S P E C I A L R E P O R T

Copyright Basics Including 12 Myths About Copyrights for Artists and Craftpersons

by
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Simply put, copyright is the legal exclusive right of the artist or author of a creative work to control the copying of that work.

I highly recommend that you register your designs. If someone steals your design, and you have not registered your copyright, they can register a copyright in their own name and potentially sue you, even though you were the originator. This has happened to some artists.

This report illuminates common and sometimes potentially costly myths regarding copyright and the artist or craftperson.

Fair Use

Copyright gives an artist or author the right to prevent others from copying or making copies of a work (or any part of it) without permission. Copyright is a legal means of protecting an artist's expression, allowing him or her to earn financial benefits from their artistic works.

If you plan to use another artist's copyrighted work or part of it, you must obtain the artist's written permission. If you don't get that permission, you my be susceptible to financial risks. By law, only the copyright owner or someone acting with the owner's authority, such as a publisher, can give that permission.

The exception is what is called "fair use." Fair use is often used as a defense to copyright infringement. It allows scholars, researchers, and others to use portions of copyrighted works without seeking permission.

So just what is fair use?

Before looking at the myths about copyright, it will be helpful to view the following guidelines for fair use. Unfortunately, every copyright case that goes to court has different elements that affect the judgement. Fair use is not a black and white area in the law. If you have any doubt whether your use of a work is fair, seek permission or seek the advice of an attorney with experience in copyright law.

Whether an item is found to be fair use is determined, case by case, through these factors:

1) What is the character of the use?

2) What is the nature of the work to be used?

3) How much of the work will you use?

4) What effect would this use have on the market for the original or for permissions if the use were widespread?

In almost every case, it is a court of law that makes the determination of fair use. It is useful for the craft artist to know that visual works receive a high degree of protection under copyright law. In regards to fair use, extracting parts of unpublished materials is riskier than using parts from published materials. Often, but not always, if a work is unpublished, that factor weighs against fair use.

Even when you are unaware that you are infringing on an artist's copyright, you can still be liable for damages.

12 Myths About Copyright

(Gathered from various sources.)

Myth #1 "Someone buys my original art and now has the right to reproduce it."

False. Even if you sell an original, you control the rights to reproduce and sell or distribute copies, not the purchaser. The exception is when they specifically buy the copyright from you, which you should not do without careful consideration and large remuneration.

Myth #2 "If a craft item or art work doesn't show a copyright notice, it is not legally copyrighted."

False now but was true in the past. Almost everything created privately and originally after April 1, 1989 is copyrighted and protected whether the piece contains a notice or not. You should assume for other artist's works that they are copyrighted and may not be copied unless you have permission or you know otherwise. It is true that a notice strengthens the protection, by warning people, and by allowing one to get more and different damages, but it is not necessary. If it looks copyrighted, you should assume it is. This applies to pictures, too. You may not scan pictures from magazines and use them in your work without permission. Currently almost all major countries adhere to something called the Berne copyright convention which expresses the above.

Myth #3 "The work is in the public domain, so I don't have to get permission to use it."

Don't count on it. Public domain refers to the lack of copyright protection. A design or piece of artwork may have become trademarked or identified as a logo for its originator. Works not registered or protected under copyright, may enjoy protection by trademark or some other form of contract law. Also, identifiable people may have rights as to the manner in which their name or likeness is used.

Myth #4 "If I don't make money from the sale, I'm not in violation of an artist's copyright."

False. Whether you ask money or not may affect the damages awarded in a lawsuit, but it's still a violation if you give it away. You may be found guilty of causing the originator damages by hurting the commercial value of the piece.

Myth #5 "If I only use a small portion of the original piece, permission is not required."

May be false. See the section on Fair Use on page 2. Even though fair use is a gray area, judges have often said that "you cannot escape liability by showing how much of a work you did not take." Courts use the four criteria of fair use explained earlier. Your use of the portion should not infringe on the commercial value of the work. That is, people would no longer have to buy the original piece because they are buying yours.

Myth #6 "Another artist took my piece's title and violated my copyright." or **"Somebody copyrighted that name."**

False. Titles, facts, and ideas can not be copyrighted, however their expression and structure can. In other words, ten authors could write books with the same title or four artists can put the same title on different

works. However, you can trademark a phrase or word as your item's name which gives you legal rights to its use. Although copyright does not effectively end until years after the author's death, a trademark has to be proven to be in use to be maintained.

Myth #7 "The artwork I plan to use was in an out-of-print book. Therefore, the design is in the public domain and I don't need permission."

Don't count on it. A book can go out-of-print while still being covered by copyright. A book that is out-of-print is considered in a temporary state. The copyrights usually go back to the author or illustrator, which means the underlying copyright protection is still in effect.

Myth #8 "If I give the artist/author credit, it isn't necessary to get permission."

False. Giving credit to the originator does not immunize you from copyright infringement. Copyright infringement is any unauthorized use of another artist's copyrighted works.

Myth #9 "I changed the original work, so I don't need permission."

False. Copyright law says the originator / copyright owner has exclusive rights over controlling modifications of their works. If you added a new layer of copyrighted material to a previously existing work, you have created a derivative work. If done without permission of the artist / copyright owner, you may be in violation of the owner's copyright. It may be that your derivative work actually helps the sale of the original piece and the original artist might ignore your infringement. However, that is entirely at their discretion. An exception is works used as criticism and parody.

Myth #10 "Someone who steals my designs can go to prison."

Not likely in most cases. Copyright law is, for the most part, civil law. In other words, violating a copyright might get you sued, but not charged with a crime or thrown in jail. Whoever's set of evidence the judge or jury accepts or believes more, will most likely win the case. But rules vary depending on the violation. Important note: a commercial copyright violation involving more than 10 copies with a value over $2500 was made a felony.

Myth #11 "Someone emailed me the image or I found it posted anonymously to an online discussion group. Therefore, the work is in the public domain and I don't need permission to use it."

False. Internet postings and republications of protected material, done without the consent of the copyright owner, can constitute copyright infringement. Just because someone can easily upload or download information on the Internet, nor because it is anonymously posted, means a work is in the public domain or available to be copied. The Copyright Act specifically protects anonymous works from unauthorized copying.

Myth #12 "My use of someone else's art or design harms no one, in fact it provides the owner with free advertising."

False. The artist or author has control of what is done with their work. If the owner doesn't want 'free advertising', you are violating their copyright using their designs without permission. It's always safer to ask permission.

Copyright Basics

What is Copyright?

Copyright is a form of protection provided by the laws of the United States (title 17, U.S. Code) to the authors of "original works of authorship," including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the 1976 Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

- To reproduce the work in copies or phonorecords;
- To prepare derivative works based upon the work;
- To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- To perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- To display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- In the case of sound recordings, to perform the work publicly by means of a digital transmission.

In addition, certain authors of works of visual art have the rights of attribution and integrity as described in section 106A of the 1976 Copyright Act.

It is illegal for anyone to violate any of the rights provided by the copyright law to the owner of copyright. These rights, however, are not unlimited in scope. Sections 107 through 121 of the 1976 Copyright Act establish limitations on these rights. In some cases, these limitations are specified exemptions from copyright liability. One major limitation is the doctrine of "fair use," which is given a statutory basis in section 107 of the 1976 Copyright Act. For further information about the limitations of any of these rights, consult the copyright law or write to the Copyright Office.

Who Can Claim Copyright

Copyright protection subsists from the time the work is created in fixed form. The copyright in the work of authorship immediately becomes the property of the author who created the work. Only the author or those deriving their rights through the author can rightfully claim copyright.

In the case of works made for hire, the employer and not the employee is considered to be the author. Section 101 of the copyright law defines a "work made for hire" as:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as: a contribution to a collective work

  If the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire....the authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary.

Copyright in each separate contribution to a periodical or other collective work is distinct from copyright in the collective work as a whole and vests initially with the author of the contribution.

General Principles

1) Mere ownership of a book, manuscript, painting, or any other copy or phonorecord does not give the possessor the copyright. The law provides that transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright.

2) Minors may claim copyright, but state laws may regulate the business dealings involving copyrights owned by minors. For information on relevant state laws, consult an attorney.

Copyright and National Origin of Work

Copyright protection is available for all unpublished works, regardless of the nationality or domicile of the author.

Published works are eligible for copyright protection in the United States if any one of the following conditions is met:

• On the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party,* or is a stateless person wherever that person may be domiciled; or a treaty party is a country or intergovernmental organization other than the United States that is a party to an international agreement.

• The work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party. For purposes of this condition, a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be; or

• The work is a sound recording that was first fixed in a treaty party; or

• The work is a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party; or

• The work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

• The work is a foreign work that was in the public domain in the United States prior to 1996 and its copyright was restored under the Uruguay Round Agreements Act (URAA). Request Circular 38b, "Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act (URAA-GATT)," for further information.

• The work comes within the scope of a Presidential proclamation.

What Works are Protected?

Copyright protects "original works of authorship" that are fixed in a tangible form of expression. The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device.

What is Not Protected by Copyright?

Several categories of material are generally not eligible for federal copyright protection. These include among others:

• Works that have not been fixed in a tangible form of expression (for example, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded)

• Titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents

• Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration

• Works consisting entirely of information that is common property and containing no original authorship (for example: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources)

How to Secure a Copyright

The way in which copyright protection is secured is frequently misunderstood. No publication or registration or other action in the Copyright Office is required to secure copyright. There are, however, certain definite advantages to registration.

Copyright is secured automatically when the work is created, and a work is "created" when it is fixed in a copy or phonorecord for the first time. "Copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm.

If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date.

Publication

Publication is no longer the key to obtaining federal copyright as it was under the Copyright Act of 1909. However, publication remains important to copyright owners.

The 1976 Copyright Act defines publication as follows:

> "Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication.

Notice of Copyright

The use of a copyright notice is no longer required under U. S. law, although it is often beneficial. Because prior law did contain such a requirement, however, the use of notice is still relevant to the copyright status of older works.

Notice was required under the 1976 Copyright Act. This requirement was eliminated when the United States adhered to the Berne Convention, effective March 1, 1989. Although works published without notice before that date could have entered the public domain in the United States, the Uruguay Round Agreements Act (URAA) restores copyright in certain foreign works originally published without notice.

The Copyright Office does not take a position on whether copies of works first published with notice before March 1, 1989, which are distributed on or after March 1, 1989, must bear the copyright notice.

Use of the notice may be important because it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication. Furthermore, in the event that a work is infringed, if a proper notice of copyright appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in section 504(c)(2) of the copyright law. Innocent infringement occurs when the infringer did not realize that the work was protected.

The use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office.

Form of Notice for Visually Perceptible Copies

The notice for visually perceptible copies should contain all the following three elements:

1. The symbol © (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr."; and

2. The year of first publication of the work. In the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying textual matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful article; and

3. The name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

Example: © 2010 John Doe

The "C in a circle" notice is used only on "visually perceptible copies." Certain kinds of works -- for example, musical, dramatic, and literary works -- may be fixed not in "copies" but by means of sound in an audio recording. Since audio recordings such as audio tapes and phonograph disks are "phonorecords" and not "copies," the "C in a circle" notice is not used to indicate protection of the underlying musical, dramatic, or literary work that is recorded.

Unpublished Works

The author or copyright owner may wish to place a copyright notice on any unpublished copies or phonorecords that leave his or her control.

Example: Unpublished work © 2009 Jane Doe

Omission of the Notice and Errors in Notice

The 1976 Copyright Act attempted to ameliorate the strict consequences of failure to include notice under prior law. It contained provisions that set out specific corrective steps to cure omissions or certain errors in notice. Under these provisions, an applicant had 5 years after publication to cure omission of notice or certain errors. Although these provisions are technically still in the law, their impact has been limited by the amendment making notice optional for all works published on and after March 1, 1989.

How Long Copyright Endures

Works Originally Created on or after January 1, 1978
A work that is created (fixed in tangible form for the first time) on or after January 1, 1978, 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, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.

Works Originally Created before January 1, 1978, But Not Published or Registered by That Date
These works have been automatically brought under the statute and are now given federal copyright protection. The duration of copyright in these works will generally be computed in the same way as for works created on or after January 1, 1978: the life-plus-70 or 95/120-year terms will apply to them as well. The law provides that in no case will the term of copyright for works in this category expire before December 31, 2002, and for works published on or before December 31, 2002, the term of copyright will not expire before December 31, 2047.

Works Originally Created and Published or Registered before January 1, 1978
Under the law in effect before 1978, copyright was secured either on the date a work was published with a copyright notice or on the date of registration if the work was registered in unpublished form. In either case, the copyright endured for a first term of 28 years from the date it was secured. During the last (28th) year of the first term, the copyright was eligible for renewal. The Copyright Act of 1976 extended the renewal term from 28 to 47 years for copyrights that were subsisting on January 1, 1978, or for pre-1978 copyrights restored under the Uruguay Round Agreements Act (URAA), making these works eligible for a total term of protection of 75 years. Public Law 105-298, enacted on October 27, 1998, further extended the renewal term of copyrights still subsisting on that date by an additional 20 years, providing for a renewal term of 67 years and a total term of protection of 95 years.

Public Law 102-307, enacted on June 26, 1992, amended the 1976 Copyright Act to provide for automatic renewal of the term of copyrights secured between January 1, 1964, and December 31, 1977. Although the renewal term is automatically provided, the Copyright Office does not issue a renewal certificate for these works unless a renewal application and fee are received and registered in the Copyright Office.

Public Law 102-307 makes renewal registration optional. Thus, filing for renewal registration is no longer required in order to extend the original 28-year copyright term to the full 95 years. However, some benefits accrue from making a renewal registration during the 28th year of the original term.

Transfer of Copyright
Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred, but the transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. Transfer of a right on a nonexclusive basis does not require a written agreement.

A copyright may also be conveyed by operation of law and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

Copyright is a personal property right, and it is subject to the various state laws and regulations that govern the ownership, inheritance, or transfer of personal property as well as terms of contracts or conduct of business. For information about relevant state laws, consult an attorney.

Transfers of copyright are normally made by contract. The Copyright Office does not have any forms for such transfers. The law does provide for the recordation in the Copyright Office of transfers of copyright ownership. Although recordation is not required to make a valid transfer between the parties, it does provide certain legal advantages and may be required to validate the transfer as against third parties.

International Copyright Protection

There is no such thing as an "international copyright" that will automatically protect an author's writings throughout the world. Protection against unauthorized use in a particular country basically depends on the national laws of that country. However, most countries offer protection to foreign works under certain conditions that have been greatly simplified by international copyright treaties and conventions.

There are two principal international copyright conventions, the Berne Union for the Protection of Literary and Artistic Property (Berne Convention) and the Universal Copyright Convention (UCC). An artist who wishes copyright protection for his or her work in a particular country should first determine the extent of the protection available to works of foreign artists in that country. If possible, this should be done before the work is published anywhere, because protection may depend on the facts existing at the time of first publication.

If the country in which protection is sought is a party to one of the international copyright conventions, the work generally may be protected by complying with the conditions of that convention. Even if the work cannot be brought under an international convention, protection under the specific provisions of the country's national laws may still be possible. There are, however, some countries that offer little or no copyright protection to any foreign works. For current information on the requirements and protection provided by other countries, it may be advisable to consult an expert familiar with foreign copyright laws.

Copyright Registration

In general, copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. However, registration is not a condition of copyright protection. Even though registration is not a requirement for protection, the copyright law provides several inducements or advantages to encourage copyright owners to make registration. Among these advantages are the following:

- Registration establishes a public record of the copyright claim.
- Before an infringement suit may be filed in court, registration is necessary for works of U. S. origin.
- If made before or within 5 years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate.
- If registration is made within 3 months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.

• Registration allows the owner of the copyright to record the registration with the U. S. Customs Service for protection against the importation of infringing copies. For additional information, request Publication No. 563 "How to Protect Your Intellectual Property Right," from: U.S. Customs Service, P.O. Box 7404, Washington, D.C. 20044. See the U.S. Customs Service Website at www.customs.gov for online publications.

• Registration may be made at any time within the life of the copyright. Unlike the law before 1978, when a work has been registered in unpublished form, it is not necessary to make another registration when the work becomes published, although the copyright owner may register the published edition, if desired.

What is a trademark or service mark?

A trademark is a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others.

A service mark is the same as a trademark, except that it identifies and distinguishes the source of a service rather than a product. For our purposes, the terms "trademark" and "mark" refer to both trademarks and service marks.

Do Trademarks, Copyrights and Patents protect the same things? No. Trademarks, copyrights and patents all differ. A copyright protects an original artistic or literary work; a patent protects an invention.

Search for existing trademarks before you file for one at: www.uspto.gov/trademarks/index.jsp

Is registration of my mark required?

No. You can establish rights in a mark based on legitimate use of the mark. However, owning a federal trademark registration on the Principal Register provides several advantages, e.g., constructive notice to the public of the registrant's claim of ownership of the mark; a legal presumption of the registrant's ownership of the mark and the registrant's exclusive right to use the mark nationwide on or in connection with the goods and/or services listed in the registration; the ability to bring an action concerning the mark in federal court; the use of the U.S registration as a basis to obtain registration in foreign countries; and the ability to file the U.S. registration with the U.S. Customs Service to prevent importation of infringing foreign goods.

When can I use the trademark symbols TM, SM and ®?

Any time you claim rights in a mark, you may use the "TM" (trademark) or "SM" (service mark) designation to alert the public to your claim, regardless of whether you have filed an application with the USPTO (United States Patent and Trademark Office). However, you may use the federal registration symbol "®" only after the USPTO actually registers a mark, and not while an application is pending. Also, you may use the registration symbol with the mark only on or in connection with the goods and/or services listed in the federal trademark registration.

All forms and instructions for filing a copyright registration can be downloaded online from: **www.copyright.gov/circs/** Be sure to check through all the forms available at the link just mentioned to see if your creative work falls into a specific category that may require its own type of copyright registration form. For answers to more frequently asked questions about copyright, see **www.copyright.gov/help/faq/**

Have you run out of ideas for where to sell your crafts online or not getting sales because there is too much competition? Then you should check out ***Sell Your Crafts Online***, with More Than 500 Free and Low-Cost Ideas for Craft Artists and Indie Designers to Get More Links, Traffic, and Sales. **Download the ebook edition (PDF with live hyperlinks) here.**

Or get the paperback edition (for those who prefer to hold a book in their hands) here.

About the Author

This report is written by James Dillehay, professional craft artist and author of nine books. James's articles have helped readers of *Family Circle, The Crafts Report, Better Homes & Gardens, Country Almanac, Sunshine Artist, Ceramics Monthly,* and many more. James has been interviewed in *The Wall Street Journal, The Chicago Tribune, Bottom Line Personal* and has appeared on HGTV and Entrepreneur Radio.

He served as a member of the advisory boards to the National Craft Association and ArtisanStreet.com. James has taught workshops on marketing, pricing and online promotion of arts and crafts around the U.S. He currently weaves and writes in a studio frequently visited by deer, bear, bobcats, the occasional skunk and other assorted wildlife friends next to the Cibola National Forest in central New Mexico.

Get James' free tips, news, and reviews on craft marketing ideas and tools at the Craftmarketer blog: **www.craftmarketer.com/sellyourcrafts/**