Mind Your Copyrights
Maryland Institute College of Art
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HOW COPYRIGHT WORKS

- Reserves 5 Exclusive Rights to authors
- Requires fixation, original expression
- Vests initially in “Author” of work
- For Limited Period of Time?
- Rights in Federal statute passed by Congress

FIVE EXCLUSIVE RIGHTS:

- **REPRODUCTION** – the right to reproduce (i.e. copy or duplicate) the work
- **MODIFICATION** – the right to prepare derivative works based on the work
- **DISTRIBUTION** – the right to distribute copies of the work to the public
- **PERFORMANCE** – the right to perform the work
- **DISPLAY** – the right to display the work
- **TRANSMISSION** – the right of sound recording artists to certain digital transmissions

TERM of COPYRIGHT*

- Works created after 1/1/78 have a copyright term of life of the author + 70 years. 17 U.S.C. § 302 (a).
- Works of corporate authorship have a copyright term of the shorter of 95 years from publication or 120 years from creation. 17 U.S.C. § 302 (a).
- *For works created after January 1, 1978!
- Earlier works have more complicated rules

DATE OF WORK | PROTECTED FROM | TERM
--- | --- | ---
Created 1-1-78 or after | When work is fixed in tangible medium of expression | Life + 70 years if work of corporate authorship; life of author + 70 years if work of authorship; 95 years from publication or 120 years from creation.
Published before 1973 | In public domain | None
Published from 1974 - 77 | When published with notice | 56 years + could be renewed for 28 years; now extended by 20 years for artistic renewal of 95 years if not so renewed; now in public domain
Published from 1974 - 77 | When published without notice | 56 years; automatic extension of 28 years for second term
Created before 1-1-78 but not published | 1-1-78, the effective date of the 1976 Act which created common law copyright | Life + 70 years or 12-31-2003, whichever is greater
Created before 1-1-78 but published after 1-1-78 | 1-1-78, the effective date of the 1976 Act which created common law copyright | Life + 70 years or 12-31-2003, whichever is greater

NO COPYRIGHT PROTECTION!

- Ideas, facts and discoveries
- Public domain materials
- Works by federal employees
- Databases
- Instructions
- Factual and scientific writings
- Titles and slogans
- Simple geometric shapes
- Scenes au faire

WARNING! Public Domain status is complex! Seek advise of legal counsel

W.W. Denslow (1899)
ORPHAN WORKS AND ARTISTS

Last Legislation Proposed:

• Define “orphan works” authors/© owners still missing after a reasonably diligent search.
• “Reasonably diligent search” requires searching for authors and owners in registries according to best practices - Copyright Office is NOT a registry!!
• Documented orphan works can be used without permission.
• Owners of orphan works limited to a reasonable royalty -- no statutory damages - even if registered - nonprofits pay nothing.

- Protect your works from becoming orphan works with copyright notice in a watermark.
- Be Findable - join or create your own art registry, or
- www.tineye.com

COPYRIGHT OWNERSHIP

• Person who “fixes” the Work is the “Author”
• An Author may transfer all or part of the Copyright
• Usually the Author is the “Owner” of the Copyright*
• *Unless she is employed by someone else...

COPYRIGHT AGREEMENTS

• Assignment –
  - Transfers all rights -- Must be in writing and signed by the copyright owner.

• License -
  - Permits “licensee” a limited right to use
  - Includes Creative Commons licenses

• Oral Agreement –
  - Non-exclusive limited right for single use

ORAL AGREEMENTS

If you agree by phone or handshake:

• Client gets Non-Exclusive rights
• for Intended Purpose Only and
• No Rights if didn’t pay as agreed!

CAUTION! Oral Agreements are Difficult to Enforce!

WORK FOR HIRE AGREEMENTS

If employee = employer owns the ©
But independent contractor retains ©
Unless “Specially Ordered or Commissioned” as a Work Made For Hire in a written agreement for use in a...

• Contribution to a collective work
• Motion picture or audiovisual work
• Translation
• Supplementary work
• Compilation
• Instructional text
• Test
• Answer material for test
• Atlas
CO-AUTHORSHIP

It’s “Joint Ownership” when:

- Created by 2 or more artists
- who INTEND TO MERGE contributions into 1 work
- Jointly owned and any may exploit work but must account for income to co-owners
- All Contributions must be Copyrightable (ie minimal amount of creativity and non-factual)
- Alternatively (often in songwriting and maybe in performance art) – all participants get share of copyright and royalties
- WARNING Co-Authorship may be inferred from conduct

CREATIVE COMMONS

- Attribution (CC BY) distribute, remix, tweak, and build on work, even commercially, if credit author of original
- Attribution-Share-Alike (CC BY-SA) remix, tweak, and build on work even commercially, if credit author and license new works under identical terms
- Attribution-No-Derivs (CC BY-ND) redistribution, commercial/ noncomm, if unchanged and in whole, with credit
- Attribution-NonComm. CC BY-NC) remix, tweak, and build on work noncomm., if credit author, but don’t have to license on the same terms
- Attribution-NonComm-ShareAlike (CC BY-NC-SA) remix, tweak, and build on work noncomm., if credit author and license new work under identical terms
- Attribution-NonComm-NoDerivs (CC BY-NC-ND) download and share with others if credit author but can’t change, non-comm. use only

COPYRIGHT INFRINGEMENT

Unauthorized use of copyrightable material lawsuit requires-

- Proof of Ownership of Author’s Valid ©
- Access to Original
- Substantial similarity

Damages require-

- Establish connection between work infringed and infringers’ profits
- Statutory damages if eligible

COPYRIGHT NOTICE BENEFITS

- Evidence of claim of copyright ownership
- Removal of © notice violates DMCA
- Tampering with Digital Rights Management (DRM)
- No registration required to bring lawsuit for DMCA violation
- Bake © notice into image before posting

DERIVATIVE WORKS

An exclusive right of the author to produce:

- Works based on pre-existing works, which transform, adapt, comment upon, or recast the original works.
- Creator may own copyright in derivative work only if the author grants permission and the added material is copyrightable.
FAIR USE IS A DEFENSE TO COPYRIGHT INFRINGEMENT

Fair use when for purposes of -

- Criticism
- Comment
- News reporting
- Teaching
- Scholarship or Research

PARODY = FAIR USE

WHEN:

- Parody comments on ORIGINAL
- Transformative!
- May use enough to “conjure up” original

DO THE 4 FACTORS FAVOR
FAIR USE?

1. The Purpose and Character of Use
   Is the copy more educational and nonprofit or more commercial? Key concept is TRANSFORMATIVE - i.e. Is there substantial new material, new meaning and/or a new purpose added to the original work?

2. Nature of the Original Work
   Is the original work published (offered to public in copies)? What is the purpose of the original work?

3. Amount and Substantiality of Portion Used
   Does the new work copy as little of the original as necessary? No “10 Second Rule” or other rules of thumb. Is it the “Heart of the Original”?

4. Effect of Use on Market for Original Work
   Does the new work simply substitute for the original? Does it eliminate market demand for original or new versions of original?

ART ROGERS
Photograph:
Puppies 1980

JEFF KOONS
Painted wood (infringing) sculpture:
String of Puppies 1998

KOONS’ 2ND FAIR USE DEFENSE

“Niagara” Jeff Koons

Fashion magazine photo, Andrea Blanche
APPROPRIATION ART DEFENSES

Unauthorized use of another artist’s work or fair use?

What is TRANSFORMATIVE?

- New and different purpose for another’s art
- Choice of another’s art as artist material
- First Sale
- Moral Rights

Cariou v. Prince (SDNY):
- Not a Fair Use
Prince v. Cariou (2nd Circuit):
- Mostly Fair Use

FOUND OBJECTS

Doctrine of First Sale
Allows Reuse in Art of:
- Grandma’s photos
- Wallpaper scraps
- Photos in drawer
- Paper dolls from sister

TIP! Don’t resell branded materials in craft products, the brand owner can claim the crafts are counterfeit goods under trademark law.

DE MINIMIS USE

- Copying so trivial it’s not actionable
- Amount used is too limited to be protected by copyright
- Prominence of use

LEGAL RESOURCES FOR ARTISTS

Maryland Volunteer Lawyers for the Arts
www.MdVLA.org 410-752-1633
Copyright Office
www.copyright.gov
Trademark Office
www.uspto.gov
You Thought We Wouldn’t Notice
http://www.youthoughtwewouldntnotice.com/
Tin Eye Image Reverse Search
www.tineye.com
A Photo Editor
http://www.aphtoeeditor.com/

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