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Practical Guide to Copyright Registration

By Pantea M. Garroussi, Partner

Many assets critical to businesses are protected under copyright laws. These assets include proprietary software, photographs, audio and/or visual recordings, artwork, product and packaging designs, websites, advertising materials, publications, and some databases. Although you don't have to register copyrights with the U.S. Copyright Office to have a copyright, it is nevertheless essential to do so if you want to enforce your copyrights.

Although registering a copyright is relatively easy and inexpensive, it is commonly overlooked. Too often copyright owners are reminded to register their copyrights only after a litigation or transactional emergency has arisen, after it is too late to fully enjoy the benefits of registration. In deciding whether you should register your copyrights, consider the following:

- You cannot sue for copyright infringement until the copyright is registered with the Copyright Office.
- You cannot perfect a security interest in a copyright until the copyright and the grant of security interest are registered with the Copyright Office.
- If you register your copyright before it is infringed, you will be eligible for statutory damages and attorneys fees in your infringement lawsuit.

While registration is not a prerequisite to copyright ownership, it is a prerequisite to suing for copyright infringement. This requirement cannot be avoided by merely renaming the copyright infringement claim as a "misappropriation of proprietary rights" or "property theft" claim. Any claim that complains of what is essentially copyright infringement will be governed by copyright laws and the requirement that the copyright be registered before filing an infringement lawsuit.

Fortunately, a copyright may be registered at any time before filing an infringement lawsuit. Unfortunately, it typically takes between 4 to 8 months for the Copyright Office to process the application and register the copyright. The processing time can be shortened to approximately two weeks with payment of an additional fee that can be more than 15 times the filing fee for a regular application. If you wait until there is an urgent need to register your copyrights, the cost of registration increases significantly, at a time when you are already incurring unanticipated costs and losses as a result of the infringement.

Similarly, a security interest in a copyright can only be perfected if the copyright and the grant of security interest are registered with the Copyright Office. Registration is

important whether you are the grantor or recipient of the security interest in copyrights. If you are the grantor, you may be responsible for granting a perfected security interest, in which case you must register both the copyright and the grant of security interest. Filing a financing statement with the secretary of state will not suffice. If you are the secured party, the priority of your security interest remains vulnerable unless the copyright and grant of security interest are registered with the Copyright Office.

Finally, registering your copyrights before they are infringed will entitle you to a greater variety of remedies for infringement. You always have the option of seeking your actual damages or the infringer's profits resulting from the infringement, but you have to prove the existence and amount of these damages in court, usually at an enormous expense. If the copyright is registered when it is infringed, you can instead choose to recover statutory damages, without having to prove the damages. Statutory damages range from \$200 (for innocent infringement) to \$150,000 (for willful infringement) per instance of copyright infringement. If a copyright is registered and contains a copyright notice, it is unlikely that the infringer will be able to show that the infringement was innocent. Registering the copyright before it is infringed will also allow the prevailing party in the infringement lawsuit to recover its reasonable attorneys' fees and costs. Statutory damages and attorneys fees are not available if the copyright was infringed first and registered later.

If your copyrights are not timely registered, you may find that it is not worth enforcing them against infringers, given the high price of litigation and the cost of proving your damages. On the other hand, a registered copyright meaningfully shifts infringement and litigation cost to the infringer, and acts as a deterrent against infringement in the first place. Registering your copyrights is one of the cheapest insurance policies you can buy. So when in doubt, register your copyrights as early as possible.

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The DGS Corporate Finance & Acquisitions Group is ready to assist you with any issue raised in this article. Please do not hesitate to contact any member of the group to discuss your specific legal needs.

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