

## Alphabet Soup: Unraveling the Mysteries of How to Use Copyright and Trademark Notices

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Intended for advertising copywriters and product managers, this memo provides some background information on use of proper copyright, trademark and service mark notices in advertising copy and on products. It also discusses the basics of correct trademark usage.

### COPYRIGHT PROTECTION

Copyright protection in the United States is granted solely by federal statute, the Copyright Act. Until March of 1989, in no uncertain terms, the Act required copyright notice be used to preserve copyright rights. Now notice is no longer mandatory. However, it is still a very good idea to use copyright notice correctly and consistently. Use of it prevents claims of "innocent infringement", and preserves the rights to recover certain remedies.

Copyright registration, a separate process, is advisable but, is not mandatory to protect copyright rights. Protection under the copyright laws exists without it. Registration is, however, a prerequisite to filing suit for copyright infringement.

So when should copyright notice be used? A notice of copyright should be placed on all publicly distributed copies of all "copyrightable works", i.e. advertisements, product packaging and the like. The Copyright Act defines publication as "the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease or lending". Use of proper copyright notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office.

Proper copyright notice consists of each of the following three (3) elements:

1. The symbol © (the letter C in a circle), or the word "Copyright" or the abbreviation "Copr."
2. The year of first publication of the work. In the case of compilations or derivative works incorporating previously published material, the year of first publication of the compilation or derivative work is sufficient.
3. The name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. Example: "© 1985 John Doe".

Because © is recognized as a proper notice by international treaty, the © symbol should always be used. In addition, to preserve rights in most South American countries, pursuant to another international copyright treaty, the words "All Rights Reserved" should be used. Thus, proper copyright notice under U.S. and international law is: "Copyright © 1990 ABC Corporation. All Rights Reserved." Note that who the copyright owner is not always clear; the advertising agency may own rights to advertising copy, although most clients expect to own the rights. To do so, they need an assignment of rights in writing.

While notice does not have to be in any particular size of type, to be effective, copyright notice must be placed as to give "reasonable notice" of the claim of copyright. So it can't be so small that it can't be noticed or read; but it doesn't need to be a headline, either. Exactly where copyright notice must appear depends on the type of work. Following are some examples:

Single page works: Anywhere on the front or back. (Print ads fall within this category.)

Audio-visual advertisements (60 seconds or less): the same as for other audiovisual works, i.e., in the credits or titles page, but usually used on the leader only (therefore the notice does not show when the spot is broadcast).

Product packaging: There is no special rule for use of notice on product packaging. It can appear anywhere. It is customary to place it near the listing of ingredients, identification of the place of manufacture or with similar textual material on the product container, package or label..

Books and manuals: on the title page, the page immediately following the title page, the front or back cover or leaf, or the first or last page.

Periodicals: On any of the above locations, in the masthead or adjacent to the heading.

Contributions to collective works: At or near the title, on the first page, or immediately following the end of the contribution.

Computer programs: placed on the media containing a copy of the program, e.g. all tapes, disks, printouts and the supporting documentation (see books and manuals). The notice, in machine readable form, should also be placed at least at the beginning of each program, so that it is visible when the program is run or printed out.

Note that if the work is a computer program, the proprietary nature of the computer program also should be stated. A notice substantially in the form below should be reproduced on all copies of a copyrighted computer program in any form:

"this is the confidential, unpublished property of [name]. Receipt or possession of it does not convey any rights to divulge, reproduce, use, or allow others to use it without the specific written authorization of [name] and use must conform strictly to the license agreement between use and [name].

Copyright © 19\_\_ [name]. All Rights Reserved."



Copyright notice is not required on unpublished works (i.e., drafts or works used internally). However, to avoid an inadvertent publication without notice, you should affix the notice set forth above to all works such as advertisements, training manuals, computer programs and their documentation that may be "published" at some time in the future.

As stated above, copyright registration is advisable but is not mandatory to protect copyright rights. Registration is necessary, however, before suit can be filed against an infringer. Most works probably should not be registered (although copyright notice should be used) unless an infringement is known or suspected. In addition, any works that are publicly distributed and are likely to be copied, such as a valuable computer program for general application or a training manual, should be registered. Easy to read and complete forms are available from the Copyright Office in Washington, D.C. for this purpose. The filing fee per work is \$20.00.

### TRADEMARK AND SERVICE MARK PROTECTION

A trademark is a word, name, symbol or device (including a logo, slogan or motto), or any combination of these elements adopted and used by a manufacturer or merchant to identify its goods and distinguish them from those manufactured or sold by others. A trademark identifies a company's brand of a particular product.

Where a service rather than equipment is the "product" (such as a restaurant service), the mark is called a service mark. A service mark identifies the service and distinguishes it from services provided by others.

It is not necessary to register a mark in order to enforce rights in it. There are so-called "common law", unregistered trademark rights. No statutes require use of trademark notice. However, there are good reasons for registering a mark as well as for using proper trademark notice.

If you use trademark notices, others will be made aware of your proprietary interest in the mark and of your intent to protect it against use by others. Another good reason for using proper trademark notices is because proper usage is essential to create and maintain rights to a mark, and use of proper notices contributes to proper usage.

So what is proper trademark notice? It depends. If you have a federally registered mark - that is, you have a mark registered with the U.S. Patent and Trademark Office, you may use the symbol: ®, the words "Registered U.S. Patent and Trademark Office" or the abbreviation "Reg. U.S. Pat. & Tm. Office". If you don't have such a registration, or you're not sure, don't use that ®. It could cause legal problems.

If you have registered a mark in California or any other state (there is a dual registration system, both federal and state, for trademarks and service marks), you may use the word "Registered", or "Registered Trademark".

In most cases, however, a simple <sup>TM</sup> for trademark or SM for service mark will do. Or you can state that "XYZ is the trademark of the ABC Corporation" or similar designation. If a mark is your mark, you may designate it as such, without permission, registration, or any formality whatsoever. Indeed, it is always better to err on the side of use of trademark notice and include it.

And where to put the notice? Again, there are no rules. It is customary to put the notice at the "knee" or "shoulder" of a mark, like this: "XYZ<sup>TM</sup> widgets". Or, you can use an asterisk or dagger and give the trademark information in small type at the bottom of the page or product package. Notice need not be used each and every time a mark appears. Use of notice with the first, most prominent usage, is usually sufficient. So if you use a mark in a headline, it is a good idea to put the <sup>TM</sup> in the headline. It is also a good idea to use the notice the first time the mark appears in text. Note that you can't use trademark notice too often. You can use it every time a mark appears. But if you did, the page or product probably would look cluttered, and it is not necessary. Use common sense. Use notice so that readers see it.

Besides use of trademark notice, there are other rules of proper trademark notice you should follow. Why? Proper usage maintains rights, and improper usage destroys them. If a trademark becomes part of the common language as the name of a particular product, the trademark significance is lost. So be careful, and remember these guidelines:

1. As discussed above, use a proprietary trademark notice the first time the mark appears in any material. "TM" for products or "SM" for services should be used if the mark is not a registered mark. Alternatively, you could state that the particular mark is the trademark or service mark of ABC Corporation. If it is registered in California or in any other state, you may note that it is a "Registered Mark". Only if the mark is a federally registered trademark or service mark, could you use "®", the phrase "Registered in the United States Patent and Trademark Office", or the abbreviation "Reg. U.S. Pat. & TM. Off."

2. Use the generic name of the product in association with the trademark or service mark, (e.g., XEROX photocopiers, JELLO brand gelatin, LEVI'S jeans).

3. Use the mark in a correct grammatical manner; marks are adjectives not nouns or verbs (e.g. Correct: use the Xerox photocopier. Incorrect: use the Xerox. Will you xerox this document for me?).

4. Display the mark with some form of special typographical treatment (e.g., capitalized, italicized, etc.). Do not vary the mark (e.g., do not change the spelling or proper type form; do not add terms to or delete terms from the mark).

Trademark registration is also a separate process from use of trademark notice. It is generally advisable, although whether to file in one or more states, federally, or internationally, will vary from product to product. Consult your trademark attorney about registration.

## COMBINING COPYRIGHT AND TRADEMARK PROTECTION

As a practical matter, copyright and trademark notices are used together in advertising copy and on product packaging. Use the trademark notice with each mark as it appears. Use the copyright notice at the bottom of the page, or with ingredients listings or similar information, as outlined above.