

COPYRIGHT FOR THE ARTIST—AN OVERVIEW

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What is a Copyright and how does it differ from Trademark?

- A **copyright** protects works of authorship, such as writings, music, and works of art that have been tangibly expressed (*e.g.*, painting, sculpture, quilt, clothing, song lyrics, music score, etc.).
 - You cannot copyright an idea, procedure, process, system, title, principle or discovery, names, titles, short phrases, slogans, familiar symbols, and listings of contents or ingredients.
 - Examples: recipe versus ingredients; pattern for article of clothing versus process of sewing and assembling; song lyrics versus the individual words used in the lyrics; finished sculpture versus the sculpting process; etc.
- A **trademark** is a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods of one party from those of others. Consumers refer to these as Brands and those in the legal profession refer to them as Trademarks.
 - A related "mark" is a **service mark** which is a word, phrase, symbol, and/or design that identifies and distinguishes the source of a service rather than goods. The term "trademark" is often used to refer to both trademarks and service marks.
 - Examples: product brand or sports team logos (*e.g.*, Nike, Apple Computers, and Penn State Nittany Lions); company names (*e.g.*, Exxon, Kodak, and Bayer); character names, etc.

What are the benefits to copyright of my art?

- A copyright owner has the following exclusive rights in the subject of the copyright (*i.e.*, the sculpture, painting, article of clothing, song lyric...the art):
 - To reproduce (copy);
 - To prepare derivative works;
 - To distribute copies or derivatives by sale, transfer of ownership, license, loan, etc.;
 - To performance (in terms of music, choreography, or other audiovisual works); and,
 - To display the work.

How long does copyright protection last?

- The protections of a copyright last for a number of years depending on several factors including, when first created and/or published, in what country, whether a notice was included, and whether created by an individual or group or a corporate work for hire. Generally speaking, an individual artist (author) will have a copyright on the original work created after January 1, 1978, for their lifetime plus 70 years, but caution is advised to determine whether the copyright on a particular original work has terminated. Consider the following general rules:
 - The copyright has terminated if the original work was published in the U.S. prior to 1923.
 - The copyright has terminated if the original work was created between 1923 and March 1, 1989, without a notice on the work.
 - Note: original works published in the U.S. during this same period with a notice are protected for 95 years from the date of publication.

- At the end of the term the copyright terminates and the work is said to then be in the "Public Domain" where it can be freely used and shared.

How do I copyright my art?

- Your work is automatically copyrighted when first fixed in a tangible form; a copyright notice is no longer legally required to secure copyright on works first published on or after March 1, 1989.
 - However, there are legal benefits for using a copyright notice, including, but not limited to:
 - Public notice of copyright;
 - Ability to file an infringement claim; and,
 - Entitlement to statutory remedies for infringement (*i.e.*, statutory damages and attorney fees versus actual damages and profits).
 - The copyright notice consists of three elements. They are the "c" in a circle (©), the year of first publication, and the name of the owner of copyright (*e.g.*, © 2013 Your Name).
 - So called "Poor Man's Copyright" (*i.e.*, mailing an original work to yourself) is a myth and was never effective or provided for in the copyright laws as a method of registration.
- The process for registering a copyright is not complex, but systematic and can be done online (*i.e.*, search for availability, file required forms and pay registration fees)
 - See www.copyright.gov for more information

What does it mean to infringe on a copyright or trademark?

- Simply stated, copyright infringement or trademark infringement occurs when a copyrighted work or trademark is reproduced, distributed, performed (copyright only), publically displayed or made into a derivative work without the permission of the owner of the copyright or trademark.

What is the penalty for copyright infringement?

- The penalties vary depending on whether the copyrighted work is registered:
 - If copyright is not registered, copyright owner can receive actual damages caused and profits of the infringing party.
 - If copyright is registered (at least three months prior to infringement), copyright owner can receive *either* actual damages or statutory damages, injunctive relief; impoundment of all works claimed to have violated the copyright (with destruction of all such works possible if claim is sustained); profits of the infringing party (Note: burden of proof shifts to infringing party to produce evidence that any portion of its profits are not attributable to the infringement); costs of filing and pursuing the litigation; attorney's fees, and criminal sanctions (*i.e.*, criminal fines and imprisonment of 1 to 10 years for each violation).
 - Statutory damages vary based on a finding by a court of whether the infringement was committed willfully and can range from \$750 to \$150,000.
 - Fact of conviction is a matter of public record which has its own consequences.

What is Fair Use and will it protect me from copyright infringement?

- Copyright laws grant legal protections to the copyright owners. The doctrine of "Fair Use" is an exception and a limitation of those protections.

- It is important to remember that "Fair Use" is NOT an affirmative right and is instead a defense to a claim of infringement (*i.e.*, failure of the infringing party to claim and prove that the use was a "Fair Use" under the law resolves in favor of the copyright owner).
- Fair use is decided by courts on a case-by-case basis after balancing the four factors listed in Section 107 of the Copyright Act. Those four factors are:
 - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - Transformative Quality – is the new work the same as the copyrighted work, or have you transformed the copyrighted work, using it in a new and different way?
 - Commercial or Noncommercial – Will you make money from the new work, or is it intended for nonprofit, educational, or personal purposes? Note: commercial characteristic is not a bright-line test.
 - (2) the nature of the copyrighted work;
 - Is the original copyrighted work factual (*i.e.*, news report) or creative (*i.e.*, art or other creative work)?
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and,
 - How much (*i.e.*, all or some smaller amount) and what portion (*i.e.*, heart of the work or just reference) of the original copyrighted work is used in the new work as weighed against the purpose of the new work (*i.e.*, see factor #1 above)?
 - (4) the effect of the use (*i.e.*, the new work) upon the potential market for or value of the copyrighted work.
 - Note: this factor is applicable even if the new work is distributed free of charge.

Some Fair Use Myths Exposed:

- It is not copyright infringement if I change a certain percentage of the copyrighted work.
 - False. There is no arithmetic formula in the law to determine how much change from an original copyrighted work will be permitted under a claimed defense of Fair Use. Instead, the court will analyze all four factors to determine whether the new work infringes on the owner's copyright.
- It is not copyright infringement if I only use a small percentage of a copyrighted work in my new work.
 - False. There is no arithmetic formula in the law to determine whether the particular quantity of the original copyrighted work used without permission of the copyright owner is permitted under a claimed defense of Fair Use. Instead, the court will analyze all four factors to determine whether the new work infringes on the owner's copyright.
- It is not copyright infringement if I create my work in a different medium.
 - False. One of the exclusive rights granted to a copyright owner is the right to control derivatives of the original work. For example, it is a copyright infringement where a sculptor, without permission of the photographer, creates a sculpture that resembles the photograph. Instead, the court will analyze all four factors to determine whether the new work infringes on the owner's copyright.
- It is not copyright infringement if I use a photo that I found on the internet because that is public domain.
 - False. Whether a work is copyrighted is not determined on its general availability or even lack of identifiable copyright. The only ways for a previously copyrighted work to be in

the "Public Domain" is for the copyright to have expired or to have been abandoned. Whether the copyright has expired is a question to be answered by the facts surrounding the copyright.

- It is not copyright infringement if I used the original copyrighted work for inspiration and I don't intend to infringe.
 - False. Whether you "intend" to infringe or, stated another way, whether you believed your new work infringed on the copyrighted work of another, may be one of a number of considerations taken into account in determining damage awards for infringement (*i.e.*, willful infringement). Since creators of all works of original authorship are afforded copyright protection, a person using such original work is deemed to know whether they are the original author (*i.e.*, claiming you did not know it was copyrighted is tantamount to claiming you may be the author).
- It is not copyright infringement because I only created a single new work.
 - False. In fact, one element used to determine whether to assess criminal penalties depends on whether the purpose was for either commercial advantage or personal financial gain. A separate element for assessing criminal sanctions is whether you created or distributed one or more copies of the original work in a 180-day period with a value of more than \$1,000.
- My risk of being caught is small because I am not a famous artist.
 - False. With the internet the world has become much smaller. Large companies have personnel on staff that "troll" the internet for violations. Many artists today have websites or social media pages which contain images of their work. Note: the image of an unauthorized work is itself a violation of a copyright.
- It is not copyright infringement if I acknowledge or attribute the original work to the original author.
 - False. Copyright infringement is not the same as plagiarism and is not determined on whether credit is given to the original author of the copyrighted work.

What should I do if I believe someone has violated my copyright?

- First, you need to be sure there is a violation. You must keep in mind exactly what it is that you claim to be copyrighted (*i.e.*, is it a photo of your work, is it the list of ingredients or sources, is it the idea behind your piece, etc.?).
- Second, assuming you believe an infringement of your copyright has occurred, take steps to document the infringement (*i.e.*, document whether it has been sold or distributed, at what cost, if any, by whom and to whom, etc.).
- Third, consider approaching the violator to request the infringement cease and desist.
- Finally, consider consulting and securing the services of a competent attorney to bring a legal action against the infringing party. Note: legal actions are an expensive and time-consuming process with varying degrees of predictability in terms of result.

Practical Advice: Try to imagine how you would feel if someone were to claim your work as their own creation. Stay true to your claim as an artist and create your art based on your own talents.

DISCLAIMER: *This publication is not intended to provide legal advice or replace the need for legal advice. The reader should always consult with competent legal counsel of their choosing for advice on their particular situation.*