GUIDE TO

copyright basics

VLAA

Volunteer Lawyers and Accountants for the Arts

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St. Louis Volunteer Lawyers and Accountants for the Arts (VLAA) provides free legal and accounting assistance to financially eligble artists, arts workers, small creative businesses and nonprofit cultural organizations. VLAA also offers a wide variety of educational programs.

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Preface

"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." — Justice Potter Stewart, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975)

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 whether, how and when 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, providing protection for creative expression — but not for ideas — and through the copyright's eventual expiration.

What follows is a summary of core copyright concepts and critical issues for creatives and cultural organizations. It is intended to provide answers to the most frequently asked questions and is by no means an exhaustive discussion of copyright law.

We encourage you to seek legal counsel when you have questions about protecting your intellectual property rights or using another artist's work.

Copyright Basics

What Is Copyright?

Copyright is a form of protection provided by the laws of the United States to the authors of "original works of authorship" including literary, dramatic, musical, artistic and certain other intellectual works. The Copyright Act generally gives the owner of copyright the *exclusive* right to do and to authorize others to do the following:

• To *reproduce* the copyrighted work in copies or phonorecords[1];
• To prepare *derivative works* based upon the copyrighted work;
• To *distribute* copies or phonorecords of the copyrighted work to the public for 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; and
• To *display the 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.

In addition, authors of certain works of visual art have the related moral rights[2] of attribution and integrity as described in the Visual Artists Rights Act of 1990.

Who Can Claim Copyright?

Copyright protection exists from the time the work is created in a fixed form. The copyright in the work of authorship *immediately* becomes the property of the author who created it. Only the author, or those deriving their rights from the author, can rightfully claim copyright. In the case of works made for hire, the employer and not the employee is the author. The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary.

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. Copyrightable works include the following:

• literary works;
• musical works, including any accompanying words;
• dramatic works, including any accompanying music;
• pantomimes and choreographic works;
• pictorial, graphic and sculptural works;
• motion pictures and other audiovisual works;
• sound records; and
• architectural works.

1 The term phonorecord includes any material object in which sounds are fixed, including CDs, cassette tapes, LPs and other formats.
2 For an explanation of moral rights, see page 11.

What Is Not Protected by Copyright?

Several categories of material are generally not eligible for protection. These include:

• 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; 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.

How to Secure 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 advantages to registration (see page 4).

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. Examples include books, sheet music and microfilm.

Notice of Copyright

Copyright notice is optional, though highly recommended. Use of the notice is recommended 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 the work carries a proper notice, the court will not allow a defendant to claim "innocent infringement" — that is that he or she did not realize that the work is protected.

The notice for visually perceptible copies should contain the following three elements: © 2018 John Doe. 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.

How Long Protection Endures

Work that is created on or after January 1, 1978 is automatically protected from the moment of its creation. The work is ordinarily given a term enduring for the author's life plus an additional 70 years after the author's death. For works made for hire, the duration of the copyright is 95 years from publication or 120 years from creation, whichever is shorter.

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 the transfer is in writing* and signed by the owner of the rights conveyed.

Registration

Although registration with the Copyright Office is not required to secure copyright protection, there are important advantages to registration:

- Registration establishes a public record of the copyright claim;
- Before an infringement suit may be filed in court, registration is necessary;
- If made before or within five years of publication, registration will establish evidence in court of the validity of the copyright; and
- If registration is made within three 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.

As a cost-saving measure, a body of work may be registered as a "collection," with one application form and one fee if either of the following requirements is met:

- The collection is made up of unpublished works by the same author and owned by the same claimant; or
- The collection is made up of multiple published works contained in the same unit of publication and owned by the same claimant.

Anyone can use eCO, the Copyright Office's online system, to register basic claims to copyright. The registration fee is $45 for one work by a single author. For other fees, visit: https://www.copyright.gov/about/fees.html.

To access eCO, go to the Copyright Office website at www.copyright.gov and click on *Register a Copyright*. If you do not have an electronic copy of your work, follow the directions for sending a hard copy or copies.

Work Made for Hire

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 music. It is the author of a work who owns the copyright in that work. However, when a work is considered "made for hire," there are two situations in which the copyright is held not by the creator, but by the person who put him to work.

The first situation concerns works that are produced by employees. When an employee creates a work while acting within the regular scope of employment, it is the employer who is considered the author and the employer who owns the copyright. For instance, the copyright in a newspaper article is usually owned by the paper and not by the reporter who wrote it.

Sometimes it can be a little unclear if a person is truly an employee or is, instead, an independent contractor or freelancer called in to do a job. It is best to clarify this relationship before beginning an assignment.

The second situation involves some commissioned works. When a non-employee creates a work for another, the party who ordered or commissioned the work owns the copyright if and only if:

1) The parties expressly state in a signed written agreement that the work will be considered a work made for hire; and

2) 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 instructional text; a test; answers to a test; or an atlas.

In thinking about work made for hire, artists should consider whether they will ever want to sell copies or different (derivative) versions of their work. If so, they should avoid agreements of this kind because the rights would belong to the commissioning party.

Arts organizations involved in creating new works should clarify, in advance, who own the copyright.

Fair Use

Courts have long recognized that in some situations it's just not sensible or fair to penalize someone for using another person's work without permission. That, in a nutshell, is the principle behind the doctrine of fair use.

Congress wrote the fair use doctrine into the Copyright Act of 1976. That's both good news and bad news for anyone who wants to use another person's work without permission. It's good news since the law says that you can "borrow" so long as it's fair to do so. It's bad news because determining what "fair" really means is subject to interpretation. The statute does provide examples of uses that can be considered fair. In effect, Congress was arming people who are sued for using a work without permission with ready-made arguments for why their use of a work should be allowed. The courts decide what is fair on a case-by-case basis. They are guided by four factors.

The purpose and charactor of the use, including whether the use is of a commercial nature or for nonprofits educational purposes: Reproduction for criticism, comment, news reporting, teaching, scholarship, and research are is usually considered fair use. Increasingly, courts focus on whether the use is "transformative," meaning does the work add new meaning? Generally, courts are more generous in allowing works to be parodied than in permitting them to be quoted outright. In a case concerning 2 Live Crew's bawdy song, *Pretty Woman*, a take-off on Roy Orbison's hit ballad *Oh, Pretty Woman*, the Supreme Court recognized a limited right to borrow from a copyrighted work in creating a parody. It held that a parodist may use the "heart" of the work being parodied so long as no more is taken than necessary to "conjure up" the original.

The effect of the use on the potential market of the copyrighted work: The Supreme Court also noted that a parody must not harm the market for the original song. This touches on an important issue courts consider when asked to decide if something is fair use: is the new work in direct competition with the original? If so, then it is generally not considered fair use.

The amount and substantiality of the portion used: A court will also take into consideration how large a portion of a work is being taken. This isn't a simple question of counting seven musical notes or the number of words that are copied. A court would be far less likely to allow the use of two lines from a haiku (a Japanese poem of three lines and exactly seventeen syllables) than it would be to allow the use of two lines from a novel.

The nature of the copyrighted work: As a general rule, one can quote from a purely factual work such more readily than from a creative work. For example, artists must pay for even the tiniest snippet when they sample another artist's music.

If there's one piece of advice that can be used to sum up the doctrine of fair use it's this: let your conscience be your guide. And, when in doubt, get permission.

Permission & Licensing

The safest and most ethical course 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, Inc. 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. Describe, in detail, exactly what you would like to use, how and when. Be prepared to pay a fee or royalty (often negotiable) and to give the specified credit.

Once permission is granted (preferably in writing), you've entered into a licensing agreement. But exactly what rights have been granted? The distinction between *exclusive* and *non-exclusive* rights is crucial. A non-exclusive license means that the intellectual property rights conveyed may be granted to more than one licensee. An exclusive license does not necessarily mean that there is only one licensee. It may mean that the scope of the license is exclusive to a certain geographical area or to a limited field of use. For example, a licensor may grant an exclusive license for a product for sale in the United States and may grant another exclusive license for the product sales in Japan. Permission agreements should clearly state whether the granted rights are exclusive or non-exclusive.

Licensing intellectual property is big business. Not surprisingly, entertainment/character licensing continues to be the largest category in the industry. While not everyone creates artwork that is suitable for licensing, many fine artists, illustrators, crafts people and photographers have entered into lucrative licensing partnerships with merchandisers. Licensing agreements usually contain a specified use, a limited time, a specified territory and a fee or royalty. A variety of other clauses may be included in the agreement. Common provisions address artist approval of product design and quality, earnings statements, the right to inspect the records of the licensee and grounds for terminating the contract. VLAA urges artists to seek legal counsel before signing agreements with art licensing agents or manufacturers.

If you want to give people the right to share, use and even build upon a work you've created while preserving your copyright, you may want to consider Creative Commons licensing. The nonprofit organization's free, easy-to-use copyright licenses provide a simple, standardized way to give the public permission to share and use your creative work — on conditions of your choice. Similarly, if you're looking for content that you can freely and legally use, a large pool of Creative Commons-licensed work is available. More information: www.creativecommons.org.

Core Concepts

Ideas vs. Expression

Copyright protects "original" works of expression, not the ideas conveyed in the work. This principle is known as the *idea/expression dichotomy*. The idea/expression dichotomy allows artists to draw freely on familiar themes, myths and images. For example, a new play about young lovers being kept apart by their families probably would be considered original even though the basic plot and characters — the ideas — are just like *Romeo and Juliet*, *West Side Story* and many other works. The play would be protected because the playwright expressed the ideas through his own dialogue, setting, specific plot elements and character development. Originality does require at least some minimal level of creativity.

Copyright Secured Automatically Upon Creation

Copyright is secured *automatically* when the work is fixed in tangible form. Examples of works that are fixed include paintings, books and CDs. 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: © 2018 John Doe) is no longer required, but is recommended.

Joint Authors

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 protectable expression (not just ideas, such as playwright getting suggestions from the cast). Joint authors are treated as equal "tenants in common" with each co-owner having an independent right to license the use of a work, subject to accounting to the other co-owners. When artists collaborate, they should sign agreements that clarify and protect the rights and obligations of all parties whether or not they qualify as joint authors. Collaboration agreements typically outline deadlines, copyright ownership, 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, such as mediation.

Works of Utility

Utilitarian aspects of a work are not protected by copyright. Examples are clothing, furniture, dinnerware and lighting fixtures. Copyright may protect any pictorial, graphic or sculptural authorship that can be identified separately from the utilitarian aspects of the object. For example, a carving on the back of a chair or a floral relief design on silver flatware could be protected by copyright, but the design of the chair or flatware itself could not. Some designs of useful articles may qualify for protection under the federal patent law or as trade dress.

Infringement

To prove infringement, there must be evidence of actual copying. The first author would have to demonstrate that the second author had *access* to his work and that the two works are *substantially similar*. Access can usually be presumed if the second author had a "reasonable opportunity" to see, hear, read or watch the first author's work. Courts use different tests for substantial similarity.

Ownership of the Physical Work Versus Ownership of the Copyright
Ownership of the physical item, such as a book or a painting, is not the same as owning the copyright to the work embodied in that item. In other words, the author retains the exclusive reproduction and other rights unless the rights are transferred. To avoid misunderstandings, retention of rights should be included in the bill of sale. Transfer of exclusive rights is not valid unless that transfer is put in writing and signed by the copyright owner.

Public Domain
Works in the public domain can be used freely without permission. 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 re-published with new material added. Derivative works are independently copyrightable. However, the copyright in the new work does not affect or extend the protection, if any, in the underlying work.

First Sale Doctrine
Under the first sale doctrine, ownership of a physical copy of a copyrighted work, like a book, permits the owner to lend, resell or rent the item. But rental rights are restricted in some mediums. For example, the first sale doctrine doesn't apply to software, because it usually is licensed rather than sold.

Compulsory Music Licenses
This exception to the copyright holder's exclusive rights of reproduction and distribution allows anyone to record and distribute any commercially-released, non-dramatic song (a song that is not from a musical or an opera) so long as the mechanical license rates established by copyright law are paid to the copyright owner of the song. Generally, compulsory licenses are obtained by contacting the Harry Fox Agency (www.harryfox.com).

Plagiarism
Plagiarism, which comes from a Latin word for "kidnapper," is taking someone else's ideas, words or other types of work and presenting them as your own. In academia, plagiarism is considered unethical and dishonest. It can end a politician's career or destroy a journalist's reputation. Plagiarism is morally reprehensible, but it is not the same as copyright infringement, which occurs when someone makes unauthorized use of material that is protected by copyright.

Visual Artists Rights Act

Is a violated Calder still a Calder? In 1958, Alexander Calder's award-winning sculpture "Pittsburgh" underwent some unexpected changes after it was displayed in the rotunda of the Greater Pittsburgh International Airport. The free-moving, graceful mobile was motorized and re-weighted without Calder's knowledge, and its original black and white colors were repainted in pea green and gold.

So is a violated Calder still a Calder? Most would agree that it is not. Art has the right to be left alone, and the alteration or destruction of a work without the artist's consent insults the artist and degrades our culture. France, Germany, Italy and most other European nations, along with some Latin American nations, have long recognized the concept of moral rights or droit moral (having originated in France). Moral rights are based on the belief that the integrity of an original work should be protected and preserved.

Do American artists enjoy the same protection? What rights does an American visual artist have after a work is sold, and how is the artist's creation protected from future alteration or destruction? The Visual Artists Rights Act of 1990, known as VARA, addresses these issues by recognizing and protecting the moral rights. These rights are based on the assumption that artists' honor and livelihood are dependent upon the presentation of their work as created, and that alteration can damage an artist's reputation. Moral rights legislation acknowledges a continuing relationship between artists and their work that exists even when the artist does not own the actual work or its copyright.

VARA is a part of United States copyright law, and it preserves the artist's moral rights by protecting specific works of visual art from being altered or destroyed without the artist's consent. VARA grants two primary rights:

The right of attribution permits the artist to claim or deny authorship of the work, which allows the artist to dissociate himself with any undesirable changes to the original work. Artists can prevent the use of their name as the creator of a work in the event of distortion, mutilation, or other modification of the work that would be prejudicial to their honor or reputation.

The right of integrity enables artists to prevent the intentional distortion, mutilation or other modification of a work that is harmful to their honor or reputation. Where the work is of a "recognized stature," the right of integrity further includes the right to prevent any intentional or grossly negligent destruction of the work. VARA leaves the definition of "recognized stature" wide open, and courts must determine what this term means on a case-by-case basis.

VARA covers only a limited category of visual artworks: paintings, sculptures, drawings, prints, and still photographs produced for exhibition. Within this group, only single copies or signed and numbered limited editions of 200 or less are actually protected.

VARA does not apply to any of the following works: posters, maps, globes or charts, technical drawings, diagrams, models, applied art, motion pictures, books and other publications, electronic publications, merchandising items or advertising, promotional, descriptive, covering, packaging material or containers.

Even if a work qualifies for VARA protection, there are several exceptions to coverage. For example, natural changes resulting from aging, decay, or the inherent quality of the materials are not covered under VARA. Similarly, modification resulting from conservation or public presentation involving lighting and placement is not covered, unless the modification is "grossly negligent." For example, while some natural fading is unavoidable for textiles, excessive fading caused by overexposure to direct sunlight could be considered "grossly negligent" behavior, and this type of action could violate VARA. materials are not covered under VARA.

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In addition, the right of attribution does not apply to a reproduction, depiction, or portrayal of a work. Protection is triggered only in the event of a distortion, mutilation, or modification that is prejudicial to the artist's honor or reputation.

If the work is part of a building and the building owner wants to remove a work, VARA rights will not apply if (1) the building owner has made a diligent effort to notify the artist of the intent to remove the work, or (2) the artist received the notice, and failed to remove the work or pay for removal within 90 days after receiving the notice.

Several additional points are critical to understanding the basics of VARA protection:

• Moral rights can be waived (signed away) if the artist consents in writing, but they can't be transferred.

• Under certain circumstances, the person who employs an artist or commissions an artwork acquires copyright ownership. A work made for hire is a work created by an employee within the scope of employment or some works commissioned under contract. If the work is created as work made for hire, there are no VARA rights.

• For works created after the 1990 law went into effect, VARA rights last for the life of the artist. This is unlike copyright protection, which normally lasts for the life of the artist plus 70 years.

In order to fully protect themselves, parties to a transaction involving moral rights, especially those with waiver provisions, should always seek legal advice when contracting for the commission or sale of a work.

Estate Planning

You're not alone if you don't like the thought of planning for the eventual disposal of your assets. But if you fail to make estate planning decisions, the impact on your heirs can be costly and stressful.

For artists, estate planning involves more than writing a will or setting up a trust. Visual artists need to make plans for the ultimate disbursement of their artwork. If you're a composer, writer, choreographer, filmmaker or visual artist, you may have another valuable asset — the copyright in your works. In most cases, the works will be protected for 70 years after your death. Remember, ownership of copyright is completely distinct and separate from ownership of the physical object. For example, while your papers may reside in a university library, the copyright to those letters and papers will likely belong to your estate.

Here are some basic (and far from exhaustive) copyright-related points to keep in mind when planning your estate:

Recordkeeping: The first step is organizing and documenting your work, which includes tracking sales and gifts. Maintain complete files of any publishing, recording, licensing, assignment and collaboration agreements. You also should maintain records of registrations with organizations, such as the Writers Guild of America and copyrights that you have registered with the U.S. Copyright Office.

To protect young writers, musicians and artists from having to "live" with bad deals they made early in their careers, when they had little negotiating skill or leverage, copyright law (Section 203 of the 1976 Act and Section 304 of the 1998 Act) gives creators or their heirs the right to terminate assignments after a given number of years have passed. Although the specifics are complicated, generally speaking, work signed away after 1978 is eligible to be recaptured after 35 years; work signed away before 1978 is eligible to be recaptured after 56 years. There are complex guidelines that must be met to recapture transferred rights. For more information, check out the Creative Commons Termination of Transfer Tool, www.labs.creativecommons.org/demos/termination.

Instructions: Leave clear instructions. Will copyright ownership be bequeathed to family members, institutions or other parties? Do you have specific instructions or restrictions on how your work may be used or licensed? Remember, both money and reputation are at stake. To prevent infighting or legal disputes over who controls the copyright in your work, consider the option of expert management. In some circumstances, a cultural executor such as a gallery or a literary agent may be better equipped to manage licensing (and other matters, such as the disposition of artwork or posthumous publishing agreements) than family members.

Documents: Once you have sketched out your plans, you must prepare and execute the relevant documents. A qualified attorney should assist you and you may need to consult an accountant to discuss the tax consequences of your decisions. Finally, you should revisit your estate plan every few years to ensure it remains consistent with your wishes.

Related Rights

Moral Rights: These rights, which have been in place in many European countries since the 19th century, are based on the premise that an artist's honor and livelihood are dependent upon the presentation of his work as created and that alteration can damage his reputation. Moral rights fall into four categories: 1) the right of an author to receive credit as the author, to prevent others from falsely being named author and to prevent use of his name for works he did not create; 2) the right of an author to prevent mutilation of a work; 3) the right of an author to withdraw a work from distribution if it no longer represents his views; and 4) the right of the author to determine when and how to make his work public. Under the Visual Artists Rights Act of 1990, some works of art are protected from being altered or destroyed without the consent of the artist.

Trademark: A word, name, symbol or device used by a manufacturer or merchant to identify 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."

Trade Dress: The total visual image of a product including features such as size, shape, color or color combinations, texture and graphics. Examples are Campbell's distinctive red and white soup cans or the design of McDonald's buildings. Trade dress law may offer recourse when an artist's style is replicated without pirating any particular work.

Patent: Patents provide an inventor 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 for articles of manufacture.

Right of Privacy: The right of a person to be free from intrusion into matters of a personal nature is known as the right of privacy. The underlying premise is that some facts are so intimate that they should not be made public without the person's permission. Although not explicitly mentioned in the Constitution, the right of privacy has been held to be implicit in the Bill of Rights.

Right of Publicity: An individual's right to control and profit from the commercial use of his name, likeness and persona is called the right of publicity. This right varies from state to state, but most states protect public figures and celebrities from the unauthorized commercial exploitation of their identity. The laws attempt to strike a balance between an individual's right of publicity and freedom of speech. The greatest protection is provided for news. Lesser protection is provided for entertainment and fiction and the least protection is available for advertising.