

VENTURES

QUARTERLY NEWSLETTER FOR SMALL, MINORITY- AND WOMAN-OWNED BUSINESSES

Copyright and Small Business: A Plan for Owning and Protecting Key Business Assets

By Brian Darville, Managing Director, Brocadiant IP

When people think of copyrights, they often think of music, films, books and video games, but works protected by U.S. copyright law are part of every business. With the increase in digital technologies, the rate of creation for copyrighted works has increased, as have the risks of copyright infringement.

Here is a brief outline of U.S. copyright law and a plan for any business to own and protect its copyrighted works.

Scope of Copyright

Under Section 102(a) of the Copyright Act, copyright protection exists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

Broadly defined, literary works include such things as advertising and promotional materials, business brochures, Web sites, software and other written works so long as such materials meet the low level of originality required under the Copyright Act. Pictorial and graphical works also are protected. As a result, almost every business owns some copyrighted works and should take steps to protect them.

Copyright Notice

Although no longer required under U.S. law, notice of copyright is strongly recommended. Proper copyright notice provides notice of the owner's copyright and the year of first publication. Copyright notice also vitiates a defendant's claim of innocent infringement as a defense in mitigation of actual or statutory damages, except in limited circumstances.

Proper copyright notice has three components: 1) An indication of copyright—"Copyright," "Copyr." or ©; 2) The year of first publication; and 3) the copyright owner's name. An example: "© 2010 Microsoft Corporation." Although not required, some companies include the word "Copyright" in addition to the "©" symbol as part of the notice.

Copyright Term

The term of a copyright varies depending upon whether the work was (a) created and published or registered before January 1, 1978, (b) originally created before January 1, 1978, but not published or registered by that date, or (c) originally created on or after January 1, 1978. Works created on or after January 1, 1978, ordinarily are given a term for the life of the author plus an additional 70 years after the author's death. In the case of a "joint work," the term lasts for 70 years after the death of the last surviving author.

For works made-for-hire and for anonymous and pseudonymous works, the term of copyright is 95 years from publication, or 120 years from the date of creation, whichever is shorter. Copyright Office Circular 15a, Duration of Copyright, provides additional detailed information on the term of copyright.

Copyright Ownership

Copyright ownership arises the moment a sufficiently original work is "fixed in any tangible medium of expression." Copyright ownership is often said to arise when the pen lifts from the paper and the expressive work is "fixed." In today's context, copyright arises when the "save" button is pressed to save a digital work. The key question, however, is who owns the copyright in that work?

A company does not automatically own a copyrighted work created in whole or in part by an independent contractor, such as a consultant or software developer. Unless there is an agreement to the contrary, the independent contractor will own any copyrighted work he or she creates.

For corporate or other business entities, any copyrighted work created by an employee within the scope of the employment automatically is owned by the employer as a matter of law.

In some cases, however, it is unclear whether a particular worker is an employee or an independent contractor. A company does not automatically own a copyrighted work created in whole or in part by an independent contractor, such as a consultant or software developer. Unless there is an agreement to the contrary, the independent contractor will own any copyrighted work he or she creates.

Moreover, general agency principles govern whether a particular worker is an employee or an independent contractor. The hiring party's right to control the manner and means by which the product is created is the touchstone of whether or not a worker is an employee. Factors relevant to this inquiry include:

- the skills required for the work;
- the source of the instrumentalities and tools;
- the location of the work;
- the duration of the relationship between the parties;
- whether the hiring party has the right to assign additional projects to the hired party;
- the extent of the hired party's discretion over when and how long to work;
- the method of payment;
- the hired party's role in hiring and paying assistants;
- whether the work is part of the regular business of the hiring party;
- whether the hiring party is in business;
- the provision of employee benefits; and
- the tax treatment of the hired party.

COPYRIGHT continues on page 4

BUSINESS VENTURES Second Quarter 2010

THINK GLOBAL 2
You're Global Even if You're Local

SMALL BUSINESS SPOTLIGHT 3
FCEDA Workshops Help 8(a) Companies Thrive, Compete and Graduate
FCEDA President and CEO Addresses OSDDBU Procurement Conference

FYI 3

You're Global Even if You're Local

By Tom Finn, Global Leadership Consultant, Tom Finn Associates, Inc.

This article begins a four-part series on "going global" for companies looking to be leaders in one of the most diverse counties in the country.

If you are a Fairfax County business, or a leader in a government agency, let's face it: You are global. Fact: You've got multicultural customers and employees. Challenge: interpreting and working with the resulting cultural nuances. Fact: You've got 24/7 pressure to produce world-class quality goods and services. Challenge: overcoming the overload characterizing today's workplace due to increasing pressure for quality.

Case Studies

- A ten-year customer of a local credit union comes in to a branch wearing a headscarf. The teller tells her that she will have to go to the back of the bank to be served. The customer is so upset she reports her story to the media, and the credit union gets publicity it doesn't want.
- A telecommunications executive says, "Thinking is the most important part of my job, and I don't have time to think."

These examples illustrate the risks a company might face due to mishandling cultural differences or being buried by workplace frenzy. However, take heart: we are a uniquely diverse, high-pressure county—a global, fast-paced marketplace where Herndon competes with Hamburg and Hyderabad. Therefore, if you can harness cultural difference and manage pressure here,

you will have high quality leaders, employees, products, and services that could operate anywhere.

Culture and Pressure in our Backyard

Here are some statistics that might spur you to think more globally:

- 25 percent of Fairfax citizens are foreign-born.
- In 1970, less than 7 percent of Fairfax citizens were members of ethnic/racial minority groups. In 2008, 42 percent are members of those groups
- 35 percent of Fairfax households speak a language other than English at home

How does the influence of global competitive pressure affect organizations? Examples from my customers:

- **Lost sales.** An overwhelmed executive is too busy to respond to all the customers who want his product, so he loses the business.
- **Fewer product and service offerings.** Human and business resources are too compromised to come together to launch a new product line.
- **Fewer creative ideas.** Because of operational demands, senior leaders are buried under a mountain of details, with no time to develop creative insights or strategies.
- **Poor service.** Customers get shoddy, "make-do" service due to last-minute, crisis cleanup caused by escalating pace and inattention.
- **Excellence deferred.** Skill development is postponed and bottleneck repair is delayed until the (latest) "reorganization is settled."

Clueless to Culture, Numbness to Pressure

It is fascinating—and often discouraging—but, if you don't know what you don't know, it is very easy to lose business, demotivate an employee, or create a culture that drives away customers and/or employees. Two of my own customers had no idea that certain of their business practices were driving away business and freezing out female employees from promotions. I chronicled these scenarios in stories such as "A Bank For White People," and "A Restaurant for Men." Pressure has a different "hidden" quality. In a "get it done" culture like ours, business owners don't want to admit they can't handle the pressure—and organizations reinforce this hiding by rewarding workaholics. In a down economy, no one wants to risk losing a job.

This series will explore the hidden influence of culture and pressure with concrete suggestions for how leaders can use global thinking: that can be as simple as thinking in cultural "niches," which will allow you to see new opportunities. Looking to thrive under pressure? Start thinking about what gets you stuck, time and again, in a pressure spiral. Business people who use these tactics can grow their businesses, engage, and attract employees.

Remember, getting to know what we don't know is the first step in "going global." ■

Tom Finn is a performance improvement consultant for leaders and is the author of *Are You Clueless? Seven Clues to Profit, Productivity, & Partnership for Leaders in a Multicultural World*. His ideas on handling pressure are at www.lifelineconsulting.com and on culture at www.arelifeconsulting.com. He resides in Reston and can be reached at tfinnman@aol.com or 703-709-7947.

FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY

8300 Boone Boulevard, Suite 450, Vienna, Virginia 22182-2633
Voice: 703-790-0600 • Fax: 703-893-1269
info@fceda.org • www.FairfaxCountyEDA.org

The Fairfax County Economic Development Authority (FCEDA) is an independent authority created under state law, operating under the direction of seven Commissioners appointed by the Fairfax County Board of Supervisors. Its activities are funded by Fairfax County.

COUNTY BOARD OF SUPERVISORS

Sharon Bulova, *Chairman* • Penelope A. Gross, *Vice Chairman*
John C. Cook • John W. Foust • Michael R. Frey
Pat Herrity • Catherine M. Hudgins • Gerald W. Hyland
Jeff McKay • Linda Q. Smyth

ECONOMIC DEVELOPMENT AUTHORITY COMMISSIONERS

Steven Davis, *Chairman* • Michael S. Horwatt, *Vice Chairman*
Ron Johnson • Catherine Lange
Michael Lewis • Mark Lowham • Sudhakar Shenoy

ECONOMIC DEVELOPMENT AUTHORITY STAFF

Gerald L. Gordon, *President and Chief Executive Officer*
Robin Fenner, *Vice President, Management*
Alan Fogg, *Vice President, Communications*
Catherine W. Riley, *Vice President, Marketing*
Barbara Cohen, *Director, Administration*
Rodney Lusk, *Director, National Marketing*
Jan Mul, *Director, International Marketing*
Ivy G. Richards, *Director, Market Research & Real Estate*
Karen Smaw, *Director, Small & Minority Business Development*

BUSINESS VENTURES PRODUCTION

Ellen Acconcia, *Editor* • Vicki L. Serrano, *Graphic Designer*

The FCEDA assists businesses interested in locating, relocating or expanding their commercial office or industrial operations in Fairfax County. The FCEDA's services are available on a confidential, no-cost basis.

FCEDA President and CEO Receives VAHCC Bridge Builder Award

On April 23, 2010, Virginia Hispanic Chamber of Commerce (VAHCC) presented a "Bridge Builder Award" to Dr. Gerald L. Gordon, president and CEO of the FCEDA, at the VAHCC annual gala in Richmond. The awards honor those who forge connections among Virginia's diverse racial, ethnic, religious and cultural groups. Previous recipients include former Mexico President Vicente Fox, and U.S. Sen. (and former Virginia governor) Mark Warner.

"This is an extraordinary honor for me," Gordon said. "As the child of first-generation Americans, I fully appreciate the difficulty of coming to a new country and starting a business. The Virginia Hispanic Chamber is helping men and women do exactly that, and working on their behalf to develop business relationships with large companies and integrate them into the economic mainstream. The chamber does important work." ■



Michel Zajur, VAHCC president and CEO, Virginia Hispanic Chamber of Commerce, Dr. Gordon, and Cynthia S. Cecil, senior manager, Community Relations & Employee Involvement, Altria Client Services.

Photo courtesy Virginia Hispanic Chamber of Commerce

Founded in 2000 and based in Richmond, the VAHCC is the first statewide organization to empower Hispanics in the Virginia business community by building economic, social, and cultural bridges between Virginia and its growing Hispanic community. An FCEDA partner, the VAHCC maintains its northern Virginia office in the FCEDA's Tysons Corner headquarters.

SMALL BUSINESS SPOTLIGHT

FCEDA Workshops Help 8(a) Companies Thrive, Compete and Graduate

In March 2010, the Fairfax County Economic Development Authority (FCEDA) began a series of workshops designed to explore opportunities for companies in the U.S. Small Business Administration's 8(a) program, a business development initiative for small disadvantaged businesses. During the workshops at FCEDA headquarters in Tysons Corner, attendees interact with business owners who have led companies through all phases of the 8(a) program, as well as attorneys, bankers and SCORE representatives who advise 8(a) companies.

"Thanks in part to the 8(a) program, Fairfax County has one of the most dynamic small and minority business communities in the nation. These workshops will help companies make the most of the program and transition out of it to become even stronger businesses," said Gerald L. Gordon, Ph.D., president and CEO of the FCEDA. "This series represents another way that the FCEDA is fostering small business growth in Fairfax County."

The series is designed for representatives of companies that are certified as 8(a) companies or companies that have graduated from the 8(a) program. The March 9 seminar, "8(a) Contracting and JV/Mentor-Protégé Programs," featured information for companies that want to convert their 8(a) status into government contracting opportunities as a prime contractor, subcontractor, or a protégé in an official mentor-protégé relationship. On May 18, "Financing Growth for 8(a) Companies," assisted participants with information about financial options including commercial bank loans, factoring, venture capital and grants. Workshops continue on July 15 and November 4. The events are free, but registration is required and seating is limited. Visit www.fairfaxcountyeda.org/8a-workshop-series for details about each session and to register.

The 8(a) Program is the U.S. Small Business Administration's initiative to promote equal access for socially and economically disadvantaged individuals to participate in the business sector of the nation's economy. The program allows 8(a) approved firms to participate in the business sector and to become independently competitive in the marketplace. ■



Ronald C. Johnson, chairman and CEO of Ronson Network Services Corporation, and an FCEDA commissioner, makes a presentation at the FCEDA's 8(a) workshop.

Photo by Enrique Lagos, FCEDA

FCEDA President and CEO Addresses OSDBU Procurement Conference

Saying, "Fairfax County has a large and dynamic community of small and minority-owned businesses. I am delighted to have the opportunity to address government and industry leaders who work together so effectively to enable more companies to enter the economic mainstream, to create jobs and wealth, and to improve our collective quality of life," Gerald L. Gordon, Ph.D., president and CEO of the FCEDA on April 21, 2010 addressed the 20th Anniversary OSDBU Procurement Conference in Chantilly.

The conference—which included forums on federal small business programs and seminars on doing business with the government and how to navigate through the subcontracting arena—was presented by the Federal Office of Small and Disadvantaged Business Utilization Directors Interagency Council ("OSDBU Council"). More than 60 government agencies and 300 companies exhibited at the conference, which had more than 3,000 attendees.

Fairfax County is home to 43 percent of Virginia's 8(a) businesses and 42 percent of Virginia companies designated as small, disadvantaged businesses (SDB). Fairfax County-based 8(a)/SDB firms won more than \$234 million in federal procurement contract awards during fiscal year 2009. ■



From left to right, Dr. Gordon, Mauricio Vera, director, Office of Small and Disadvantaged Utilization, USAID; Maura O'Neill, senior counselor for innovation, USAID; Glenn Delgado, associate administrator, Office of Small Business Programs, NASA; and Charles Bolden, Jr., administrator, NASA.

Photo by Karen Smaw, FCEDA

FYI . . .

... Register now for one of the FCEDA's FREE monthly workshops on starting a business in Fairfax County. Remaining 2010 dates are September 14, October 5 and November 12. Visit www.fairfaxcountyeda.org/starting-business-seminar for details.

... Looking for a business event or class in Fairfax County? The FCEDA maintains an online Small Business Datebook especially for entrepreneurs. Visit www.fairfaxcountyeda.org/fceda-events-calendar. To submit a business-related event for the calendar, contact the FCEDA at 703-790-0600.

... The FCEDA offers small businesses counseling at its Tysons Corner office through an arrangement with SCORE (a Small Business Administration initiative). Visit www.fairfaxcountyeda.org/score.htm, for more information and to schedule an appointment.

... The United States Hispanic Chamber of Commerce 31st Convention & Business Expo will be held September 22-25 in Dallas, Texas. The country's largest networking venue for Hispanic businesses and corporations interested in the Hispanic market features hundreds of exhibitors from the U.S. and abroad. For more information, visit www.usbcc.org.

... The National Minority Supplier Development Council's (NMSDC) annual conference and business opportunity fair will be held October 24-27 in Miami Beach, Florida. For more information, visit www.nmsdc.org.

... The Fairfax County Department of Purchasing and Supply Management Agency, Contracts Division, conducts FREE monthly "Selling to Fairfax County" workshops. The remaining dates in 2010 are June 16, July 21, August 18, September 15, October 20, November 17 and December 15. Visit www.fairfaxcounty.gov/dpsm/osbl/workshop.htm or call 703-324-3201 to register.

... The Fairfax County Small Business Commission (SBC) oversees the programs related to county contract awards to small, minority and woman-owned businesses and those owned by disabled persons. SBC's remaining 2010 meetings (open to the public) are July 26, September 27 and December 6. For more information, contact Michael Estelle at the county's Department of Purchasing & Supply Management Agency, 703-324-3201, or visit www.fairfaxcounty.gov/dpsm. ■

All of the incidents of the relationship between the company and hired party must be assessed and weighed with no one factor being decisive in determining whether the hired party is an employee. Given the number of relevant factors, whether a particular worker is an employee versus an independent contractor can be complex.

To address this issue, a company can enter into a Work-Made-For-Hire agreement with any independent contractor providing that the independent contractor's contribution to the copyrighted work is intended to be a work-made-for-hire and that ownership of the copyrighted work shall vest in the company. Under the Copyright Act, the following can be considered works made-for-hire:

- A work specially ordered or commissioned for use as a contribution to a collective work
- As part of a motion picture
- As part of some other audio-visual work
- A translation
- A supplementary work
- A compilation
- An instructional text
- A test or answer material for a test
- An atlas

In addition, for these works to be considered works made for hire, the parties must expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Because only these nine types of works can be works made for hire under the Copyright Act, a Work-Made-for-Hire Agreement typically also includes an assignment of any copyrights and other intellectual property rights from the worker to the hiring company. This approach ensures that even if a particular worker is an independent contractor and the work at issue does not

qualify as a work made for hire, the hiring company will still own all intellectual property in the work because of the assignment.

In those instances where an independent contractor either creates or contributes to the copyrighted work and there is no Work-Made-For-Hire agreement and assignment in place, that independent contractor will be either a sole owner of the copyright or a joint owner of the copyright. If the independent contractor owns the work, the company cannot commercially exploit the work without a license from the independent contractor. If the contractor and the company are joint owners, the company has a duty to account to the contractor for the work, which means that the contractor is legally entitled to share in the profits from commercial exploitation of the work.

In a recent California case, technology start-up JustMed, Inc., retained a worker to write the source code for software used on its digital audio larynx—a device to help individuals whose larynxes have been surgically removed produce clearer speech. (*JustMed, Inc. v. Byce, Case No. 07-35861 [9th Cir. Aug 5, 2010]*). JustMed's somewhat informal employee practices raised questions as to whether the worker was an employee when he developed the source code for the software. After the code was developed, there was a falling out between JustMed and the worker, and an ownership dispute arose over the software. The court concluded that the worker was an employee of JustMed when he created the code, ruling that JustMed owned the copyrights in the source code exclusively and had no duty to account to its employee for profits generated from sales of the software.

Copyright Registration

Registration of copyrights with the U.S. Copyright Office is a straightforward process. It entails completing an application form, paying the required government fee, and providing the "deposit" copies of the work, which vary depending upon the type of work involved.

Copyright registration is critical to fully protecting copyrights. Although not required for ownership of copyright, timely copyright registration confers significant benefits, including proof of ownership and validity of the copyright, as well as the ability to obtain statutory damages and attorney's fees for infringement of the work. Statutory damages range from \$750 to \$30,000 for nonwillful infringement and from \$750 to \$150,000 for willful infringement in the court's discretion. The ability to recover statutory damages can be critical in a copyright case because proving actual damages resulting from the infringement often can be problematic.

Similarly, the prevailing party in a copyright infringement action can recover its attorney's fees in the court's discretion if copyright in the work was timely registered. The ability to recover attorney's fees provides a party to copyright infringement action significant leverage in the litigation.

To recover statutory damages or attorney's fees, a copyright owner must register copyright in its work either before the infringement or within three months after the first publication of the work.

Conclusion

Companies can take simple steps to own and protect the copyrights they create for their business:

- Require all employees to sign invention disclosure and assignment agreements.
- Require all contractors to sign work-made-for-hire and assignment agreements.
- Provide proper Copyright Notice in proper form on all works of authorship.
- Register all works and derivative works with the U.S. Copyright Office.
- Audit all company intellectual property on a recurring basis—every two or three years. ■

Brian Darville is Managing Director of Brocadiant IP, a law firm handling trademark, copyright, ecommerce and litigation services located in northern Virginia. He can be reached at 703-768-7711 or bdarville@brocadiant.com.