HOW DOES COPYRIGHT WORK?

- Constitutional Right offers INCENTIVE
- Reserves 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

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

...ABSTRACT ART?

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 | Life + 70 years (or if work is a renewal work, life + 95 years from publication, or 120 years from creation) |
Published before 1923 | in public domain | None |
Published from 1923 – 82 | When published with notice | 28 years + could be renewed for 28 years, now extended by 28 years for a total renewal term of 95 years, now in public domain |
Published from 1983 – 77 | When published with notice | 30 years for first term, then automatic extension of 28 years for second term |
Created before 1-1-78 but not published | 1-1-78, the effective date of the 1978 Act which eliminated common law copyright | Life + 70 years or 12-21-2002, whichever is greater |
Created before 1-1-78 but published before 12-31-2002 | 1-1-78, the effective date of the 1978 Act which eliminated common law copyright | Life + 70 years or 12-21-2007, whichever is greater |

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

Orphan Works and Visual Art

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

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AUTHOR’S 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 to certain digital transmissions

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

What about 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 is... “Complicated”

If employee = employer owns the ©
But independent contractor retains ©
Unless “Specially Ordered or Commissioned” as a WMFH 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


Baltimore Artist James Reid, 1981
CO-OWNERSHIP

It’s “Joint Ownership” when:

- Created by two+ 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-Ownership may be inferred from conduct

MORAL RIGHTS

U.S. artists have limited moral rights under VARA
European artists have moral rights, sometimes in perpetuity, that protects integrity of author's name and works, but in the U.S.:
- Visual Artist Rights Act (1991+) protects certain works of "recognized stature" from destruction or mutilation and Artist's name in connection with such works
- Courts interpretations of VARA, e.g., Mass. Museum of Contemporary Art v. Christoph Büchel
- State statutes protecting certain kinds of fine art works from destruction

Copyright Infringement

The unauthorized use of copyrightable material and requires-

- Proof of Author's Ownership (© Reg.)
- Access to Original
- Substantial similarity

Damages require-

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

Benefits of Copyright Registration

- Proof of validity, date protected and ownership
- Required to bring lawsuit for copyright infringement
- Required to get statutory damages and attorneys' fees*
- Must register the copyright in the work before infringement happens

*If registered prior to infringement
Only $35 @ www.copyright.gov/eco/

Benefits of a Copyright Notice

- Evidence of claim of copyright ownership
- Removal of © by infringer violates DMCA
- Tampering with Digital Rights Management (DRM)
- No registration required to bring lawsuit for DMCA violation
- Bake © into image before posting online
Appropriation Art Uses 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 if granted author’s permission and the added material is copyrightable.

DERIVATIVE WORKS

DJ Mix Tapes

Machinima

Fan Works

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

2 Live Crew Lyrics:
Big hairy woman, you need to shave that stuff
Big hairy woman girl, you know I bet it’s tough
Big hairy woman, all that hair ain’t legit
’Cause you look like Cousin It… Big hairy woman

If the 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?
Koons’ Fair Use Defense: Round 2

Shepard Fairey
Hope Poster
and actual A.P. photo

Did Fairey use Too Much of Original?

Is it Transformative?

Mannie Garcia(???)
Photograph:

What about “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

What about “Di Minimus Use”?

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

Appropriation Artists & Defenses

Under the Doctrine of First Sale, owner of object may sell, modify or destroy the object*

- Selling a book, painting, etc., does not transfer copyright in art to new owner
- *Unless object is protected by VARA or “Moral Rights”

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

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www.ober.com

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Legal Resources for Graphic Designers

Maryland Lawyers for the Arts
www.MdArtsLaw.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.aphotoeditor.com

Cynthia Blake Sanders, Esquire
Ober|Kaler
410-347-7367
cbsanders@ober.com
www.oberipwatch.com