

LAW MEMO

Copyright Tips for Organizations

It is a principle of American law — as articulated in the Constitution — that artists and inventors should reap the economic benefits of their creative endeavors. Copyright law enables creators, producers, publishers and distributors of artistic works to control how, when and whether their works are used.

But copyright law also strikes a "cultural bargain" between creators and the public interest by limiting the scope of the copyright holder's monopoly through the fair use doctrine, which provides protection for creative expression but not for ideas, and the copyright's eventual expiration.

This issue of *Arts Law Memo* summarizes core copyright concepts and critical issues for arts organizations. It is intended to provide answers to the most frequently asked questions, but is by no means, an exhaustive discussion of copyright law.

"The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."

—Potter Stewart, *Twentieth Century Music Corp. v. Aiken* (1975)

COPYRIGHT PROTECTION

Copyright protects "original works of authorship" that are "fixed in a tangible form of expression." Copyright affords protection for expressions of authorship in literary, musical, dramatic, choreographic, pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural

works. In contrast, patents protect inventions and certain designs; trademarks (such as logos) identify the source of goods or services.

Bundle of Rights

The copyright law gives "authors" a bundle of exclusive rights in their work. These rights include reproduction, preparation of derivative works (e.g. the film version of a play), distribution, performance, and display. In addition, authors of certain works of visual art have the related moral rights of attribution and integrity as described in the Visual Artists Rights Act of 1990.

Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be licensed or transferred, but the transfer of exclusive rights is not valid unless that transfer is put in writing and signed by the copyright owner.

Originality

Copyright protects the particular way an author has expressed himself. It does not protect the ideas, systems, or factual information conveyed in the work. This means that if the author writes a story about three bears and a little girl with blonde hair, he cannot sue someone for copyright infringement if the second author writes her own story about three bears and a little girl with blonde hair unless there was actual copying. To prove infringement, the first author would have to show that the second author had access to his work and that the two works were substantially similar.

Fixed in a tangible medium of expression

A work is fixed when it is in a tangible form that would allow the work to be perceived, reproduced or otherwise communicated. Examples of works that are fixed include a painting on a canvas, a poem written on a piece of paper and a song recorded on tape.

Registration

The way in which copyright protection is secured is frequently misunderstood. No publication or registration with the Copyright Office is required to secure

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VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
- Mediating arts-related disputes;
- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
- Maintaining a reference library;
- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national volunteer lawyers for the arts network.

This issue was written by Sue Greenberg, VLAA's executive director.

This publication is distributed with the understanding that VLAA is not engaged in rendering legal or accounting counsel. We urge you to seek professional services to address your specific needs.

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copyright.

Even though registration is not a requirement for protection, the copyright law provides several incentives to encourage copyright owners to register. Likewise, the use of a copyright notice (Example: © John Doe, 2003) is no longer required, but is recommended.

COPYRIGHT OWNERSHIP

For arts organizations, the key concerns are determining who owns the copyright in new works, and securing the rights to present, perform, publish or otherwise use another author's work.

Who is the author?

Ordinarily the person who creates a work is considered the "author," as that term is used in copyright law. A painter is considered the "author" of his painting, a composer the "author" of her song. But determining who owns the copyright when artists collaborate, are 9-5 employees, or receive commissions can be confusing.

Joint Authorship, Collaboration & Contracts

The essential ingredients for creating and sustaining a successful collaboration include bringing together the right people, developing a shared goal, clarifying roles and a workable decision-making process, committing adequate resources, building trust by getting to work as a team (instead of simply meeting and planning) and frequent, honest communication.

When artists collaborate, there may be additional challenges revolving around credit, compensation and control. Unfortunately, the law does not always coincide with how artists view their collaborative relationships.

Exactly when and how do collaborators become joint authors for copyright purposes? When "authors" collaborate to create a new work, they are considered joint authors when two criteria are met. First, the authors must intend at the time the work is created that they are creating a joint work. Second, the joint authors must contribute protectible expression.

Contributing ideas does not entitle the contributor to a copyright interest in

the work (unless the parties have expressly agreed, preferably in writing, to share ownership).

Written agreements should specifically clarify and protect the rights and obligations of the collaborators, whether or not they qualify as joint authors.

Collaboration agreements typically outline deadlines, copyright ownership, authorship credit, how income and expenses will be shared, decision-making, what will happen if a collaborator wants to quit, dies, or is disabled, and a procedure for resolving disputes.

Work-Made-For-Hire

There are two situations, known as works-made-for-hire, in which the copyright is held not by the creator(s), but by the employer or the person for whom the work was prepared. The first situation concerns works that are produced by employees while acting within the scope of their regular employment. Unless the parties have agreed otherwise in writing, the employer is considered the author. For example, the copyright in a study guide for a new play would be owned by the theatre, and not by the education director who wrote it.

Recently, Martha Graham's artistic legacy was put at risk because the dance company which bears her name was in danger of losing the right to perform and license her dances, which she willed to her confidant Ronald Protas.

Significantly, the court found that the dances created by Graham while she was employed by her company between 1951 and her death in 1991 were works-made-for-hire.

The company's victory over the unsavory Protas overshadowed an important lesson: the assumption that choreographers own their dances is based on the closely-knit dance community's long standing tradition rather than on legal precedent.

The second work-for-hire situation involves certain commissioned works. When a non-employee creates a work, the party who specially ordered or commissioned the work owns the

copyright if, and only if: the parties expressly state in a signed written agreement that the work will be considered a work-made-for-hire *and* the work falls within one of nine specified categories: a contribution to a collective work, a part of motion picture or other audio-visual work, a translation, a supplementary work, a compilation, an instruction text, a test, answers to a test, or an atlas.

Arts organizations involved in creating new works should clarify, in advance, who owns the copyright. VLAA can supply sample contracts and encourages members of the arts community to include mediation clauses in their agreements.

USING ANOTHER'S WORK

The underlying purpose of our copyright laws is to promote creativity by granting "authors" a limited monopoly in their work. Because of these limitations, which include the fair use doctrine and the public domain, some works may be used without obtaining permission. But more often, arts organizations need to secure rights from the copyright holder of his representative and be prepared to pay fees or royalties.

Fair Use

Grounded in the First Amendment, fair use is probably the most significant limitation of a copyright owner's exclusive rights. While courts define what constitutes fair use on a case-by-case basis, criticism and comment, news reporting, research and scholarship, and limited nonprofit classroom use are usually considered fair. So are parody, copying for the blind, and single reproductions prepared by a calligrapher for a single client.

Four factors are considered when determining whether or not a particular use is fair:

- the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes: the noncommercial educational use is more likely to be a fair use;
- the nature of the copyrighted work: the more factual and less creative the

- the amount and substantiality of the portion used in relation to the copyrighted work as a whole: the more taken, the less likely to be fair use; and

- the effect of the use on the potential market for or value of the copyrighted work: if the use is diminishing the copyright owner's opportunity to make money, it is less likely to be fair.

The distinction between fair use and infringement may be unclear and is not easily defined. There is no specific number of words, lines or musical notes that may safely be taken without permission. Acknowledging the source of copyrighted material does not constitute fair use.

Nonprofit organizations sometimes operate under the misunderstanding, that because of their status, that they need not pay attention to the narrow scope of the fair use doctrine. Of particular interest to arts organizations with education programs are the guidelines developed by librarians, educators and publishers addressing the fair use of work for classroom use.

For more information, consult Circular 21 *Reproductions of Copyrighted Works by Educators and Librarians* (www.loc.gov/copyright).

Public Domain

In some cases, a work may be in the public domain. Examples include works created by federal government employees as part of their regular jobs, and works in which copyright protection has expired. Determining the copyright term for a work created before 1978 can be tricky, but if the work was published or registered before 1923, it probably is in the public domain.

It is important to note that there may be valid copyrights in derivative works based on works that have fallen into the public domain. New versions include musical arrangements, adaptations, revised or newly edited editions, translations, dramatizations, abridgments, compilations, and works republished with new material added.

The law provides that derivative works, published or unpublished, are

independently copyrightable. However, the copyright in such a work does not affect or extend the protection, if any, in the underlying work.

The Sony Bono Copyright Extension Act of 1998 extended the protection for works published between 1923 and 1978 for 20 years. A new work is automatically protected from the moment of its creation and is ordinarily given a term enduring for the author's life, plus an additional 70 years after the author's death.

In the case of "a joint work prepared by two or more authors who did not work-for-hire," the term lasts for 70 years after the last surviving author's death. For works-made-for-hire the term will be 95 years from publication or 120 years from creation, whichever is shorter.

Permissions, Rights and Royalties

The safest and most ethical course of action is always to get permission from the copyright owner before using copyrighted material.

The various arts disciplines approach this process in different ways. A theatre might contact the playwright's agent, Samuel French Inc., or Dramatists Play Service. A jazz festival would obtain a license from ASCAP and BMI, the performing rights societies that collect royalties for the non-dramatic performance of music. Permission to reprint a poem would probably be obtained from the publisher.

Regardless, the process is the same. It begins with a request to use the

material. Be prepared to describe, in detail, exactly what your organization would like to use, how and when. Be prepared to pay a fee or royalty (often negotiable) and to give credit.

Generally, freelance photographers, graphic artists, writers and illustrators assume they are granting one-time publication rights, though they may be willing to transfer the copyright or license it. To be valid, a transfer of copyright ownership rights must be in writing. Licensing agreements usually contain a specified use, a limited time, a specified territory, and a fee or royalty.

Finally, organizations that purchase or are given works of art should remember that ownership of the material object is not the same as ownership of the copyright. Unless the copyright has been assigned or transferred, the artist or his heirs should be consulted before the work is reproduced in print or on the web.

The Arts, Technology, and Intellectual Property

Technology is rapidly changing the marketplace for a broad range of copyrighted works. While the high profile debates, such as lawsuits that led to the demise of Napster, tend to center around the commercial arts and entertainment industries, digitalization and interconnectivity are also forcing nonprofit arts organizations to adapt to the information age. Savvy arts leaders stay informed about technology issues and opportunities pertaining to their organization.

Other Types of Intellectual Property

Trademark A word, name, symbol or device used by a manufacturer or merchant to identify his goods or services and distinguish them from other goods or services. Examples include logos and phrases, such as Hallmark's "when you care enough to send the very best."

Patents provide inventors with the exclusive right to make, use or sell a new, useful, and not obvious invention for a limited period of time. Utility patents have been granted for everything from airplanes to zippers. Design patents protect new, original ornamental designs.

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RESOURCES

U.S. Copyright Office loc.gov/copyright

Visit the federal government's official copyright site to find circulars, factsheets, and registration forms.

Recommended Books

Fishman, Stephen. *Copyright Handbook*

Samuels, Edward. *The Illustrated Story of Copyright*

Shapiro, Michael. *A Museum's Guide to Copyright and Trademark*, published by the American Association of Museums

Stim, Richard. *Getting Permission: How to License and Clear Copyrighted Material*

Vaidhyanathan, Siva. *Copyrights and Copywrongs*

This book and many others on arts law and business practices are available at the **St. Louis Volunteer Lawyers and Accountants for the Arts library** located within the Regional Arts Commission office, 3540 Washington, in Grand Center.