

BEUSSE, BROWNLEE, WOLTER, MORA & MAIRE, P.A.

WEBSITE COPYRIGHT INQUIRY

Briefly, copyright is a legal device which provides the owner of the work (e.g., book, manuscript, software program, artwork, technical drawings, website, etc.) exclusive rights over the work, such as the right to make copies, the right to distribute copies, the right to make adaptations/derivative works (prepare new works based on the underlying work), as well as the right to perform and/or display the work in public. The Copyright Office specifically addresses the registration of websites in Circular 66 - Copyright Registration for Online Works.

Copyright automatically comes into existence the moment an author fixes his or her work in some tangible form, *e.g.*, software code is written. If a work is created as a “work-for-hire,” ownership generally goes to the employer (or person who commissioned the work in certain instances). Otherwise, ownership remains in the author or website developer and must be expressly assigned.

Copyright protects an author’s work only if and to the extent it is *original* (*i.e.*, not copied from another’s work). However, a work need not be entirely new to be protectable. Certain works are derived from previously existing works or are compilations of pre-existing material and become new works of authorship entitled to copyright protection. The most important limitation of copyright is that it protects only the particular form of expression, not the ideas, methods or concepts contained within it. Software patents or trade secrets are the best vehicle for protecting such ideas.

In the past, all published works had to contain a copyright notice (©, name of owner, date) to be protected. Now the use of copyright notice is optional, but it is always a good idea to include copyright notice on all published works to warn potential infringers of your claim to copyright. You should place your copyright notice in a number of different places to ensure that it serves its intended purpose — to be seen and give notice of your copyright. Preferably, every page of a website should contain the notice.

The definition of “publication” in the U.S. copyright law does not specifically address online transmission and websites. Under current copyright law, “publication” is defined as “... the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.” 17 U.S.C. Sec. 101. In a recent New York case, however, the district judge held that the date in which a website goes “live” on the Internet is the date of publication. The date of publication may be important in determining whether you are entitled to statutory damages in the event on infringement.

Furthermore, registration of the work with the U.S. Copyright Office is not *required*. However, prompt registration provides a number of important advantages if it is ever necessary to go to court to enforce it. For example, registration makes your copyright a matter of public record and may provide you with the ability to collect statutory damages (\$750 - \$30,000 or up to \$150,000 in cases of willful infringement) and attorney fees in the event of litigation.

Usually websites are often revised and modified on a regular basis. Preferably, each version of a website should be registered separately starting with the first published version. A new version of a preexisting *published* website is considered a *derivative work* under current copyright law. Once you have registered an original version of a website, all material contained in *that* version is covered, regardless of how many new versions are produced. However, new material contained in the new versions is not covered without additional registrations. If the changes are minor, or merely correct routine errors, registration is probably not necessary — and will not be allowed. If, on the other hand, your changes are significant, you should register the new site as a new version of the original site. Note carefully that under Copyright Office rules, registering a later version of a previously published website will not constitute registration of the earlier version, and will only cover the new material added to the preexisting site. Accordingly, under the current regulations, the original version and any intervening versions should also be registered for complete protection.

The deposit material required by the Copyright Office varies depending on the type of work to be registered and whether the work has been published. Usually a CD of the entire site is provided as deposit materials. The Copyright Office normally retains deposits for only five years. You may, however, request a full-term retention for a fee.

In the event of infringement, you will need to demonstrate copying, which generally can be established by showing access and substantial similarity to your work. The best evidence of infringement is to catch the infringer with a work that is somehow instantly identifiable as being yours. This can be accomplished by burying nonfunctional and idiosyncratic symbols somewhere in the code, meta-tags, or in hidden text. If these symbols or coding are present in the infringer's copy, a court will likely conclude that there was indeed copying.

It is also very important to keep meticulous records of the entire development process, from the initial stage to final publication. A policy for maintaining master copies of each version of your site should also be implemented for evidential purposes. This can be useful in demonstrating that your work was original (in the event you are charged with infringement) and also to demonstrate that the software code involved in any litigation for which you are charging someone with infringement is owned by you. The kinds of evidence courts typically rely on are witnessed records and Copyright Office deposits, since electronic records are too easily altered to give them legal credibility. Dated, witnessed, hard copy print-outs of code and web pages are likely to be the most credible form of evidence. Supplemental permanent media copies (CDs) may also prove effective in some instances.