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Copyright Registration Basics for “Creative Entrepreneurs”

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When I talk to writers, artists, and other creative people with ideas for a film, television show, or other production the first thing they often want to do is start talking to other people about it. Sometimes they only have an idea in mind, or more often they have some pitch materials, a treatment, a bible, some storyboards or an entire screenplay. But whatever it is, they want to get other people excited about their project so they can get their film or television show made.

I call them “creative entrepreneurs.” Their creative aspirations, ideas, and materials often are the only assets they have. If they don’t establish ownership of these assets they may never see their dreams become realities, or profit from them even if they are produced.

Creators often have little idea how important it is to establish ownership of their creations before venturing into the competitive and often-contentious US entertainment industry. Some know enough to register their treatments and scripts with the Writers Guild of America registry service. But generally only the ones who’ve been around long enough to have learned the hard way will have obtained US copyright registrations.

This is unfortunate because copyright registration is relatively easy and inexpensive, and offers considerable benefits to copyright owners, so there is every reason to register. These benefits cannot be obtained by any other method, including the WGA registry service. Failure to obtain a timely copyright registration can result in significant consequences, potentially leaving the writer, artist, or other creator without effective means to pursue theft, plagiarism, and infringement.

Copyright registration should play a basic underlying role in every creative entrepreneur’s strategy for maintaining the value of his or her creations and preventing infringement of copyrighted works. There is simply no substitute—the creator who signs away valuable rights or waits until someone has stolen the screenplay already has missed out on key protections extended to registered copyright owners.

As a rule of thumb, copyright registration application should be made no later than three months after initial publication of the copyrighted work. But to maximize the benefits of copyright ownership, the creative entrepreneur may want to register well in advance, prior to sharing copyright assets with others in the entertainment industry.

Top Ten Reasons to Register Your Copyright

In the United States, copyright generally attaches automatically the moment an original work is created and “fixed” in a tangible medium of expression. Strong protections are available to copyright owners under the US Copyright Act, including the right to prevent others from copying and selling copies of the work, or creating additional derivative works (such as a sequel or spin-off) based on the copyrighted work. These rights and protections are available to copyright owners independent of filing a copyright registration application with the US Copyright Office.

Timely and proper registration with the Copyright Office, however, can bring significant additional value to copyright owners. The discussion below offers a basic introduction to the most important benefits of timely copyright registration. These benefits are available for both published and unpublished works. The Copyright Office’s registration application process is relatively straightforward, but most copyright owners will benefit from having a copyright attorney walk them through the process and review their application at least the first few times.

1. Public Notice of Ownership

Registration establishes a public record of the copyright ownership of a work. This is one of the primary benefits of registration, as it puts other parties on notice that you own a work and that you are serious about copyright protection. Similar to affixing a copyright notice (such as “© 2014, Melanie Tomanov, All rights reserved”) to copies of your work, registration advertises your ownership and your intent to protect your rights.

The basic notice function that is achieved by copyright registration lays the foundation for nearly all of the additional benefits that flow from registration as discussed in the remainder of this article. Failure to register can open the door to an infringer’s claim that his infringement was “innocent” because he was unaware of the copyright owner’s rights in the works. So while neither copyright registration nor affixing a copyright notice is strictly required under current laws for copyright to attach to your work, both are easy and affordable measures that offer significant additional protections to copyright owners.

2. Credible Copyright Policing

The entertainment industry is chockfull of savvy infringers. These infringers often are well aware of the benefits copyright registration confers on copyright owners. The benefits discussed below, such as the ability to file suit immediately, the presumption of ownership and validity, and the threat of statutory damages, legal costs and attorney fees often can be enough to dissuade the knowledgeable infringer from copying a registered work. Timely copyright registration can enhance the effect of a “cease and desist” letter on the infringer who understands that the letter is backed by a credible threat of immediate legal action. Thus registration can result in a more robust copyright protection strategy for copyright owners and improve the chances that copyright infringements never happen in the first place, or can be settled quickly and without the need for lawsuits.

Failure to timely register, on the other hand, can signal to potential infringers that copyright owners do not understand their rights or are not serious about protecting and policing their copyrighted works. Thus attempts by copyright owners to police works that have not been registered may be perceived as lacking in credibility.

3. Presumption of Ownership and Validity

A certificate of copyright registration serves in court as *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate.

This means that a court will accept your ownership rights in the copyright of the relevant work as established, and it will fall to the infringer to try to disprove your rights. This “shift in the burden of proof” can be critical to winning a lawsuit. But it can be particularly useful when a copyright owner is seeking swift enforcement, such as a preliminary injunction to stop an infringer. The presumption of ownership and validity is only available where proper registration was made within five years of initial publication of the copyrighted work—thus timely registration is key in this context to enjoying the full range of benefits available to copyright owners.

In contrast, the Writers Guild of America (WGA) script registry does not establish ownership or validity. In a dispute, WGA registration is valuable as evidence only that a script was in existence on the registration date. Thus a material shortcoming of WGA registration is that it typically is not useful in a legal dispute to establish authorship or ownership of a screenplay or other creative materials.

4. It Is Easy and Inexpensive

Copyright registration is a remarkable value and the copyright registration procedure is relatively simple. Registration can be made at any point after creation of a copyright work, and is available for both published and unpublished works.

Most copyright registration applications can be filed online through eCO (the electronic Copyright Office filing system, at <http://www.copyright.gov/eco>) by filling out and submitting an electronic form, paying a basic \$35 filing fee and then submitting the required deposit materials. Complying with the deposit requirement generally is the trickiest part—the nature of the required deposit varies with the type of work, and copyright law requires that deposit materials be of the “best edition” of the work (generally meaning the highest quality). For online applications, the Copyright Office will allow you to upload certain deposit materials in PDF format after you’ve paid the filing fee. Other deposit materials must be physically submitted to the Copyright Office in hard copy. Older “mail-in” registration forms also are still available at additional fees. If you find any portion of the application process daunting, consider asking a copyright attorney to walk you through the process at least the first time.

5. Ability to File a Lawsuit Immediately

Filing a copyright infringement lawsuit in federal court requires a certificate of copyright registration. A copyright owner with a valid copyright registration

certificate in hand can immediately file suit or seek a preliminary injunction or other expedited relief. Copyright owners without a registration certificate typically must wait to file the lawsuit while they apply for copyright registration. Even if you immediately file a registration application with the Copyright Office, the copyright registration process typically takes about six months to one year to complete, and during this time your lawsuit cannot proceed until the copyright registration certificate issues.

For this reason, copyright registration can add clout to “cease and desist” letters—the knowledgeable infringer understands that such letters are backed by a credible threat of immediate legal action. Conversely, attempts to police works that have not been registered may be perceived as lacking in credibility, because the savvy infringer knows that legal recourse will not be swift.

In an emergency, it may be possible to obtain a copyright registration certificate in as little as one week through an expedited registration process that requires payment of additional fees.

6. Statutory Damages, Legal Costs and Attorney Fees

If you are the copyright owner, then you want statutory damages available in an infringement lawsuit. A range of statutory damages, currently a discretionary amount between \$750–\$30,000 per infringed work, is available to the owners of timely registered works *without having to prove actual damages*. Copyright registration can also help to preclude an innocent intent defense for infringers. If a copyright owner can show willful infringement, the available damages may increase up to \$150,000 per infringed work. Infringers who show they were “not aware and had no reason to believe” they were infringing can ask the court to reduce statutory damages to as low as \$200 per infringed work.

Statutory damages are available only in lawsuits involving copyrighted works that have been timely registered with the Copyright Office. Copyright owners who are eligible to receive statutory damages also may be entitled to have their legal costs and attorney fees paid by the infringer. In this context, “timely” registration means that you have properly filed a copyright application (*i.e.*, the Copyright Office receives the properly completed application, fee, and required deposit materials) within three months after initial publication of the work, or before the infringement at issue begins.

This means that if you wait to register until someone has stolen your screenplay, then it is already too late. Once the infringement begins, you will not be

eligible for statutory damages, legal costs, or attorney fees even if you immediately file a registration application.

Without timely registration, the remedies available to a copyright owner typically are limited to an award of actual damages and disgorgement of the infringer’s profits, and the burden is on the copyright owner to provide proof of such damages and profits. It often is difficult or impossible to prove that you were actually damaged or how much your infringer profited, and in that case you may not be awarded any money at all in a lawsuit even if you prove infringement. Disgorgement of the infringer’s profits typically is available only back to the copyright registration date, so the copyright owner ideally wants a registration date that precedes the date the infringement commenced.

7. Enforcement—The Cost-Benefit Analysis

The ability to recover statutory damages, legal costs, and attorney fees is often critical to decision-making when the cost of a lawsuit to enforce a copyright may be high in comparison to the potential damages available. Without the ability to recover legal costs and statutory damages, many copyright owners must decide to forego an expensive legal action against a copyright infringer. So failure to obtain a timely copyright registration can potentially leave the writer, artist, or other creator without effective means to pursue theft, plagiarism, and infringement.

Knowledgeable infringers often are fully aware of this cost-benefit analysis on the part of the copyright owner. Threats of legal action for unregistered works can be perceived as empty if the infringer knows a lawsuit will cost far more than the potential damages you can recover.

This calculus is one of the main reasons registration can result in a more robust copyright protection strategy for copyright owners. It can improve the chances that copyright infringement matters never happen in the first place, or can be settled quickly and without the need for lawsuits. If matters do progress to a lawsuit, timely registration can substantially improve your chances of coming out ahead financially.

8. Monetizing Your Assets—Recordation of Transfers

As a copyright owner, the Copyright Act gives you the right to assign or license your copyrighted works to others. You also can purchase or license rights to copyrighted works owned by other copyright owners. The Copyright Act provides a system for recordation

of such transactions so that the new owner or licensee may establish a public record of its ownership or licensed rights in the copyrighted work. The Copyright Office typically will record any “transfer of copyright ownership” or other document pertaining to a copyright. Recordation of such documents with the Copyright Office gives constructive public notice of the facts written in the recorded document, but only if the document specifically identifies the work to which it pertains *and* if registration has been made for the relevant copyrighted work.

Creative entrepreneurs typically want to profit by exploiting their creative assets, and these recordation procedures often play an important role in facilitating the monetization of copyrighted assets. If you want to sell the motion picture rights to your novel to a major motion picture studio, the studio will require a copyright registration first. Typically, they also will require you to sign a short form Assignment Agreement that they will then record with the Copyright Office.

Thus complying with the Copyright Office’s registration and recordation systems can be an important means to maximizing the value of your creative assets. The publicly available chain-of-title record that results from copyright registration combined with recordation of subsequent transfers can be essential to establish both ownership and value of copyright assets.

9. Monetizing Your Assets—Perfecting Security Interests

Loans, mortgages and security agreements where copyright assets are collateral can be recorded and perfected with the Copyright Office following the same procedure applicable to recordation of transfers discussed above. Many creative entrepreneurs (and even established producers and major studios) may have few assets other than their copyrighted works. As with any other kind of entrepreneur, the ability to use these copyright works as collateral for a loan can be important to realizing their creative aspirations.

Most lenders will not accept unregistered copyright assets as collateral. As with other transfers of copyright, a security interest in a copyrighted work may not be perfected under the Copyright Act until the copyrighted work to which it pertains has been registered with the Copyright Office. Under current federal case law, compliance with the Copyright Act’s recordation procedures is the *only* valid means to perfect a security interest in a registered copyrighted work.

The Copyright Act also establishes a means of determining priority among secured parties: As between

two conflicting transfers, the one executed first prevails if it is recorded with the Copyright Office within one month if executed in the United States, and two months if executed outside the United States. Thus in contrast to the “first to file or perfect” rule of Article 9 of the Uniform Commercial Code, the Copyright Act permits the recordation of a transfer of copyright to be retroactively effective for purposes of priority by as much as two months after receipt by the Copyright Office.

10. Protection against Foreign Bootleg Copies

The US Customs and Border Protection can seize foreign bootleg copies of registered copyrighted works at the border. Any registered copyright owner may record with the US Customs and Border Protection a certificate of copyright registration, accompanied by required identifying material and the appropriate fee. Such a recordation generally is valid for 20 years, and can be successively renewed as long as the underlying copyright registration remains valid. The US Customs and Border Protection is empowered to bar the importation of “piratical” copies of the registered work (*i.e.*, copies made without the authorization of the copyright owner). Piratical goods are subject to fines, seizure, forfeiture, and/or destruction at the border.

The US Customs and Border Protection approach can be an alternative to copyright infringement litigation in federal court. The expedited procedures available under this approach may offer copyright owners significant timing benefits compared to proceeding to federal court based on an infringement claim.

Conclusion

Copyright registration is a relatively simple and cost-effective means of adding value to your copyrighted works and discouraging copyright infringement. As a rule of thumb, you should file no later than three months after the initial publication of the relevant copyrighted work. But the strategic creative entrepreneur may want to register well before publication, prior to sharing copyright assets with others in the entertainment industry.

One of the primary benefits of timely registration with the Copyright Office is creation of a public record that puts other parties on notice that you own a work and that you are serious about copyright protection. Other benefits of timely copyright registration include the ability to file suit in federal court immediately, the presumption of ownership and validity, and the availability of statutory damages, legal costs, and

attorney fees. Registration also can confer significant advantages to copyright owners by facilitating the sale, licensing, and financial transactions involving copyrighted works.

For the creative entrepreneur, copyright registration should play a fundamental role in his or her overall strategy for establishing and maintaining the value of the creative entrepreneur's primary assets—the creative works. If the entrepreneur doesn't establish

ownership of these assets he or she may never see his or her creative aspirations become realities, or profit from them even if they are produced. Failure to obtain a timely copyright registration potentially can leave the creative entrepreneur without effective means to pursue theft, plagiarism, and infringement. It is always wise to consult with a knowledgeable copyright attorney to develop a plan for timely and proper copyright registration.

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