS ARE PROTECTED?

Copyright protects "original works of authorship" that are fixed in a tangible form of expression. The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device. Copyrightable works include the following categories:

1. literary works;
2. musical works, including any accompanying words
3. dramatic works, including any accompanying music
4. pantomimes and choreographic works
5. pictorial, graphic, and sculptural works
6. motion pictures and other audiovisual works
7. sound recordings
8. architectural works, plans and blueprints

These categories should be viewed broadly. For example, computer programs and most "compilations" may be registered as "literary works"; maps and architectural plans may be registered as "pictorial, graphic, and sculptural works."

WHAT IS NOT PROTECTED BY COPYRIGHT?

Several categories of material are generally not eligible for federal copyright protection. These include among others:

- Works that have **not** been fixed in a tangible form of expression (for example, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded)
- Titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration
- Works consisting **entirely** of information that is common property and containing no original authorship (for example: standard calendars, height

and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources)

HOW TO SECURE A COPYRIGHT

Copyright Secured Automatically upon Creation

The way in which copyright protection is secured is frequently misunderstood. No publication or registration or other action in the Copyright Office is required to secure copyright. (See following [Note](#).) There are, however, certain definite advantages to registration.

Copyright is secured ***automatically*** when the work is created, and a work is "created" when it is fixed in a copy or phonorecord for the first time. "Copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm. "Phonorecords" are material objects embodying fixations of sounds (excluding, by statutory definition, motion picture soundtracks), such as cassette tapes, CDs, or LPs. Thus, for example, a song (the "work") can be fixed in sheet music ("copies") or in phonograph disks ("phonorecords"), or both.

If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date.

NOTICE OF COPYRIGHT

The use of a copyright notice is no longer required under U. S. law, although it is often beneficial. Because prior law did contain such a requirement, however, the use of notice is still relevant to the copyright status of older works.

Notice was required under the 1976 Copyright Act. This requirement was eliminated when the United States adhered to the Berne Convention, effective March 1, 1989. Although works published without notice before that date could have entered the public domain in the United States, the Uruguay Round Agreements Act (URAA) restores copyright in certain foreign works originally published without notice. For further information about copyright amendments in the URAA, request [Circular 38b](#).

The Copyright Office does not take a position on whether copies of works first published with notice before March 1, 1989, which are distributed on or after March 1, 1989, must bear the copyright notice.

Use of the notice may be important because it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication. Furthermore, in the event that a work is infringed, if a proper notice of copyright appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in [section 504\(c\)\(2\)](#) of the copyright law. Innocent infringement occurs when the infringer did not realize that the work was protected.

The use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office.

Form of Notice for Visually Perceptible Copies

The notice for visually perceptible copies should contain all the following three elements:

1. **The symbol** © (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr."; and
2. **The year of first publication** of the work. In the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying textual matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful article; and
3. **The name of the owner of copyright** in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.


Example: © 2002 John Doe

The "C in a circle" notice is used only on "visually perceptible copies." Certain kinds of works--for example, musical, dramatic, and literary works--may be fixed not in "copies" but by means of sound in an audio recording. Since audio recordings such as audio tapes and phonograph disks are "phonorecords" and not "copies," the "C in a circle" notice is not used to indicate protection of the underlying musical, dramatic, or literary work that is recorded.

Form of Notice for Phonorecords of Sound Recordings*

Sound recordings are defined in the law as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." Common examples include recordings of music, drama, or lectures. A sound recording is not the same as a phonorecord. A phonorecord is the physical object in which works of authorship are embodied. The word "phonorecord" includes cassette tapes, CDs, LPs, 45 r. p. m. disks, as well as other formats.

The notice for phonorecords embodying a sound recording should contain all the following three elements:

1. The symbol  (the letter P in a circle); and
2. The year of first publication of the sound recording; and
3. The name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. If the producer of the sound recording is named on the phonorecord label or container and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.

Example: 2006 A.B.C. Records Inc.

Publications Incorporating U. S. Government Works

Works by the U. S. Government are not eligible for U. S. copyright protection. For works published on and after March 1, 1989, the previous notice requirement for works consisting primarily of one or more U. S. Government works has been eliminated. However, use of a notice on such a work will defeat a claim of innocent infringement as previously described provided the notice also includes a statement that identifies either those portions of the work in which copyright is claimed or those portions that constitute U. S. Government material.

For more information, visit the website of the Copyright Office at www.copyright.gov.

What is a trademark?

A trademark is a distinctive word, phrase, logo, domain name, graphic symbol, slogan, or other device that is used to identify the source of a product and to distinguish a manufacturer's or merchant's products from others. Some examples are Nike for sports apparel, Gatorade for beverages, and Microsoft for software.

Consumers often make their purchasing choices on the basis of recognizable trademarks (sometimes referred to simply as "marks"). For this reason, the main thrust of trademark law is to make sure that trademarks don't overlap in a manner that causes customers to become confused about the source of a product.

If two similar trademarks are being used by companies that provide different products or services, there may not be a trademark conflict. This is especially true if the two businesses serve only local markets and are hundreds of miles apart.

However, in the case of trademarks that have become famous -- for example, McDonald's -- the courts are willing to grant much broader protection and prohibit almost all use of the trademark (or anything close to it) by anyone other than the famous mark's owner. For instance, McDonald's was able to prevent the use of the mark McSleep by a motel chain because McSleep traded on the McDonald's reputation for a particular type of service (quick, inexpensive, standardized). This type of sweeping protection is authorized by federal and state statutes (referred to as anti-dilution laws) designed to prevent the weakening of a famous mark's reputation for quality.

In order to be eligible for trademark protection, a word or phrase must be "distinctive" --unique enough to help customers recognize a particular product in the marketplace -- rather than generic, like "The Coffee House." A mark may either be inherently distinctive (the mark is unusual in and of itself, such as Diesel fashions) or may become distinctive over time because customers come to associate the mark with the product or service (for example, McDonald's restaurants).