

Copyright

in 28 jurisdictions worldwide

Contributing editors: Stuart Sinder,
Jonathan Reichman and James Rosini

2009



Published by
Getting The Deal Through
in association with:

- Aavik & Partners Law Office
- ABBC – Azevedo Neves, Benjamim Mendes, Bessa Monteiro, Carvalho & Associados, Sociedade de Advogados RL
- Adams & Adams
- Advokatfirman NorelidHolm
- AKD Prinsen Van Wijmen
- Anand and Anand, Advocates
- Anderson Mōri & Tomotsune
- Awapatent AS
- Cabinet Bruno Ryterband
- Cavelier Abogados
- David Garrick, Kayode & Co
- Deris Patents & Trademarks Agency AS
- Deris Law Office
- Dorda Brugger Jordis
- E Blum & Co AG
- Freehills
- Garcia Magliona y Cia Ltda
- Hammonds LLP
- Hoet Pelaez Castillo & Duque
- Kenyon & Kenyon LLP
- Kim & Chang
- Marx Van Ranst Vermeersch & Partners
- MGAP Attorneys at Law
- Olivares & Cia
- Preu Bohlig & Partner
- Ridout & Maybee LLP
- Sár and Partners Attorneys at Law
- Thompson Associates

Copyright 2009

Contributing editors:
Stuart Sinder, Jonathan Reichman and James Rosini
Kenyon & Kenyon LLP

Business development manager
Joseph Samuel

Marketing managers
Alan Lee
Dan Brennan
George Ingledew
Edward Perugia
Robyn Hetherington
Dan White
Tamzin Mahmoud
Ellie Notley

Subscriptions manager
Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

Assistant editor
Adam Myers

Editorial assistants
Nick Drummond-Roe
Charlotte North

Senior production editor
Jonathan Cowie

Senior subeditor
Kathryn Smuland

Subeditors
Jonathan Allen
Laura Zúñiga
Ariana Frampton
Sarah Dookhun

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Copyright 2009
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd
2009

No photocopying: copyright
licences do not apply.

ISSN 1748-8257

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of July 2009, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law
Business
Research

Overview Justin Kyal, Stuart Sinder and Jonathan Reichman <i>Kenyon & Kenyon LLP</i>	3
Australia Kristin Stammer and Helen Macpherson <i>Freehills</i>	4
Austria Axel Anderl <i>Dorda Brugger Jordis</i>	9
Belgium Jan Ravelingjen and Pieter De Grauwe <i>Marx Van Ranst Vermeersch & Partners</i>	14
Canada Janet M Fuhrer, D Paul Tackaberry and David Lam <i>Ridout & Maybee LLP</i>	18
Chile Claudio Magliona <i>Garcia Magliona y Cia Ltda</i>	24
Colombia Daniel Peña <i>Cavelier Abogados</i>	30
Denmark Thorbjørn Swanstrøm <i>Awapatent AS</i>	35
Estonia Elise Vasamäe <i>Aavik & Partners Law Office</i>	40
France Bruno Ryterband <i>Cabinet Bruno Ryterband</i>	46
Germany Astrid Gérard and Stefan Schweyer <i>Preu Bohlig & Partner</i>	53
Hungary Katalin Horváth <i>Sár and Partners Attorneys at Law</i>	59
India Pravin Anand and Munish Mehra <i>Anand and Anand, Advocates</i>	67
Japan Yasufumi Shiroyama <i>Anderson Mōri & Tomotsune</i>	72
Korea Jay Young-June Yang, Jai-Wook Lee and Chang-Hwan Shin <i>Kim & Chang</i>	77
Malaysia Benjamin J Thompson <i>Thompson Associates</i>	81
Mexico Luis C Schmidt <i>Olivares & Cia</i>	85
Netherlands Martin Hemmer <i>AKD Prinsen Van Wijmen</i>	91
Nigeria Olugboyega Kayode <i>David Garrick, Kayode & Co</i>	95
Portugal César Bessa Monteiro <i>ABBC – Azevedo Neves, Benjamim Mendes, Bessa Monteiro, Carvalho & Associados, Sociedade de Advogados RL</i>	99
Russia Yuriy Korchuganov and Ekaterina Ermakova <i>MGAP Attorneys at Law</i>	105
South Africa Charné le Roux and Vuyiswa Dlamini <i>Adams & Adams</i>	110
Spain Fernando González and Hector Romero <i>Hammonds LLP</i>	115
Sweden Hans-Olov Dahlén <i>Advokatfirman NorelidHolm</i>	120
Switzerland Brendan Bolli, Sven Capol, Barbara Gehri and Felix Locher <i>E Blum & Co AG</i>	125
Turkey M N Aydin Deris, Banu Barbur, Okan Can and Elif Dincer <i>Deris Patents & Trademarks Agency AS</i> <i>Deris Law Office</i>	131
United Kingdom Patricia Jones <i>Hammonds LLP</i>	137
United States Jonathan Reichman <i>Kenyon & Kenyon LLP</i>	143
Venezuela Magdaly Sanchez-Aranguren and Patricia Hoet Limbourg <i>Hoet Pelaez Castillo & Duque</i>	149

United States

Jonathan Reichman

Kenyon & Kenyon LLP

Legislation and enforcement

1 What is the relevant legislation?

The main copyright statute in the United States is the Copyright Act 17 USC 101 et seq, also known as the Copyright Act of 1976, which took effect on 1 January 1978. Another very important copyright law which relates to software protection and digital technology is the Digital Millennium Copyright Act 1998, which is codified in the Copyright Act at 17 USC 512, 1201–1205, 1301–1332. In addition, 18 USC 2319 provides for the criminal infringement of a copyright.

2 Who enforces it?

The copyright laws of the United States are enforced by the federal courts through lawsuits initiated mainly by the owner of the copyright rights. In certain circumstances, the United States federal government may initiate a criminal copyright enforcement action against counterfeiting at the request of the copyright owner. A copyright owner can also record its rights with the United States Customs Agency. The Customs Agency will then stop the infringing products at the border and prevent them from entering the United States.

Agency

3 Is there a centralised copyright agency? What does this agency do?

The Copyright Office is the centralised copyright agency. The Copyright Office provides:

- expert assistance to Congress on intellectual property matters;
- advises Congress on anticipated changes in US copyright law;
- analyses and assists in drafting copyright legislation and legislative reports and provides and undertakes studies for Congress; and
- offers advice to Congress on compliance with multilateral agreements, such as the Berne Convention for the Protection of Literary and Artistic Works.

The Copyright Office works with:

- the Executive Branch's department of state;
- the US Trade Representative's Office; and
- the Department of Commerce

in providing technical expertise in negotiations for international intellectual property agreements. It also provides technical assistance to other countries in developing their own copyright laws; and, through its International Copyright Institute, promotes worldwide understanding and cooperation in providing protection for intellectual property.

The Copyright Office is also an office of record, a place where private parties' claims to copyright are registered and where documents relating to copyright may be recorded when the requirements of copyright law are met.

The Copyright Office furnishes information to the general public

about the provisions of the copyright law and the procedures for registration, explains the operations and practices of the Copyright Office, and reports on facts found in the public records of the Copyright Office.

The Copyright Office also administers the mandatory deposit provisions of the law, which include collecting royalties.

Additionally, the Copyright Office and the Library of Congress administer the Copyright Arbitration Royalty Panels, which meet for limited times for the purpose of adjusting rates and distributing royalties in the radio, music and television industries.

Subject matter and scope of copyright

4 What types of works are copyrightable?

Copyright protects any qualifying '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. Viewed broadly, copyrightable works include the following categories:

- literary works;
- musical works, including any accompanying words;
- dramatic works, including any accompanying music;
- pantomimes and choreographic works;
- pictorial, graphic and sculptural works;
- motion pictures and other audio-visual works;
- sound recordings; and
- architectural works.

5 What types of rights are covered by copyright?

The Copyright Act generally gives the owner of a copyright the exclusive right to:

- reproduce, and authorise others to reproduce, the work in copies or phonographic records;
- prepare derivative works based upon the work;
- distribute copies or phonographic records of the work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- perform the work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes and motion pictures and other audio-visual works;
- 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 audio-visual work; and
- perform the work publicly by means of a digital audio transmission, in the case of sound recordings.

6 What may not be protected by copyright?

The following may not be protected by copyright:

- works that have not been fixed in a tangible form of expression;
- titles, names, short phrases and slogans;
- familiar symbols or designs;
- mere variations of typographic ornamentation, lettering, or colouring;
- mere listings of ingredients or contents;
- ideas, procedures, methods, systems, processes, concepts, principles, discoveries or devices, as distinguished from descriptions, explanations, or illustrations; and
- works consisting entirely of information that is common property and containing no original authorship.

7 Do the doctrines of 'fair use' or 'fair dealing' exist?

The doctrines of fair use and fair dealing exist. Fair use is codified in section 107 of the Copyright Act. See question 8.

8 What are the standards used in determining whether a particular use is fair?

Under the fair use doctrine of the Copyright Act, it is permissible to use limited portions of a work, including quotes, for purposes such as commentary, criticism, news reporting and scholarly reports. Courts use four non-exclusive factors in determining a question of fair use. Courts are free to adapt them to particular situations on a case-by-case basis and judges have a great deal of freedom when making a fair use determination. The outcome of any given question of fair use can therefore be difficult to predict. The four factors are:

- the purpose and character of the use (ie, whether the use is 'transformative' in nature);
- the nature of the copyrighted work;
- the amount and substantiality of the portion taken; and
- the effect of the use upon the potential market for the copyrighted work.

9 Are architectural works protected by copyright? How?

An architectural work that qualifies as a 'design of a building embodied in any tangible medium of expression, including a building, architectural plans, or drawings' may be protected by copyright. The protection extends to any architectural work created on or after 1 December 1990. In addition, any architectural works that were not constructed and embodied in unpublished plans or drawings on that date and were constructed by 31 December 2002 are eligible for protection. Architectural designs embodied in buildings constructed prior to 1 December 1990 are not eligible for copyright protection.

10 Are performance rights covered by copyright? How?

The US Copyright Act currently protects performance rights in literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audio-visual works, as well as performance rights in digital transmissions of sound recordings.

11 Are 'neighbouring rights' recognised? How?

While the United States' is not a member of the Rome Convention (1961), the US Copyright Act:

- protects semi-conductor chips and boat hulls;
- requires royalties with respect to home and audio recordings; and
- addresses the unauthorised fixation and trafficking in music videos and audio recordings.

12 Are moral rights recognised?

Rights of integrity and attribution are expressly recognised in the US Copyright Act with respect to original works of fine art created after 1991, and limited edition copies of same. Beyond such works, existing case law and statutory law outside of the Copyright Act (for example, section 43(a) of the federal Trademark Act) are recognised as according authors sufficient moral rights protection to satisfy the United States' obligations as a member of the Berne Convention.

Copyright formalities**13** Is there a requirement of copyright notice?

Although use of a copyright notice was once required as a condition of copyright protection, it is now optional. A copyright notice generally consists of the symbol or word 'copyright' (or 'copr' or '©'), the name of the copyright owner, and the year of first publication, for example, '© 2003 John Smith'.

14 What are the consequences for failure to display a copyright notice?

In general, the only remotely significant consequence of a failure to display the copyright notice is that it makes it much easier for an infringer of the underlying work to claim that he or she is an 'innocent infringer'. Displaying a copyright notice is important, however, for those works published or distributed under the Copyright Act 1909 (which governs all works published until 31 December 1977) and under the Copyright Act 1976 before the United States' accession to the Berne Convention in 1989. For the latter, copyright can be lost if the notice was omitted and that omission was not cured within five years of publication by registration and affixation of the notice on the remaining copies.

15 Is there a requirement of copyright deposit?

Copyright registration is optional. However, if the copyright owner chooses to register his or her work with the Copyright Office, the applicant must submit one or more copies of the work along with the application. Upon their deposit in the Copyright Office, all copies and identifying material, including those deposited in connection with applications that have been refused registration, become the property of the US government. The actual deposit requirement varies depending on the category the work falls under.

16 What are the consequences for failure to make a copyright deposit?

The underlying work will not be registered unless the required deposit copy or copies are submitted to the Copyright Office.

17 Is there a system for copyright registration?

Copyright registration can be obtained by following the procedure described in question 19.

18 Is copyright registration mandatory?

There is no requirement that the work be registered. Copyright exists from the moment the work is created. However, a US author may not sue in federal court for infringement of his or her work unless the work has been registered (see question 21).

19 How do you apply for a copyright registration?

To apply for a copyright registration, the author must submit a completed application form, a non-refundable filing fee and a non-returnable deposit copy or copies of the work to be registered. All of the necessary forms can be downloaded from the Copyright Office

website (www.copyright.gov), picked up in person, requested by post, or requested by calling the Copyright Office's 24-hour forms hotline.

20 What are the fees to apply for a copyright registration?

With few exceptions, the standard fee for regular service is US\$65, or US\$50 when using a special form called Form CO. The fee for expedited service is US\$760. Since 1 July 2008, it is now possible to file copyright applications electronically for a reduced fee of \$35. The electronic filing supposedly ensures a speedier examination process.

21 What are the consequences for failure to register a copyrighted work?

To bring an infringement suit in federal court, a US author of a work must have a federal registration. In addition, attorneys' fees and statutory damages may be unavailable if the author has not promptly registered the work. Registration is also recommended because it gives the public notice that the creator claims copyright protection in the work and that a certificate of registration has been granted. Finally, if registration occurs within five years of publication, it is considered prima facie evidence of copyright validity and ownership in a court of law.

Ownership and transfer

22 Who is the owner of a copyrighted work?

The general rule is that the author of the work owns the copyright. The exceptions are discussed in question 23.

23 May an employer own a copyrighted work made by an employee?

An employer can own a copyright when the work is a 'work made for hire'. If a work is made for hire, the employer, and not the employee or actual author, is considered the author and therefore the owner of the copyright. The employer may be a firm, an organisation or an individual. The Copyright Act defines a work made for hire as a work prepared by an employee within the scope of his or her employment.

Whether or not a particular work is 'within the scope of employment' is not always easily determined. In a 1989 US Supreme Court decision (*Community for Creative Non-Violence v Reid*) the court applied traditional common law employment principles to this question. As an alternative to the 'work made for hire' doctrine, an employer may own a copyrighted work as the result of an assignment from its employee.

24 May a hiring party own a copyrighted work made by an independent contractor?

The Act defines a work made for hire as a work specially ordered or commissioned (ie, on an independent contractor basis) for use as:

- a contribution to a collective work;
- a part of a motion picture;
- a part of another audio-visual work;
- a translation;
- supplementary work;
- a compilation;
- an instructional text;
- a test;
- answer material for a test; or
- an atlas

if the parties expressly agree in a written document signed by them that the work will be considered a work made for hire.

25 May a copyrighted work be co-owned?

When several people create a single work together, a joint work may be created under the Copyright Act. A joint work is defined by the Copyright Act as 'a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole'. Under this definition, both authors must intend that their contributions be combined, and this intention must exist at the time the contribution is created. It is not necessary, however, that the contributions be equal in effort or value. Nor is it necessary that the joint authors work in the same physical area or at the same time. As defined in the statute, the only requirement is that both authors have the intention that the works are to be 'merged into inseparable or interdependent parts of a unitary whole'. If a joint work exists, then both authors are co-owners of equal, undivided interests in the entire work. Each author can make or grant non-exclusive uses of the entire work as he or she pleases without seeking permission from the other joint author or authors. However, if a single author wishes to grant exclusive rights to the joint work, then permission of the other joint authors is required.

26 May rights be transferred?

Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred, but the transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed or such owner's duly authorised agent. Transfer of a right on a non-exclusive basis does not require a written agreement. A copyright may also be conveyed by operation of law and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

Copyright is a personal property right, and is subject to the various state laws and regulations that govern the ownership, inheritance, or transfer of personal property as well as terms of contracts or conduct of business. Although the recording of a transfer in the US Copyright Office is not required to make the transfer valid between the parties, it does provide certain legal advantages and may be required to validate the transfer as against third parties.

27 May rights be licensed?

Copyright rights can be licensed on an exclusive and non-exclusive basis. An exclusive licence generally occurs when a copyright owner transfers one or more, but not all, of its exclusive rights but retains others. The holder of an exclusive licence becomes the owner of the transferred right and as such is entitled to sue any party that infringes the right while the licensee owns it. A non-exclusive licence gives the licensee the right to exercise one or more of the copyright owner's rights, but does not prevent the copyright owner from giving others permission to exercise the same right.

28 Are there compulsory licences? What are they?

Compulsory licences exist. Under section 115 Copyright Act, a person wishing to record a copyrighted non-dramatic musical work and publicly distribute the recording may do so if:

- the copyright owner has already made or authorised a recording of the work, which has been distributed to the US public;
- the prospective licensee's primary purpose is to distribute phonographic records of his or her own recording to the public;
- the prospective licensee serves notice of his or her intention to take a compulsory licence on the copyright owner within a specific time of making and distributing his or her recording; and
- the prospective licensee pays royalties to the copyright owner.

As indicated, this compulsory licence only applies to non-dramatic musical works. Examples of dramatic musical works include operas

and motion picture soundtracks. Note also that this right only gives the compulsory licensee the right to reproduce and publicly distribute the musical work in a phonographic record – not visual images. The compulsory licensee may arrange the musical work to the extent necessary to conform to the performers' style or manner of interpretation, but the arrangement may not change the basic melody or fundamental character of the work, and cannot be copyrighted as a derivative work without the consent of the owner of the copyright in the musical work.

29 Are licences administered by performing rights societies? How?

Private organisations such as ASCAP, BMI, and SESAC Inc, grant and administer licences for the public performance of musical works on behalf of the copyright owners of such works.

30 Is there any provision for the termination of transfers of rights?

For works created under the Copyright Act 1976 (which came into force on 1 January 1978) the statute permits termination of a transfer of rights after 35 years under certain conditions by serving written notice on the transferee within specified time limits. For works under statutory copyright protection before 1978, the statute provides similar rights of termination corresponding to the extensions of the renewal term of protection afforded to such works under the current Copyright Act.

31 Can documents evidencing transfers and other transactions be recorded with a government agency?

A document that transfers copyright ownership may be recorded in the Copyright Office provided that the document filed for recording bears the actual signature of the person who executed it, or if the document is accompanied by a sworn or official certification that it is a true copy of the original signed document. A fee for recording the transfer must be paid.

Duration of copyright

32 When does copyright protection begin?

Copyright protection subsists 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.

33 How long does copyright protection last?

The length of copyright protection varies according to when the particular work was authored or published, as discussed in question 34.

34 Does copyright duration depend on when a particular work was created or published?

Copyright duration depends on when a particular work was authored or published. A work that is created on or after 1 January 1978 is automatically protected from the moment of its creation and is ordinarily given a term enduring for the author's life plus an additional 70 years after the author's death. In the case of 'a joint work prepared by two or more authors who did not work for hire', the term lasts for 70 years after the last surviving author's death.

For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.

Works created before 1 January 1978, but not published or registered by that date, are given federal copyright protection. The

duration of copyright in these works will generally be computed in the same way as for works created on or after 1 January 1978: the plus 70- or 95- or 120-year terms will apply to them as well. The law provides that in no case will the term of copyright for works in this category expire before 31 December 2002, and for works published on or before 31 December 2002, the term of copyright will not expire before 31 December 2047.

For works created and published or registered before 1 January 1978, under the law in effect before 1978, copyright was secured either on the date a work was published with a copyright notice, or on the date of registration if the work was registered in unpublished form. In either case, the copyright endured for a first term of 28 years from the date it was secured. During the last (28th) year of the first term, the copyright was eligible for renewal. The Copyright Act 1976 extended the renewal term from 28 to 47 years for copyrights that were subsisting on 1 January 1978, making these works eligible for a total term of protection of 75 years.

Additional changes to the law in 1998 further extended the renewal term of copyrights still subsisting on that date by an additional 20 years, providing for a renewal term of 67 years and a total term of protection of 95 years.

35 Do terms of copyright have to be renewed? How?

Works created on or after 1 January 1978 do not need to be renewed. As to works published or registered prior to 1 January 1978, works first published up until 1963 had to be formally renewed, through a renewal registration in the US Copyright Office, to maintain protection; failure to renew placed the work in the public domain. For works first published or registered between 1964 and 1977, renewal is automatic; though obtaining a renewal registration provides certain advantages.

Copyright infringement and remedies

36 What constitutes copyright infringement?

Copyright infringement occurs when a party makes unauthorised use of copyrighted material, or copied material that is substantially similar to the original work, in a manner that violates one of the copyright owner's exclusive rights, such as the right to reproduce or perform the copyrighted work, or to make derivative works that build upon it.

37 Does secondary liability exist for copyright infringement? What actions incur such liability?

Secondary liability for copyright infringement is not statutorily defined, but is enshrined in case law. Various actions can incur secondary liability, which is divided by courts into two categories: first, vicarious liability, when the secondary party has the ability to supervise the infringing conduct, and directly benefits financially from the infringement; and second, contributory infringement, when the secondary party has knowledge or reason to know of the infringement, and contributes to, authorises, or induces the infringement.

38 What remedies are available against a copyright infringer?

Penalties can include:

- a court order restraining the infringer from continuing the infringing activity;
- confiscation and destruction of the infringing items;
- the payment to the copyright owner of any profits the infringer received, and of any losses suffered by the copyright owner; or
- statutory damages as an alternative to actual profits and losses; and
- attorneys' fees.

39 Is there a time limit for seeking remedies?

The statute of limitations for bringing a copyright infringement claim is three years. The statute of limitations is measured from the time the claim accrued, usually meaning the time at which the infringement occurred, although one recent court decision held that it was the time at which the plaintiff knew or had sufficient reason to know that the infringement occurred. If, at the time of suit, the infringement has been ongoing for more than three years, the copyright owner will be able to pursue an injunction and monetary recovery for the infringements occurring within the past three years, but not for the earlier infringements.

40 Are monetary damages available for copyright infringement?

Monetary damages are available for copyright infringement. A party found liable for copyright infringement may be found liable for either the copyright owner's actual damages and any additional profits of the infringer; or statutory damages, as provided by the Copyright Act. However, statutory damages are only available if registration for the infringed work has been obtained within certain time requirements.

41 Are attorneys' fees and costs available for copyright infringement?

Both costs and attorneys' fees are available for copyright infringement. Reasonable attorneys' fees may be awarded in the court's discretion if the work was registered with the US Copyright Office within certain time requirements.

42 Are there criminal copyright provisions? What are they?

Criminal copyright provisions exist. Under the Copyright Act, it is a criminal offence to wilfully infringe a copyright for either commercial or private financial gain, or by the reproduction or distribution, including by electronic means, during any 180-day period, of one or more copies or phonographic records of one or more copyrighted works, which have a total retail value of more than US\$1,000.

In addition, it is a criminal offence to place a fraudulent copyright notice on any article, or to publicly distribute or import for public distribution any article bearing such fraudulent notice. It is also a criminal offence to remove or alter any notice of copyright appearing on a copy of a copyrighted work with fraudulent intent. Moreover, it is a criminal offence to knowingly make a false representation of a material fact in an application for copyright registration, or in any written statement filed in connection with the application.

Update and trends

There are several hot topics relating to copyright regulation in the United States. The first is what effect the new intellectual property enforcement coordinator, a new position created by the 2008 PRO-IP Act, will have. The coordinator's purpose is to coordinate anti-infringement activities across federal and state agencies; what impact this position will have, however, remains unclear.

The second topic is the ramification of the *Google Books* settlement, and what effect such settlement will have on the digital distribution of written works.

The third topic is whether Congress will pass an amendment to protect fashion designs under copyright law, and, if such law is enacted, which designs will be protected and how broad the scope of protection will be. Lastly, there is the uncertain impact of the Supreme Court's denial of certiorari in the *Cablevision* case, where the Second Circuit held that remotely-operated DVR systems are not infringing.

43 Is online copyright infringement actionable?

There are ways to pursue copyright infringement occurring online. If the party is infringing the copyright through a website, the standard remedies apply. In addition, the Online Copyright Infringement Liability Limitation Act, an element of the 1998 Digital Millennium Copyright Act, allows copyright holders to request that an online service provider remove access to copyright infringing material if the copyrighted material is made available through the online service provider.

However, that same act provides four 'safe harbours' for certain online service providers, protecting them from copyright infringement liability if such service providers comply with certain requirements.

44 How may copyright infringement be prevented?

It may not be possible to prevent copyright infringement. A number of steps can be taken to put the public on notice that the work is copyrighted and that the copyright rights will be enforced. The work should be registered with the Copyright Office. In addition, a copyright notice should be used on the work. The owner should also actively police the relevant marketplace for potential infringements. Furthermore, the owner should take advantage of any technical measures that prevent copyright infringement of relevant works like digital music files or computer software. The Digital Millennium Copyright Act prohibits the circumvention of access control technologies which are employed by copyright owners to protect their works from infringement.

**Jonathan Reichman****jreichman@kenyon.com**

One Broadway
New York, NY 10004-1007
United States

Tel: +1 212 425 7200
Fax: +1 212 425 5288
www.kenyon.com

Relationship to foreign rights

45 Which international copyright conventions does your country belong to?

The United States is a member of:

- the Buenos Aires Convention of 1910;
- the Berne Convention for the Protection of Literary and Artistic Works (1886 as revised);
- the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms;
- the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite;
- the Universal Copyright Convention (Geneva 1952 and Paris 1971);

- the World Intellectual Property Organization Copyright Treaty; and
- the World Intellectual Property Organization Performances and Phonograms Treaty as well as a number of bilateral copyright treaties. The United States is also a member of the World Trade Organization.

46 What obligations are imposed by your country's membership of international copyright conventions?

As the United States has copyright relations with most countries throughout the world, the main obligation is to honour the copyrights of citizens of those other countries.

GETTING THE DEAL THROUGH®

Annual volumes published on:

- | | |
|-----------------------------------|------------------------------|
| Air Transport | Merger Control |
| Anti-Corruption Regulation | Mergers & Acquisitions |
| Arbitration | Mining |
| Banking Regulation | Oil Regulation |
| Cartel Regulation | Patents |
| Construction | Pharmaceutical Antitrust |
| Copyright | Private Antitrust Litigation |
| Corporate Governance | Private Equity |
| Dispute Resolution | Product Liability |
| Dominance | Project Finance |
| e-Commerce | Public Procurement |
| Electricity Regulation | Real Estate |
| Environment | Restructuring & Insolvency |
| Franchise | Securities Finance |
| Gas Regulation | Shipping |
| Insurance & Reinsurance | Tax on Inbound Investment |
| Intellectual Property & Antitrust | Telecoms and Media |
| Labour & Employment | Trademarks |
| Licensing | Vertical Agreements |

**For more information or to
purchase books, please visit:
www.GettingTheDealThrough.com**



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006



The Official Research Partner of
the International Bar Association