

# Small Business Today<sup>SM</sup>

[www.SouthernBizLaw.com](http://www.SouthernBizLaw.com)

---

## **Cover Your Assets: How to Protect Yourself in an Uncertain World Protect Your Ideas!**

---

December 21, 2006

**SUSAN PERRILLOUX BILLEAUD, L.L.C.**  
***The Lawyer For Small Business<sup>SM</sup>***

*This newsletter is a companion to the four-part lecture series we are presenting to benefit the Acadiana Education Endowment.*

Laws governing ownership of ideas are called "Intellectual Property" or "IP." IP gives you, as the owner, the "right to exclude" others for a limited time from exploiting your idea. To defend your right, you must sue the person who is infringing on your ownership, although the federal government will assist you in certain, limited circumstances.

Following the limited time allowed for your exclusively use, your idea is said to enter the "public domain." Ideas in the "public domain" become available for anyone to use in virtually any way. Please note that the IP laws of different nations vary in the degree of protection provided, so this letter will only discuss the approach used in the United States.

Three categories of IP are copyrights, trademarks and patents. To claim ownership in any category, your ideas must be "reduced to tangible form." Copyrights must be "fixed in tangible form," trademarks must be "used in commerce," and patents must be "reduced to practice."

Although your idea must be made into *something* for it to gain legal protection, IP law does not protect the tangible object into which the idea is embodied. For example, IP law does not protect your ownership of a physical copy of a book, but would deal instead with the ideas contained in that book.

Copyright law is the area of IP that protects the rights of creators in original works of authorship, including works of literature, music, drama, graphic, choreographic, sound recording, audiovisual, architecture and computer software. But note: copyright does *not* grant a creator rights to *concepts* underlying his ideas.

In other words, you cannot copyright the *concept* of making gold pins in the shape of butterflies simply by making one. To grant a copyright on the *concept* would prevent everyone else from making any kind of butterfly-shaped stick pin in gold. So copyright law only allows you to protect the way your particular pin looks. Others may make pins using the same *concept*, just not your specific *idea*.

Copyright protection affords authors the exclusive right to reproduce, adapt, distribute, perform and display the protected work, subject to certain limitations such as the fair use privilege. The term of a copyright for works published after

1989 is generally measured as the life of the author plus seventy years.

Even before a work is registered, it is already protected. Copyrights arise automatically as soon as the work is "fixed in any tangible medium of expression." Further, if you hire somebody to make a copyrightable work, the copyright to the idea is yours—absent an agreement to the contrary.

While copyright registration with the federal government is voluntary, it is a good idea. First, federal registration is relatively inexpensive--\$30 plus attorney's fees. Second, registration within five years after publication means that the copyright is presumed to be valid by courts. Third, registration is required before a lawsuit can be brought to protect a copyright.

In 1989, the latest version of the Copyright Act was passed. One prerequisite for creators of works published after 1989 is that copyright notice is no longer required. That means others can't run around copying your ideas merely because there is no "©" or "copyright" on it. Unless you expressly give another permission (called a "license") to use it, any use by another is infringement.

A kind of infringement that became common after the internet became popular involves use of so-called freeware. Freeware is software available for download without charge. Typically, freeware comes with a license that allows you to use the code under limited circumstances.

A common restriction in a freeware license may prohibit using the code by a for-profit business. If you use freeware licensed with such a condition on your company's website, for example, you will infringe on the programmer's copyright. In other words, the enforceability of a license does not depend on whether payment is required. An author's copyright and the limitations of any license are still enforceable.

The same rules apply to photographs. Copying photos from other's websites without permission is a copyright violation. If you like an image, write the webmaster requesting permission to use it before you do. You may find that he does not even own it, but took it without permission or licensed it from a broker.

Why worry? Because the penalties for infringement of copyrights can be pretty steep. Civil sanctions include injunctions, impounding of your copies of infringing goods and damages, including actual damages, profits and statutory damages ranging from \$200 to \$30,000, or up to \$150,000 and costs and attorneys fees if the theft was willful. Ignorance is no excuse in a case of copyright infringement, but if you both mean to steal for commercial advantage or financial gain, you also can be slapped with criminal sanctions.

Unlike copyright, trademarks don't protect your work in general. Rather

**"Cover Your Assets: How to Protect Yourself in an Uncertain World"**

*A Four-Part Lecture Series to Benefit the [Acadiana Educational Endowment](#) will be presented by: **Susan Billeaud***

Location: Acadiana Symphony Orchestra Building, 412 Travis

Date: Tuesday, December 12, 2006

Time: 7:00-8:00 p.m. plus 30 minutes for Q&A

Cost: \$5 per person cash at the door.

**Part III—Protect Your Assets!**

- Do you have a small business? Are you aware that simply incorporating your business may not provide protection for your family's assets?

trade- or service marks are “any word, name, symbol or device” used to identify your goods or services and distinguish them from the goods or services of others.

Generally, the first to use a mark in connection with a certain kind of good or service owns it. You can claim a mark by placing a notice (like TM or SM) on the upper right side of the mark and/or registering it with the state when the mark is first used in commerce.

Once the mark is used in “interstate” commerce, it can be federally registered. Federal registration protects you anywhere in the U.S., even if you have not done any business in, say, Oregon. You can also federally register the mark if you *anticipate* using the mark in the near future. A trademark is renewable as “long as the mark continues to be used and retains its distinctiveness.”

Although registration is not required, the advantages include the following: First, registration provides protection of the mark everywhere in the jurisdiction (either state or U.S.), even if you are actually using the mark only in a smaller region within the jurisdiction. Second, registration is presumptive and, later, conclusive evidence in litigation that you own the mark, thereby saving costs if you need to defend your ownership in court. Third, federal registration grants you the right to invoke the protection of the U.S. Customs Service in intercepting infringing goods entering the country. Fourth, as a practical matter, registration can provide you with a certain degree of assurance that you are not innocently infringing upon another’s mark before you spend thousands of dollars on marketing your business.

For more information on this subject, see these websites:

- ◆ Plagiarism v. Copyright Infringement article:  
<http://www.plagiarismchecker.com/plagiarism-vs-copyright.php>
- ◆ Association of American Publishers, Anti-Piracy:  
<http://www.publishers.org/antipiracy/index.cfm>
- ◆ Business Software Alliance, Whistleblower Rewards:  
<http://www.bsa.org/usa/press/newsreleases/State-Piracy-Leads.cfm>
- ◆ Music Publishers’ Association, “Copying Under Copyright: A Practical Guide”: [http://www.mpa.org/copyright\\_resource\\_center/copying](http://www.mpa.org/copyright_resource_center/copying)
- ◆ The Entertainment Software Associations’ “Join the © Team” program:  
<http://www.jointheteam.com/>

Infringement of a mark occurs when someone uses a mark that is “deceptively similar” to your mark—that is, their mark is likely to make people think you made the item they are selling. But, if a mark is deemed “famous,” your new logo can look totally different or apply to a completely different industry and still be deemed an infringement. No “Coca-Cola” riding lawn mowers, please.

Cybersquatting is a new form of trademark infringement. Defined as the registration of a domain name that is also a registered trademark or someone’s personal name, cybersquatting has been successfully challenged as both mark “dilution” and infringement. It may also violate the Anti-Cybersquatting Consumer Protection Act.

Remedies for trademark infringement include injunction, actual damages and, if willful or in bad faith, three times damages, the infringer’s profits and costs

of litigation. Like copyright infringement, innocence is no defense but may limit damages.

Patent is a third concept that grants exclusive rights to “inventors of new, useful and non-obvious inventions.” Inventions are technological products and processes, including business and teaching methods and techniques, designs and plants. The list of what is “patentable” by the U.S. Patent and Trademark Office (or “PTO”) is growing to include things that were historically barred from registration.

Depending on the nature of the invention, the issued patent will be one of two types—utility or design. The term for ownership of patentable ideas is twenty years from filing with the PTO for utility patents and fourteen years for design patents.

In the U.S., unlike the rest of the world, your right to patent arises on the date on which the invention “was first known or used” and not when the patent application was first filed. This may raise problems defending your ownership, however, if you keep your invention a secret, but a later inventor files his patent application on a similar invention first.

Benefits of applying for a patent include a presumption of validity for issued patents by enforcing courts. However, patents can be challenged on a variety of grounds.

While marking “pat.” or “patent” is not required, it can increase the damages available to you. That’s because *actual notice* of the patent is required before there can be an infringement. In other words, ignorance of the existence of a patent *actually is a defense* in an infringement case. If you don’t mark your product, damages will only accrue from the time the infringer is notified of your claim.

Remedies for patent infringement include injunctions, impounding of infringing goods, and damages, including reasonable royalties, lost profits and treble damages and attorneys fees for willful, knowing infringement.

In conclusion, as owners of intellectual property become more sophisticated in claiming and defending their ideas, it becomes more important for ordinary citizens to understand the concepts outlined in this letter. We all found out in the recent prosecution of music downloaders and their unwitting parents that IP infringement is taken seriously and can have disastrous outcomes for the unprepared.

Knowledge is power—and some serious money, if you know how to claim it. I hope that this letter has provided some food for thought about the importance of protecting your own ideas and how to stay on your side of the virtual property line when it comes to using the ideas of others.

---

Please feel free to forward this newsletter to a friend, but **do not edit, amend or change any of the contents or remove any copyright or other identifying information.**

To **subscribe**, CTRL + Click this link: [www.southernbizlaw.com](http://www.southernbizlaw.com) and go to “Newsletter”. To **unsubscribe**, please use the “Contact Us” form at [www.southernbizlaw.com](http://www.southernbizlaw.com), fill out the form including your e-mail address and type “Unsubscribe” in the subject line.

NOTE: This newsletter is not legal advice. If legal advice is required, please consult with a licensed attorney in your jurisdiction. Links are provided for information purposes only. These sites are not endorsed or supported by the author or distributor of this newsletter. This list is not meant to be exhaustive. No recommendation or representation is made or implied with respect to the sites or the information therein. Risk of use of the sites and the information therein is solely that of the user.