

COMMON SENSE GUIDE TO COPYRIGHT ONLINE



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Background

Copyright laws can be deceptively complicated, and it has become even more so in recent years. Digital technology has made image sharing, music downloading, and other forms of copying from the Internet all too easy for one to infringe unknowingly another's copyrighted work. This has altered the common perception of what is allowed under the law, and while perceptions may have changed, the law has not always necessarily kept up in this new age.

Common questions include: How can one tell if a work is copyrighted? When is it safe to assume copyright no longer applies? What is *Fair Use*? Can I use someone's photograph or pre-existing content as long as I name my source and link back to their website?



Businesses face these questions every day. We use images, photographs, music on websites, marketing brochures, products, and the like. You're probably in the same boat whenever you write a new blog post or design a brochure or create a new campaign for your or another's business.

SpinWeb and Bingham Greenebaum Doll LLP have teamed up to bring you this guide. We hope it provides some general guidance on copyright law, *Fair Use*, and common infringement issues.

What is Copyright?

Broadly speaking, copyright protects any **original work** of **authorship** which is **fixed in some tangible form**.

Thank goodness we have attorneys to help us navigate this tumultuous sea of words. Let's break down those terms in bold above to get a better understanding of this legal definition:

- **Original:** copyright protects creativity, not just hard work
- **Work:** includes books, pictures, graphics, text (ad copy letters), audio, visual (TV and radio commercials), sound recordings, etc.
- **Authorship:** you created it – you didn't copy or derive it from another work
- **Fixed in tangible form:** put on paper, disk, recording, transmitted, etc.; "sufficiently permanent," more than merely "transitory" in its existence

Examples of works eligible for copyright protection include:

- Literature
- Screenplays
- Musical and artistic works
- Movies
- Software
- Architectural Drawings

What is *not* capable of copyright protection?

- Ideas
- Titles and short phrases (not original, but may be trademarks)
- Procedure, process, system, method of operation, concept, principle, or discovery (not a work of authorship)
- Facts
- Federal government publications
 - Authored by federal government
 - Does ***not*** include state or local governments



Pop Quiz: Which of the following can be protected by copyright?*

| | YES | NO |
|----------------------------------|-------------------------------------|-------------------------------------|
| Mathematical formulas | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Logos | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Blank forms | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Photographs | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Books | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Data | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Phone books | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Listings of ingredients, recipes | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| TV/Radio commercial | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Material written in blogs | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Processes or systems | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Song | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Clip art | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Word of mouth marketing | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| House plans | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Computer software | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Company annual report | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

*As with most legal issues, there are always exceptions to these general rules, but we hope this helps you get the idea.

Getting a Few Things Straight: Trademark, Service Marks and Copyright

A *trademark* is a way to identify and distinguish the origin of goods and services. Copyright protects *authorship*.

Example: COKE® identifies a brand of soft drink to be distinguished from PEPSI®.

A *service mark* is for identifying and distinguishing between the origin of services.

Example: American Express® identifies financial and credit card services distinguishable from MASTERCARD®.

Trademarks and service marks may include words, logos, slogans, trade dress, product shapes, and even sounds, scents and colors.

Creation, Registration, and Ownership

U.S. copyright law states that, “Your work is under copyright protection the moment it is created and fixed in a tangible form that is perceptible either directly or with the aid of a machine or a device.” In other words, your “copyright” exists the moment you create the work, at which time the copyright notice (©) should be affixed to your work as discussed below. It is a common misconception that one must be federally registered in order to use the federal copyright notice - that is not the case. The notice should be affixed to the work when it is created.

Once created, it is often asked, "What is the benefit of registering my work for copyright protection if it is already under copyright the moment I create and 'fix' it? Federal registration highly recommends it for a few of the following reasons: (source: [Copyright.gov](https://www.copyright.gov))

1. The facts and existence of your copyright becomes a matter of public record as evidenced by the official certificate of registration issued in the name of the copyright owner.
2. In order to file suit to enforce your copyright, you must register it.
3. If your work is registered at the time of infringement (or shortly after you create it) you may be eligible for statutory damages and attorneys' fees in successful litigation.
4. If registration occurs within 5 years of publication, it is considered *prima facie* evidence (a legal presumption in your favor) in a court of law of the validity of the copyright and the facts stated in the copyright certificate.

If you are the author, then you are automatically the owner of the work, right? Not so fast. In the case of works made-for-hire, your employer or the one who commissions you to create the work may be the author and legal owner.

What is a work made-for-hire (WMFH)? There are **2 categories**:

1. Employer / Employee: Works prepared by an employee within the scope of employment.

2. Commissioned Work: Specially ordered or commissioned works so long as there is a written agreement stating this is a "work made for hire." There are 9 specific categories in which a "commissioned work" must fall in order to qualify as a WMFH (listed on the following page):

- Contribution to a collective work (independent works assembled)
- Part of an audiovisual work (movies, commercials)
- Translation
- Supplementary work
- Compilation (selection and arrangement of preexisting works)
- Instructional text
- Test
- Test answer
- Atlas

What is Copyright Infringement?

Copyright infringement is basically using someone else's work that is protected by the copyright law without their permission. "Use" can take various forms.

Copying - Reproducing, distributing, displaying or publicly performing a protected work is generally considered "copying." Pirated music or movies are examples of this kind of infringement. If the accused infringer has access to the work, and significant similarities exist between the original copyrighted work and the subsequent accused work, it is presumed that unlawful copying took place. It is generally not infringement to *independently create* a work, even if it is identical to the copyrighted work, so long as you do not access the original work and copy or substantially derive your work from the copyrighted work.

Substantial Similarity – This is the standard courts use to decide infringement, based generally on quantity and quality. A few words can be infringement if significant enough; but there is no specific number, rule, or test for *substantial similarity*.

Literal Infringement - Word for word or equivalent (plot, sequence, arrangement, etc.).

Nonliteral infringement - Not word for word, but appropriates the “essence” of the work.

Attribution - Merely acknowledging a source does **not** substitute as permission. We see this happening a lot in the world of photography and blogging, where someone will simply cite or link to a source and assume that’s all that is needed. To avoid copyright infringement, the general rule is to seek and confirm permission.

What is Fair Use?

Fair Use allows use of a copyright protected work without permission or authorization from the owner. It often serves as a defense for non-commercial uses such as criticism, commentary, news reporting, teaching, scholarship, or research. For example, a teacher may make multiple copies for his or her in-person classroom under the Fair Use doctrine.

Section 107 of the federal Copyright Act lists 4 factors to guide the courts on what is considered fair use:

- 1. Purpose and character of use in question**
Commercial or nonprofit
Education, research, scientific
“Transformative”
- 2. Nature of the copyrighted work**
Fiction or fact-based
- 3. Proportion of amount used to the whole**
Significance of what’s used – quantity and quality of what’s taken
How much did you copy?
- 4. Effect of the use upon the potential market for or value of the copyrighted work**

How long do copyrights last?

That depends on the type of work, whether it was published, when it was published, and whether the owner complied with requirements as to copyright notice, registration, or renewal under the law that existed at the time the work was published. Sounds complicated, *and it is!* But a few general guidelines, for most works, is provided below. [Note that the guides below don't apply for works first published *outside* the U.S., sound recordings, and certain architectural works.]

For items that have never been “published” under U.S. Copyright law:

| | | |
|---|---------------------------------|--|
| Individual Author | Life of the author + 70 years | Unpublished works from authors who died >70 years ago are generally “safe” to use. |
| Corporate Author or Death of Individual Unknown | 120 years from date of creation | Works created before 120 years ago are generally “safe” to use. |

This means that for works that haven't been published in 2015, you aren't safe using corporate works created until about 1895 or after, but otherwise, you need to know if the individual author died after about 1945.



For items that have been “published,” below is a general guide (but there may be other circumstances to consider).

| Publication Date | General Copyright Term |
|---|--|
| Before 1923 | None; these works are generally free to use |
| Between 1923 and 1977 (if published without © notice) | None; these works are generally free to use |
| Between 1923 and 1977 (if published with notice) | Up to 95 years after date of publication; however, copyright could be expired depending on exact date of publication and whether renewal of copyright was filed |
| Between 1978 and March 1, 1989 | Varies; could be 70 years from date of author’s death (if an individual) or 95 years from publication (if a corporate author), to 120 years from creation, to December 31, 2047, depending on date of creation, whether registration obtained, and other factors |
| Between March 1, 1989 and 2002 | Between 70 years after death of author (if an individual) or 120 years from creation (if a corporate author) or December 31, 2047, depending on when the work was created and published |
| 2002 and beyond | 70 years after the death of individual author; or 95 years from publication or 120 years from creation (whichever comes first) |

When to Use the Copyright Notice?

Notice of Copyright is optional, but is **strongly recommended**. Most works contain a Notice of Copyright - ©2015 Bingham Greenbaum Doll LLP (the © symbol, year of publication, and the copyright owner). All Rights Reserved. The purpose of the Notice is to inform the public that copyright protection is claimed or asserted. As shown in the above chart, notice was critical until about 1989; since then, while its importance has decreased, it remains a preferred practice.

Using Text on the Web Without Infringing or Plagiarizing

Anytime you're unsure about crossing the line into infringement or plagiarism, it is best to ask permission or simply not use the work. In general, when it comes to using text from blog posts, news articles, and magazines, you are safe if:

Quoting: You can pull a short quote from an article or a blog post, cite the source, and link back to the original article. It is generally acceptable to quote news articles and people.

Republishing a Blog Post: Always ask permission of the author. If you are helping the author by republishing his or her work, they are more likely to agree.

Summarizing and Curating: You've seen weekly digest posts, like "This Week's Best Tech Posts" and the article gives a short description of 5 different blog posts. In general, this practice is acceptable as long as you don't directly quote a majority of the article and you link back to their website. *When in doubt, ask permission.* Think to yourself, "Will the reader be interested in clicking through to the article or have I already used so much of the article that they don't need to click through to learn more?" If the latter, seek permission!

Copyright and Social Media / Photography: 2 Case Studies

Agence France Presse v. Morel - 2013

Daniel Morel, a photographer who had worked in Haiti for more than 25 years, took photographs of the earthquake that hit the island in 2010. He posted his pictures to Twitter and Twitpic.

Agence France Press (AFP) downloaded his photos and transferred them to Getty Images.

Morel sent cease-and-desist letters ordering Getty and AFP to remove his images. AFP sought a Declaratory Judgement in court denying infringement based on Twitter and Twitpic's Terms of Service Agreements and argued that Twitter's terms gave AFP a license to use the pictures.

What did the court decide?

- Twitter's and Twitpic's terms gave Twitter and Twitpic a license to re-publish the copyright protected photos, but did not give permission to third parties to do so.
- AFP argued it was a third-party beneficiary to the license agreement.
- The court rejected AFP's argument. "Twitter's Terms of Service agreement encourages content sharing, but does not expressly grant third parties licenses to use others' content."

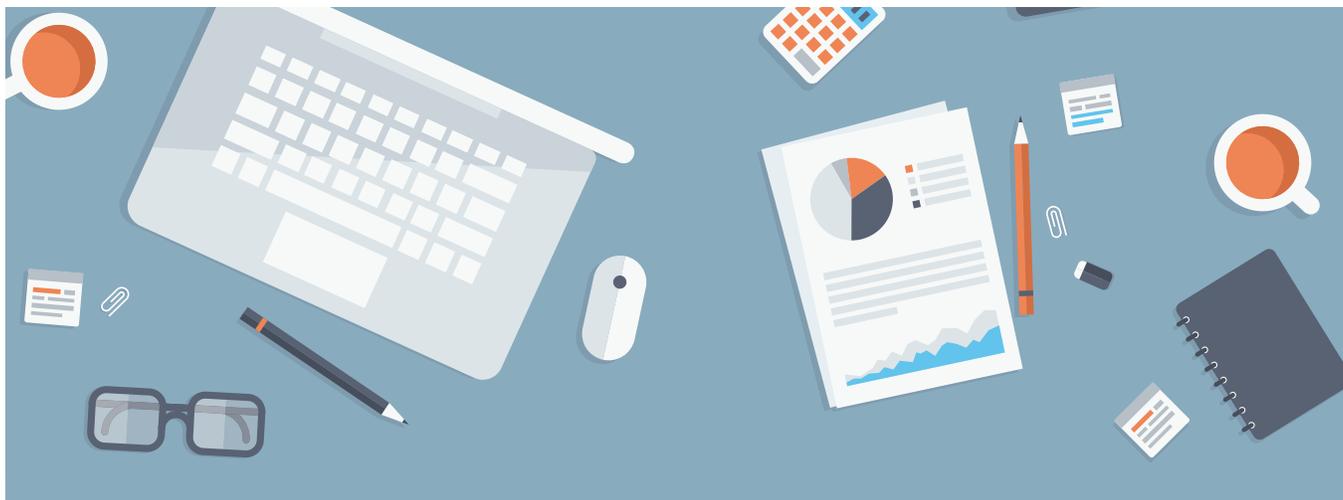
The Associated Press vs. Fairey

Here, we have a more famous copyright tussle. You probably remember the iconic poster that artist Shephard Fairey created during the Obama presidential campaign in 2008 – the one with the 3-toned image of Barack Obama and the word “HOPE” appearing underneath.

The design was originally created independently of the Obama campaign, but it became wildly popular and was eventually adopted as a symbol of the campaign. The Associated Press (AP) accused Fairey of basing the design on one of their photographs. AP demanded compensation, and Fairey responded with the defense of *Fair Use*.

In this instance, the case never went to court, as Fairey and the AP settled privately in January 2011 with an agreement to split the profits for the work.

Although the infringement case never proceeded to trial, it nonetheless illustrates that the defense of *Fair Use* (or that a use is “transformative”) is a high hurdle for most defendants to clear. Therefore, it’s always the more prudent path to seek permission at the outset of your project.



Steps to Avoiding Unlicensed Photos on the Web

Only licensed images where you have express permission from the author are generally safe to use on your blog or website.

It is not unusual for businesses creating content every day on the web to have accidentally used images they didn't have permission to use. SpinWeb itself has received cease-and-desist orders and has had to pay monetary settlements to the owner for unauthorized use of copyrighted works. It is a terrible feeling and costly mistake – one that we want to help you avoid!

Such a mistake can happen in a variety of ways, but it occurs most commonly when you select an image you think is covered by Creative Commons license (more on that in a minute) or when you think you have permission. SpinWeb now uses images that come from a stock photography website (via a subscription with Shutterstock) or photographs that its own personnel have taken.

Here are a few tips to avoid the dangers of unlicensed photos and hopefully keep you out of trouble:

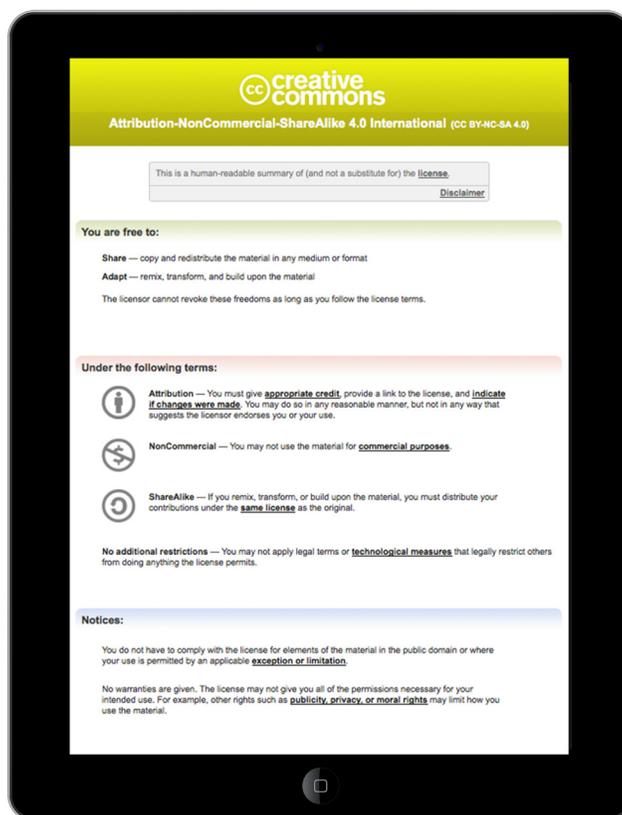
1. Don't use Google Images.

It is very tempting simply to do a quick Google Image search and find a photo to use. It seems like everyone is doing it, but you're smarter than that! You don't know where those photos may have come from. Even if you credit the source, you can still get in trouble for using a photo, graphic, or image that you didn't get permission to use or that you did not pay for.

2. Beware Flickr Creative Commons.

Authors can use Creative Commons (CC) licenses to give others the right to share, use, and build upon work they've created. When someone uploads their photos to Flickr, they can choose a CC license, some of which allow anyone to use, share, or modify the work. Other CC licenses are more restrictive.

A drawback about Creative Commons and Flickr is that the content owners can change their permissions or requirements *at any time*. It doesn't matter if it was under the "free to use and share" Creative Commons in effect at the time you used the work. For each photo you select, you must read the fine print under "Some rights reserved" link. Additionally, all CC licenses contain a disclaimer of any warranty that the licensing party even holds full rights to the image. This is obviously very risky for you; therefore, be careful if you rely on Creative Commons as a basis for using the work.

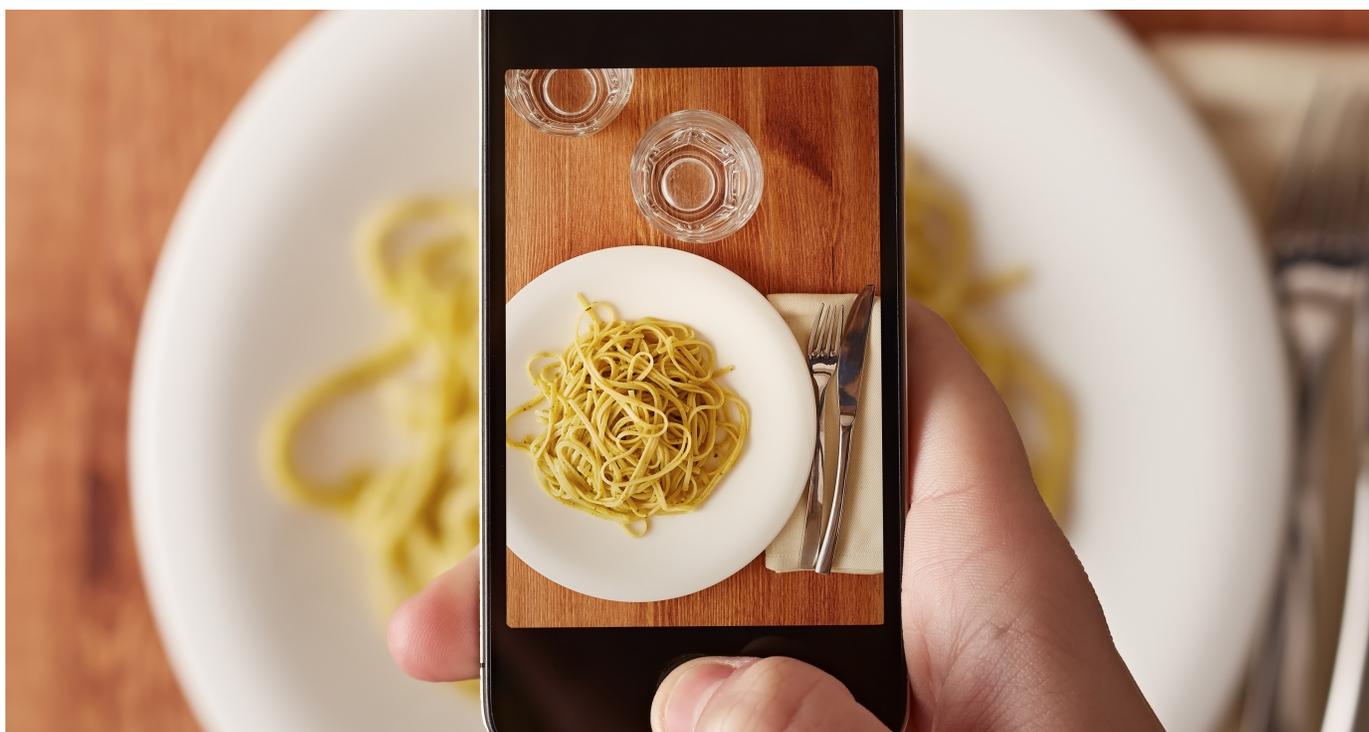


3. Seek permission when in doubt.

If you're not sure about a photo or graphic you're about to use (maybe it's on a fellow blogger's blog), then simply send them an email and ask for permission. If they say OK, make sure to save the email communications. If they say no, don't use it. Asking for permission and then proceeding to use it in the face of a refusal can get one into worse trouble.

4. Use your own original photography.

Apps like Instagram make it easy to take quick snapshots on your phone and create an original stock photo gallery.



5. Use trusted stock photography websites.

Last, but certainly not least (in fact this might be the most important) if you have the means, subscribe to a stock photography service like Shutterstock or iStock. If you do plan to make creative changes to the images, even if it's a stock photo you bought and have permission to modify, it's not a bad idea to attribute the photographer (as in the case of *Fairey vs. Associated Press*).

Filing an Application for Copyright Protection

If you're ready to apply for copyright protection for your own original creative work, what will you need to file an application with the U.S. Copyright Office?

Here is a worksheet to help you gather some of the information you'll need for the federal application. While the information requested may seem straightforward, by now you know that any of these elements can be complicated. Thus, it is advisable to work with an experienced copyright attorney to submit your application.

1. Title of Work:

2. Has the work been published?

if yes:

First nation of publication:

Year of completion/creation:

Date of first publication:

if no:

Year of completion/creation:

Name the author(s) of the work, as well as the citizenship and domicile of each author:

3. Was the work created under a "made for hire" arrangement?

a. As previously noted in this guide, a work is considered “made for hire” in two situations. First, if the work is created by an employee as part of his/her regular duties, then the work is generally considered a WMFH. A person is an employee if the hiring party has the right to control the manner and means by which the work is created. Courts have considered certain factors in the employment relationship, such as whether taxes are withheld or benefits given, to determine whether the contributor is an “employee” under this sense of the definition. Second, a work is generally considered a WMFH if the work is a specially commissioned work for specified categories of works AND there is a written agreement between the author or creator, and the commissioning party stating that the work is indeed a WMFH.

As a reminder, specially commissioned works must fall into one of the following categories in order to be treated legally as a WMFH:

- contribution to a collective work
- part of a motion picture or other audiovisual work
- translation
- supplementary work
- compilation
- instructional text
- test or answer material for a test
- atlas

b. Note: if a work is considered “made for hire,” then the employer or commissioning party will be listed as the “author” in the application.

Write each author's initials next to any of the following descriptions the author helped create:

_____ Text (Text may include works that contain a series of words or phrases, usually forming complete sentences that explain or narrate, such as poems, stories, scripts and instructions.)

_____ Editing (Editing consists of adding, revising and/or deleting preexisting text.)

_____ Photograph(s) (Photograph(s) includes photographic illustrations, prints, and slides.)

_____ Artwork (Artwork may include works such as 2D or 3D artwork, illustrative matter such as drawings, technical drawings, or other non-photographic pictorial representations.)

_____ Translation (Translation is a rendering of a work from one language to another, for example, a work translated from German into English.)

_____ Compilation (Compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. To be copyrightable, a compilation must contain at least a certain amount of original selection and/or ordering. For example, the selection of only 3 poems from different authors would generally not constitute a copyrightable compilation.)

_____ Computer Program (Computer Program refers to computer code, that is, a set of statements or instructions to be used in a computer in order to bring about a certain result.)

_____ Note that additional fields may be entered to briefly state (in general terms) authorship that is not covered by the boxes provided and for which you seek this registration.

Conclusion

Copyright and the Internet ... like we said, it's a complicated game. As we hope you have gathered from reading this guide, the preferred bottom line is **permission**. If you don't have express permission to use someone else's copyrighted work, don't use it!

Your business needs might go deeper into copyright protection. If so, it's a good idea to consult a lawyer familiar with this complicated area of the law.

About SpinWeb

SpinWeb is a digital agency specializing in corporate website design, Inbound Marketing, and app development.

SpinWeb is located in Indianapolis, Indiana, and serves organizations throughout the U.S. in the health care, law, manufacturing, and education markets, just to name a few.

Every day, SpinWeb helps organizations do things like:

- Dramatically grow the sales pipeline through Inbound Marketing
- Look like a market leader online
- Manage large amounts of web content with a few clicks
- Migrate dated systems to paperless online alternatives
- Communicate with constituents faster and with less expense

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About Bingham Greenebaum Doll LLP

Bingham Greenebaum Doll LLP is a business law firm providing transactional, intellectual property, litigation and government services to clients ranging from Fortune 500 businesses and Global 1000 companies to smaller, regionally based organizations across a variety of industries and business sectors. The firm also provides legal services to individuals and non-profits. BGD has served the legal and business needs of clients for more than a century and is one of the nation's top 150 law firms providing an international reach through its affiliations with both Terra Lex and US LAW (2 associations of independent law firms located in more than 100 countries around the globe).



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