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IP Basics: Copyright in Visual Arts

By Thomas G. Field, Jr., Professor Emeritus, University of New Hampshire School of Law Franklin Pierce Center for Intellectual Property

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Introduction

Copyright encourages the creative efforts of authors, artists, and others by securing the exclusive right to reproduce works and derive income from them.

Copyright arises automatically once an original effort has been started and some aspect of it has been fixed in a tangible medium (including those for use with computers). One need not even have notice on published copies. Registration is required only if legal action is warranted. However, giving notice and promptly registering works provide important remedial advantages in the U.S.

Those advantages are explained below, along with basic limits to copyright protection, issues to be considered in transferring copyright interests, and the fundamental distinction between works that are and are not "for hire."

Limits to Copyright

Copyright does not give an owner the right to sell or distribute a work. For example, consider one person's drawing of another's painting. Even if copyrightable (and it may not be), the drawing would infringe copyright in the original painting. Also, of course, the right to sell a work might be affected by laws governing matters such as obscenity or the rights of privacy or publicity of any person depicted.

Fair Use. Partial or limited reproduction of another's work may be permitted under the fair use doctrine. This doctrine is especially liberal where the use advances public interests such as education or scholarship.

Expressions, not Ideas, are Protected. This notion is not easy to apply in some circumstances, but it can be easily illustrated. Basically, what it means is that the author of a book has protection for her words, but not for the basic plot; or a photographer has protection from duplication of his picture of a tree, but not from other people taking pictures of trees or even the same tree. Also, of course, one cannot prevent others from using industrial processes, for example, merely by writing them down. Protection for such things is obtained under trade secret or patent laws.

Utilitarian, Three-Dimensional Works are Excluded. While a drawing of a toaster is copyrightable -- even engineering drawings of such things -- in the U.S., such works are protected by design patents.

To the extent that they have components serving no end other than aesthetics, copyright protection is available for those components. Thus, while copyright protection would be refused for most table or floor lamps, the fact that a piece of sculpture had been turned into a lamp would not negate the protection otherwise appropriate for free-standing sculpture.

Things such as vases, urns and piggy banks may or may not qualify; one way to find out is to attempt to register them. If the Copyright Office accepts the registration, court are likely to go along. If copyright registration is denied, design patent protection may be available, but that is substantially more expensive.

Independent creation is permitted. A second work, identical to an earlier copyrighted work, does not infringe, if it is, in fact, independently created. [Of course, the better known the first work, the less likely that an independent creation defense will be believed.]

Extending the Reach of Copyright

No formalities are required to obtain copyright. As mentioned above, appropriate kinds of work are protected by copyright when they are fixed in a tangible medium, whether or not they can be directly perceived by human senses. It is unnecessary even to provide a copyright notice.

In the U.S., notice eliminates a potential defense of a copier. Yet, other nations require it, and a couple also require, in addition to the usual notice, "All rights reserved." Thus, particularly where that text does not interfere with the artistic integrity of a work, copyright owners should incorporate notice into published copies of their work. If that is done, to the extent that copyright is available, it should be automatically secured in most other countries under international treaties.

In the U.S., registration is necessary for a copyright owner to enjoin, or to recover actual damages suffered from, an unauthorized use of a work. Still, better remedies, namely statutory damages up to \$150,000 and attorney fees, can be obtained if works are promptly registered. In the case of an unpublished work, registration must occur prior to the unauthorized use. In the case of a published work, registration should occur within three months of publication.

The Registration/Deposit Process

Deposit Requirements. Whether one registers or not, copies of most copyrighted works published in the U.S. must be deposited with the U.S. Copyright Office, Washington, D.C. 20559. However, there are many exceptions to the deposit requirement. For example, readers should be happy to learn that there is an exemption for "pictorial, graphic, or sculptural" works.

If the work is a composite of art elements and text or the art is distributed only in machine readable form, one should check Section 202.19 of Title 37 of the Code of Federal Regulations, available in many public libraries, or see the Copyright Office website. In any event, sanctions for failure to deposit are not imposed until a copyright owner fails to respond to an official demand for copies.

The Registration Process. Registration is straight-forward and inexpensive. Simple forms, containing basic instructions, may be quickly obtained from the Copyright Office. Registration is accomplished by returning a form (VA for works of visual art) with a modest fee and copies of (or other materials that identify) the protected work.

While deposit copies are not required for works of visual art, registration requires the submission of identifying material. For example, one might send a photograph of a large and unique sculpture or an expensive lithograph. These and other requirements are set forth in Section 202.20 of Title 37 of the Code of Federal Regulations.

Single Work or Multiple Works? Section 203.3 of Title 37 of the Code of Federal Regulations allows a single registration of an unpublished "collection" to cover works that could otherwise be individually registered if they have, for example, at least one author in common and bear a single title identifying the whole. Before taking advantage of this provision, however, one should inquire as to the position of the Copyright Office should some of the individual items later be separately published.

Whether to Register

Free-lance artists have to decide whether to register a work before trying to find a company to buy it for ultimate reproduction and sale. As discussed above, registration is unnecessary to have copyright, and, in any case, carefully selecting people with whom to do business is likely to be more cost-effective than copyright litigation.

Beyond this, some publishers have traditionally preferred that works not be registered prior to publication. Some reasons for this policy have been eliminated by changes in our law. For example, publishers will need no longer worry about separate notices on each story, cartoon or other free-lance contribution.

Other reasons, however, have not been eliminated, and some work to the advantage of submitters. For example, if a publisher transfers copyright back to contributors after publication and registration, one registration covers all. In any case, this and other policies of particular publishers should be explored in advance of making submissions.

Artist-entrepreneurs, although they reproduce and sell their own works, also need to decide whether to register them. Registration costs little, and copies may not have to be deposited, but expenses can quickly grow when each item is fairly inexpensive, runs are short and, for whatever reason, several items cannot be registered together (as discussed above). Because registration is needed only after infringement occurs and makes it possible to enjoin unauthorized use or to collect actual damages (for example, caused by lost sales) or profits, the question is whether additional remedies afforded for prompt registration are, on balance, worth the cost.

Works for Hire

An important copyright issue is whether a work is "for hire."

Employed Artists. Copyright in works of regular employees are presumed to be owned by their employers. Thus, in the absence of agreement to the contrary, employers own all rights in works created within an employee's scope of employment.

Free-Lance Artists and Entrepreneurs. In contrast with employees, free-lance artists and entrepreneurs are ordinarily presumed to own copyright in their work even though there is only one copy, and it is sold. However, a party commissioning a work might insist that it be "for hire" -- particularly if it contributes to a still larger work. If (1) this is in writing and (2) the work may be so classified under the definition of "work made for hire" in § 101 of the copyright statute, then both the work and any copyright in it are owned by the party who commissioned it.

Legal Implications of Works for Hire

Ownership. This issue is most important: As between those who own copyright in works made "for hire" and artists who actually created them, the latter have no more rights than total strangers. Thus, substantially similar later works will infringe. Freelance artists in particular need to consider carefully what they may be giving up by allowing commissioned works to be regarded as for hire.

The term of copyright. Rights in works for hire span 120 years from the date of creation or 95 years from the date of publication, whichever is shorter. The term for other works (at least when the artist is identifiable) extends for the artist's lifetime and 70 years beyond. Indeed, in the case of joint works, copyright endures for 50 years beyond death of the last surviving contributor. More information about copyright expiration.

Copyright transfers may revert. Rights in a work not for hire revert back to the artist (or the family of those who are deceased) after approximately 35 years -- even if copyright has been unconditionally sold or licensed to another. Although these time spans dramatically exceed the market life of most works, whether

a given work is one for hire is usually a simple matter to resolve at the time of a transfer. One thing is sure: Families of more than one living artist will likely regret that care was not taken to deal with this issue.

Selling and Licensing Rights

While assignments and licenses may be of most interest to free-lance artists and authors who are not dealing with a company on a take-it-or-leave-it basis, even entrepreneurs may have occasion to consider licensing others the right to reproduce a particular item.

In transferring copyrights to others, several issues should be considered and resolved in advance (preferably in writing).

Very Important Questions to Answer Before Making Transfers:

- If the work is commissioned, is it or can it be regarded as "for hire?"
- If not, what rights are being transferred? All of them, only the right of first publication or, e.g., a right to use or reproduce for other limited purposes?
- Can the publisher use the work (or parts of it) in another product line or change the method of selling it?
- Can the publisher license others to use any part of the work in/on the same or unrelated products? If so, on what basis must payment be paid?
- To what extent is the artist restricted, for example, in being able to sell substantially similar (infringing) works?
- In a long term relationship, what happens to the copyright if the publisher loses interest or goes out of business? Does the copyright return or linger in the hands of uninterested or incompetent people? (Minimum royalty provision may help avoid such problems -- in any case, heed the voice of sad experience!)
- On what basis will payment be made? For example, hourly wages, a lump sum or royalties based on sales?
- If royalties are due, on what basis will they be computed, e.g., per item or a percentage of gross sales? (Avoid net sales or profits; it is too easy for the purchaser or licensee to play games with expenses allocated to particular sales!)
- Does the publisher ask to be indemnified for expenses of defending third party suits? This is pretty common. However, anyone can sue anybody for anything! Even if you win a suit, expenses can be very high; are you being paid enough to accept this risk?

Avoiding Copyright Infringement

As discussed earlier, copyright gives its owner the exclusive right, for example, to reproduce protected subject matter (such things as ideas and facts being excluded). Sometimes a question arises as to whether a second, similar work was copied or independently created. If the person creating a second work had access to the original work and the works are virtually identical, copying is likely to be presumed even if the chance of access is remote.

When an artist sells copyright in a work, however, access is obviously not an issue if the same artist later executes a similar work. To avoid problems, it is important that the artist and purchaser of the copyright reach clear agreement about such matters. It is important that artists understand that a work does not have to be identical to infringe copyright in an earlier one. The legal test of infringement is "substantial similarity" -- which translates (roughly) into whether an ordinary observer would recognize a work as copied in whole or in part from an earlier one.

In a similar vein, artists occasionally ask if it is OK to base a painting on, for example, a magazine photograph -- even though most appreciate that turning a photograph (or some part of it) into postcards

would infringe copyright. Such questions are not easy to answer. First, an artist is unlikely to be sued for using a relatively small element from another work -- particularly if it used only for reference and is not copied in detail. (One who photographs a tropical scene does not get exclusive rights to all palm trees that might vaguely resemble those depicted there.)

Still, the safest course of action (particularly if you have any doubts) is: Do not copy unless you have permission or are sure that what you want to copy is in the public domain! Clip art is sold to be copied -- use that, taking care to note any limitations that accompany it. (For example, I have a CD of clip art that can be used in printed works, but the license expressly forbids digital distribution. Thus, I cannot use it to liven up my web pages!)

The Need for Counsel

While artists should encounter little difficulty in registering works (at least past sorting out the legal implications of group registrations), transferring copyright interests is another matter altogether. Anyone concerned about any issue posed above (or other things of the kind) should seek the advice of counsel. Failing to do so is to risk being found to have sold more than you intended or to have liabilities that you never anticipated!

Even if a license or assignment is offered on a take-it-or-leave-it basis, it pays to know what you are getting into. Lawyers cannot determine whether deals are economically advantageous or professionally satisfying for the parties. Yet, those familiar with such contracts will be able to explain the short and long-term legal implications of an agreement to the point where a client can decide for him or herself.

Finally, of course, artist-entrepreneurs face problems faced by any person in business. For example, they ought to explore such matters as product liability should a harmful material leach into food or drinks from improperly glazed pottery and should be especially concerned about anything that might be regarded as a "toy."