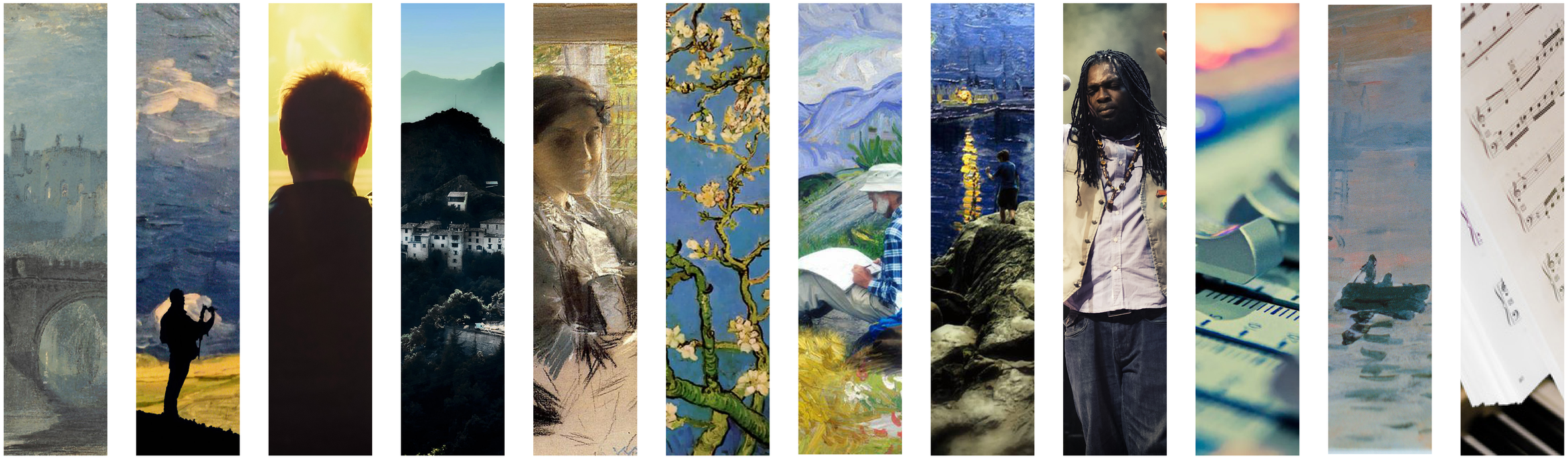
Artrepreneur

The Law of Creativity

Copyright for the Visual Artist

Cover Art by Mark Wang

TABLE OF CONTENTS



Preface

In my life before law, I was a partner in an advertising agency. We used catchy lines, short memorable words, and potent imagery, all of which were created by our staff. We had writers to write the words, graphic artists to design the visuals, photographers to shoot models or product close-ups, and industrial designers to help with product packaging, all of which is intellectual property. We retained ownership of our work product and licensed the work to our clients.

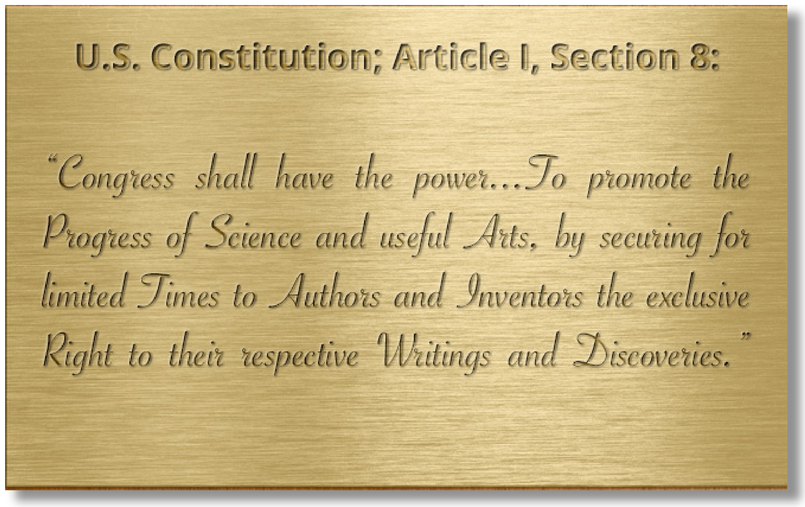
Our attorneys developed lengthy contracts and licensing agreements filled with legal jargon that I didn't understand very well, supposedly designed to protect our copyrights, trademarks, and trade secrets. The whole process seemed overly complicated. I knew that legal matters were complex. That is why we pay lawyers and don't do these things ourselves, but the whole process seemed more difficult to understand than it should have been. It wasn't until years later that I realized that the concepts behind all the legal documents weren't complicated at all; it was just that the attorney never really explained the concepts in a way that the lay-person could grasp.

Now, as an intellectual property attorney myself, I am always very careful to make sure that my clients understand what they need to do, why they need to do it, and what the consequences are if they don't. I do my best to lay out the entire process, from risks to rewards, so that my clients are well-informed. However, many lawyers don't do a very good job of explaining the law to non-lawyers. I started the Art Law Journal to help the art community learn the language of art law, so that when they have intellectual property problems, they will be able to ask an attorney the proper questions and make the best decisions for their business. My goal in this book is the same; to provide the basics of copyright law, in a way that allows the audience to know how to protect their artistic works, what to do when works are stolen, ways they can use other copyrighted material in their own works, and above all, provide the language necessary to talk about any copyright topic with an attorney.

Photo by Steven Schlackman

What is a **Copyright**?

Copyright law has always been a balancing act between the rights of creators and the rights of the public. On the one hand, copyright law encourages creative expression by giving creators the right to control over their creative works. Copyright protection was considered so important that the founding fathers enshrined it in the Constitution. Copyright allows creators to reap the fruits of their hard work and creative genius, without the specter of the works being stolen or exploited by someone else. Should the creator's rights be violated, and then copyright law provides mechanisms for restitution of those rights or monetary award from the violator. On the other hand, the founding fathers understood that monopolies over intellectual property could discourage other creators from using those works as a launching point for new creative work. As a result, the duration of copyright protection is for a limited time, after which the works enter the public domain, without any restrictions, for all to use and enjoy. Which rights a copyright holder receives, the specific mechanisms of enforcement, remedies for infringements, as well as the means for acquiring copyright protection, are among the many details found in the Copyright Act of 1976, the latest revision to the law. While copyright law is effective, in many ways it has not kept pace with the advent of new technologies. For example, the internet and social media have made it so easy to copy and disseminate the works of others. New laws such as the Digital Millennium Copyright Act (DMCA) and the Visual Artists Rights Act (VARA) have been added to try and overcome some of the more glaring omissions, but the piecemeal approach makes it hard for creators and non-creators alike to figure out what the legal boundaries are regarding creative expression. This book provides an overview of copyright law just for creators, so they can better understand their rights.



What can be Copyrighted?

Copyright does not protect every creative idea. For a creative work to receive copyright protection, it must fall within certain criteria dictated in the Copyright Act. For example, a design for a new car can receive patent protection and the car's brand name can receive trademark protection, but neither can receive a copyright. However, copyright protection would be available for the car's design drawings.

To be eligible for copyright, creative works must be:

Original Work of Authorship

To be original, an author must have created the work independently, without copying. The work must be an execution of the creator's idea, not merely the idea itself.

Fixed in a Tangible Medium

The creative work must be executed in some physical medium that can hold the expression. It can be paper, canvas, a computer drive, or even a napkin. Conversely, a dance move cannot be copyrighted because it is not fixed in a tangible medium.

Minimal Degree of Creativity

All that is required is for the work to possess some creative spark, no matter how crude, humble, or obvious it might be.

And be one of the following types of works:

- 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 recordings
- architectural works

Visual arts fall within these two categories.

Imagine that you are at the Museum of Modern Art (MoMA) in New York City, taking photos of people that are viewing Van Gogh's "The Starry Night." As soon as you click the shutter, you have created a copyrighted work. Why?

First, it is original. Nobody has that exact shot with those people. Second, the photo has at least some creativity. You decided when to take the shot, what positions the people were in, and the viewing angle. Finally, the image was imprinted on the camera sensor, so it is fixed in a tangible medium.

But now imagine, you walk up to the Van Gogh and take a picture, filling the whole frame with the painting. That photo cannot receive copyright protection. It is not an original work. The entire photo is of Van Gogh's creative work, not yours.

What cannot be Copyrighted?

Understanding what copyright doesn't protect is just as important as knowing what copyright does protect. So when you hear someone say, "That guy stole my idea. I'm going to sue him!" now you'll know it is an empty threat.

FACTS

No matter how eloquently a fact is presented, it will not rise to the level of originality that is required for copyright protection. Weather forecasts, sport stats or posting an event on Facebook are not copyrightable. When Paris Hilton tweeted, "I didn't go to England, I went to London;" as entertaining as that might be, it is not copyrightable.

IDEAS

Ideas cannot be copyrighted, only the expression of an idea. This is particularly relevant to writers. Think about Harry Potter. The novels have copyright protection in the arrangement of words, or characters names and personalities. But the idea of a boy wizard who has magical adventures while attending wizarding school is not protected.

TITLES, NAMES, SLOGANS AND HEADLINES

Titles, slogans, names and headlines are generally not protected by copyright. That also includes simple product lettering or lists, such as recipe ingredients or the contents of a room on the show Storage Wars. So even a phrase as original as *M&Ms melt in your mouth, not in your hands*, does not have copyright protection. However, they may be eligible for Trademark protection.

WILLIAM FAULKNER VS. WOODY ALLEN

In a recent copyright battle, Woody Allen used a phrase from a William Faulkner book in his movie, Midnight in Paris. The Faulkner Estate sued Allen for copyright infringement. *Does a phrase from a copyrighted book have the same protection as the entire book?*

The phrase the Faulkner Estate sued over was one of Faulkner's most famous lines, *"The past is never dead. It's not even past."* In the Woody Allen film, Owen Wilson's character says, *"The past is not dead. Actually, it's not even past. You know who said that? . . . Faulkner. And he was right. And I met him, too. I ran into him at a dinner party."* The court dismissed the case ,concluding that the short phrase did not rise to the level of creativity required for copyright protection.

What are your Copyrights?

Copyright grants the following exclusive rights to the copyright holder:

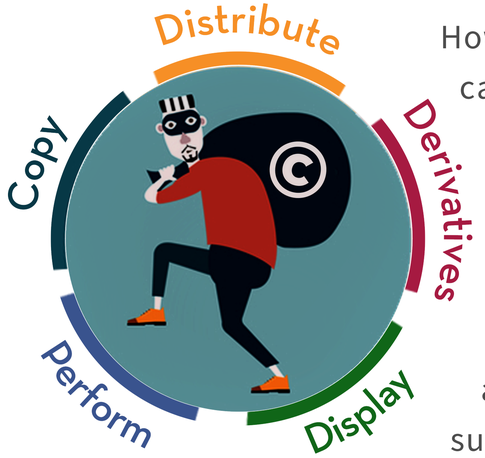
- **Make copies of the work** — The copyright holder has the right to reproduce, copy, duplicate or transcribe the work in any fixed form.
- **Distribute the work** — This is simply the right to distribute the work to the public.
- **Display the Work** — Only the copyright holder has the right to show a work directly to the public. Hanging a painting in a gallery, or displaying work on a website require permission
- **Publicly Perform the work** — Copyright holders of performing arts have the exclusive right to determine how their work is seen by the public.
- **Make derivatives of the work** — The copyright holder is the only one who can modify or make changes to the work. Anyone else need permission from the copyright holder.

Are These Rights Only for the Creator?

Not necessarily. While the exclusive rights are held by the copyright holder, a portion of these rights, or the entire set of rights, can be transferred to another person or entity for whatever time-frame the copyright holder desires, up until such time that copyright expires. Many creators do this without even realizing it. For example, showing a work in a gallery grants the gallery the right to publicly display the work and make copies of the work for promotional purposes for as long as the show continues or longer. Usually, the rights transfer is created through a written agreement, which should always be reviewed by an attorney to ensure that only the appropriate amount of rights are transferred.

Copyright Infringement

Copyright Infringement occurs whenever one of the copyright holder's rights are violated. That infringement, however, means nothing without a mechanism that enforces those rights and allows the copyright holder to receive any damages or any profits the infringer received from the theft. Before the copyright holder can enforce his or her rights, they must first show 1) proof of a valid copyright, and 2) that one of the copyright holder's exclusive rights has been violated. It then becomes the infringer's task to prove otherwise.



However, before any Federal copyright law lawsuit can begin, the copyright holder must register the work with the Copyright Office. The Copyright Office does not have the resources to verify every copyright claim, so if the copyright certificate is invalid, it will be up to the infringer to prove its invalidity, which will also alleviate them of any infringement by the supposed copyright holder (although not from the true copyright holder, if there is one).

Copyright is a "no fault" law, meaning that the reasons for an infringement are not a defense. If the defendant is found to have copied, publicly displayed, made derivatives or distributed the work without permission from the copyright holder, then it is an infringement. For example, imagine an advertiser purchases a stock photo for an ad. The stock photo site believed the uploader held the copyright but later, the true copyright holder sees the ad and sues for copyright infringement. Even though the uploader is the true violator, the stock photo site, the advertiser and the uploader are all liable for infringement.

Limits to Copyright Protection

Fair Use

As discussed earlier, there has always been a balancing act between the rights of the copyright holder and the public. While Congress wants the copyright holder to have broad rights over how creative ideas are used, there are times when that control could hamper the free flow of information to the public. These uses do not require permission from the copyright holder. In other words, *fair use* is a defense against a claim of copyright infringement. One caveat however, while a particular use may seem to be a *fair use*, just like free speech, there are many limitations on *fair use* and a lot of room for interpretation.

The following items are usually deemed *fair use*:

Criticism and Commentary	Critique of a copyrighted work, such as a book review, may require excerpts from the book.
News Reporting	Copyrighted material is sometimes necessary to explain a news event to the public.
Research and Scholarship	A research paper may require using copyrighted reference material from others.
Non-profit Educational Uses	Teachers need to use copyrighted material to instruct their students.
Parody	Poking fun at artistic works is considered *fair use*; think Saturday Night Live sketches.

Fair use, Free Speech, and the Creation of New Art

Art is speech. It is a vehicle for the expression of emotions and ideas. In its simplest form, it is a means of communication and in order to communicate certain ideas through art, one must sometimes use the art of others. Pop artists like Robert Rauschenberg, Claes Oldenburg, Andy Warhol, Roy Lichtenstein, and Tom Wesselman reproduced everyday images from popular culture as a mirror of the needs and desires of the American public. Warhol said, "Pop artists did images that anyone walking down the street would recognize in a split second—comics, picnic tables, men's pants, celebrities, refrigerators, Coke bottles."

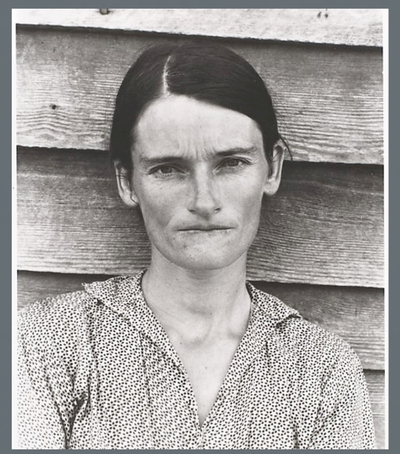
"Today, appropriating, remixing, and sampling images and media is common practice for visual, media, and performance artists. Yet such strategies continue to challenge traditional notions of originality and test the boundaries of what it means to be an artist."MoMA Most artists have used another's work at some point in their own creative work, such as taking a photo at a gallery exhibition or art fair. The postmodern appropriation artist incorporates copyrighted material into collages, paintings, sculpture, changing notions of originality.

For example, Sherry Levine challenged the concept of ownership by photographing a photograph in After Walker Evans (1981). Andy Warhol's Campbell's Soup Can series (1961) uses appropriated copies of the original labels exactly as they are seen on the cans in any store. He took the traditional still-life and instead used them as portraiture. Warhol thought using Campbell's Soup would stimulate product recognition (just like in advertising) and be equated with the company's marketing campaign at the time; "*Campbell's soup . . that Mmm Mmm good feeling*." His underlying message exposed consumerism, commercialism and big business' effect on society.

So copyright law, if given its broadest interpretation, may stifle artistic expression. So the courts needed to find ways in which the rights of the copyright holder could be maintained while at the same time, allowing these new forms of art to take shape for the benefit of society. The Fair Use doctrine is the result.

Small Torn Campbell's Soup Can (Pepper Pot), 1962. ©2008 Andy Warhol Foundation for the Visual Arts / ARS, New York.

Roy Lichtenstein (1963). Oil and synthetic polymer paint on canvas.

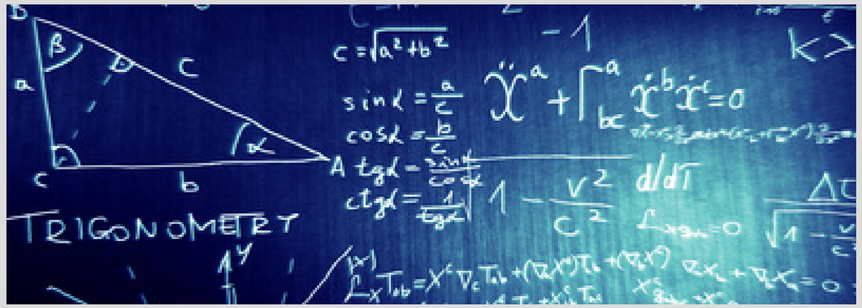


After Walker Evans: 4. Sherrie Levine (1981), Gelatin silver print. © Sherrie Levine

Tom Wesselmann (1963). Oil, enamel and synthetic polymer paint on composition board with collage of printed advertisements.

Fair use : The Four Factor Test

Over time, the court developed a test to determine whether a work is *fair use*. In the Copyright Act of 1976, Congress codified this test. The courts look at four factors, weighing each one, which when looked at as a whole, indicates *fair use*. Unfortunately, the interpretations from various courts have been varied so it is often hard to predict how the court would rule on any given work. Judges also have some leeway in how they weight the factors, so the Federal Court where your case resides becomes an additional variable. This is particularly difficult for artists wishing to appropriate other art. The only way to truly know whether a work is *fair use* is via the federal court system. If an artist is concerned about a particular work, they should ask an Intellectual Property attorney. They have seen or discussed enough cases that they will be have a good idea whether a work could be considered *fair use*, although nobody can predict how any given court will rule.



1) AMOUNT AND SUBSTANTIALITY OF PORTION USED This factor looks at both the amount used and the quality of the material used in a particular work. Use of copyrighted material in this analysis must be as little as necessary to create the new work. For example, in a major case from 1977, a CBS affiliate's use of a one-minute-and-15-second clip of a Charlie Chaplin film was not considered *fair use* when used in a news report about Chaplin's death. The court found that the portions taken were "substantial" and part of the "heart" of the film. If CBS had used only a few seconds of the film, the result might have been different.

2) PURPOSE AND CHARACTER OF THE USE The Supreme Court has considered this factor the most important in the *fair use* analysis. Non-commercial uses, such as those that promote scientific inquiry, enhance education and the free flow of information, tend to be favored as *fair use*. That doesn't mean the use must be non-commercial, nor would a non-profit use automatically be considered *fair use*. What is important is that the use of the copyrighted material be *transformative*: *does the new work change the meaning of the copyrighted work for a new audience*.

NATURE OF THE COPYRIGHTED WORK The Courts will consider factors such as whether the work is informational or just entertaining. For example, biographical information is more likely to be *fair use* than a fictional work, such as a novel. Remember that copyright is designed to encourage works that benefit the public or spread new ideas. As the Supreme Court has stated, "copying a news broadcast may have a stronger claim of *fair use* than copying a motion picture." The court also favors unpublished works over published ones. In the case of *Salinger v. Random House*, a biographer used portions of J.D. Salinger's unpublished letters, which were only available to scholars and not the general public. Since Salinger had never authorized any reproduction or publication of the letters, the court found that using the letters was not a *fair use*.

EFFECT OF THE USE ON THE POTENTIAL MARKET This factor looks at the effect using copyrighted material will have on the potential market for the copyright holder. Benefit to the public must be weighed against the personal gain of the copyright owner. If the work claiming *fair use* is so close to the original that people would no longer need to purchase the original work, claiming *fair use* will be more difficult.

Effect on the Potential Market Example. Sofa Entertainment sued Dodger Productions over its use of a 7-second clip in the musical, The Jersey Boys, in which Ed Sullivan introduces the Four Seasons. The Ninth Circuit Court of Appeals dismissed the case saying that this case is a "good example of why the *fair use* doctrine exists." The Court felt that the use was transformative, used in factual context merely to help anchor the story to the actual events. As well, the clip was only 7-seconds long; the quantitative and qualitative value in relation to the entire musical was minimal. The Court wrote; "Jersey Boys is not a substitute for The Ed Sullivan Show. The clip is seven seconds long and only appears once in the play. Dodger does not reproduce Jersey Boys on videotape or DVD, which would allow for repeated viewing of the clip. Dodger's use of the clip advances its own original creation without any reasonable threat to SOFA's business model. Therefore the fourth factor also favors a finding of *fair use*."

Staub v. Green Day

In 2003, Derek Seltzer, a street artist, created a black and white image called "*The Scream*" as a mural in a Los Angeles alley. Now, move forward to 2008. *The Scream* is still there; it's weathered, but still recognizable. Enter Roger Staub, photographer and video/set designer.

One day while wandering around L.A., Staub stumbles upon *The Scream* and snaps a picture, which he proceeds to file away with thousands of others on his computer. A couple of years later, Staub gets hired to do video backdrops for Green Day's 21st Century Breakdown Tour and digs Seltzer's *The Scream* out of mothballs. He uses it as the inspiration for a 4-minute video which will play on a screen behind Green Day during one of their songs. Staub doesn't copy *The Scream* exactly. He makes stylistic changes, such as adding color, along with additional elements throughout the video.

Seltzer learns about the video, recognizes his work in it, and since he hasn't given Green Day permission to use it, sues for copyright infringement. Green Day claims *fair use*, and asks that the case be dismissed.

The judge agreed. Why?

1. Staub had "transformed" the original image into his own work, making it unique such that a normal everyday person seeing it wouldn't think that it was similar to Seltzer's image.
2. The judge also reasoned that *The Scream* only had a small part in the overall video as compared to the various elements seen during the 4 minutes.
3. And lastly, Green Day didn't make any money from using *The Scream*, a point which the judge emphasized in his ruling. The purpose wasn't to sell *The Scream* commercially, it was merely part of a background in a live performance.

However, had Green Day merchandised the image, putting it on t-shirts or posters, the case would likely have shifted against Green Day, putting the band on the losing side.

Green Day in Concert with Staub's Version of *The Scream* in the background.

Seltzer's original image of *The Scream.*

Cariou v. Prince

The landmark case of *Cariou v. Prince* shows how difficult determining *fair use* can be. This case was controversial as attorneys, academics and legal scholars are divided over the outcome and the transformational analysis the Court used.

Here's the story. Between 1994 and 2000, Patrick Cariou began photographing the island's Rastafari, which he later turned into a book, "Yes Rasta." Richard Prince, an appropriation artist, began manipulated Cariou's photos to create new works. For example, Prince would paste other pictures on top of Cariou's photos or paint over certain portions. In 2008, the Gagosian Gallery in New York City began exhibiting Prince's new work.

Cariou sued Prince and Gagosian for copyright infringement. Prince claimed *fair use*, but the lower court disagreed saying that first factor of the *fair use* test requires that the allegedly infringing work must *comment on, relate to the historical context of, or critically refer back to the copyrighted work in order for it to be fair use.* The court cited that in Prince's depositions, Prince "didn't show that he had a message or that he was trying to create one." The court also looked at the third factor and said Prince had used more than was necessary to create his new work and also found that the work is similar enough to Cariou's original, that Prince's work could hurt Cariou's sales. Looking at all the factors, the court overwhelmingly concluded that Prince's work was nothing more than a derivative work, and so an infringement.

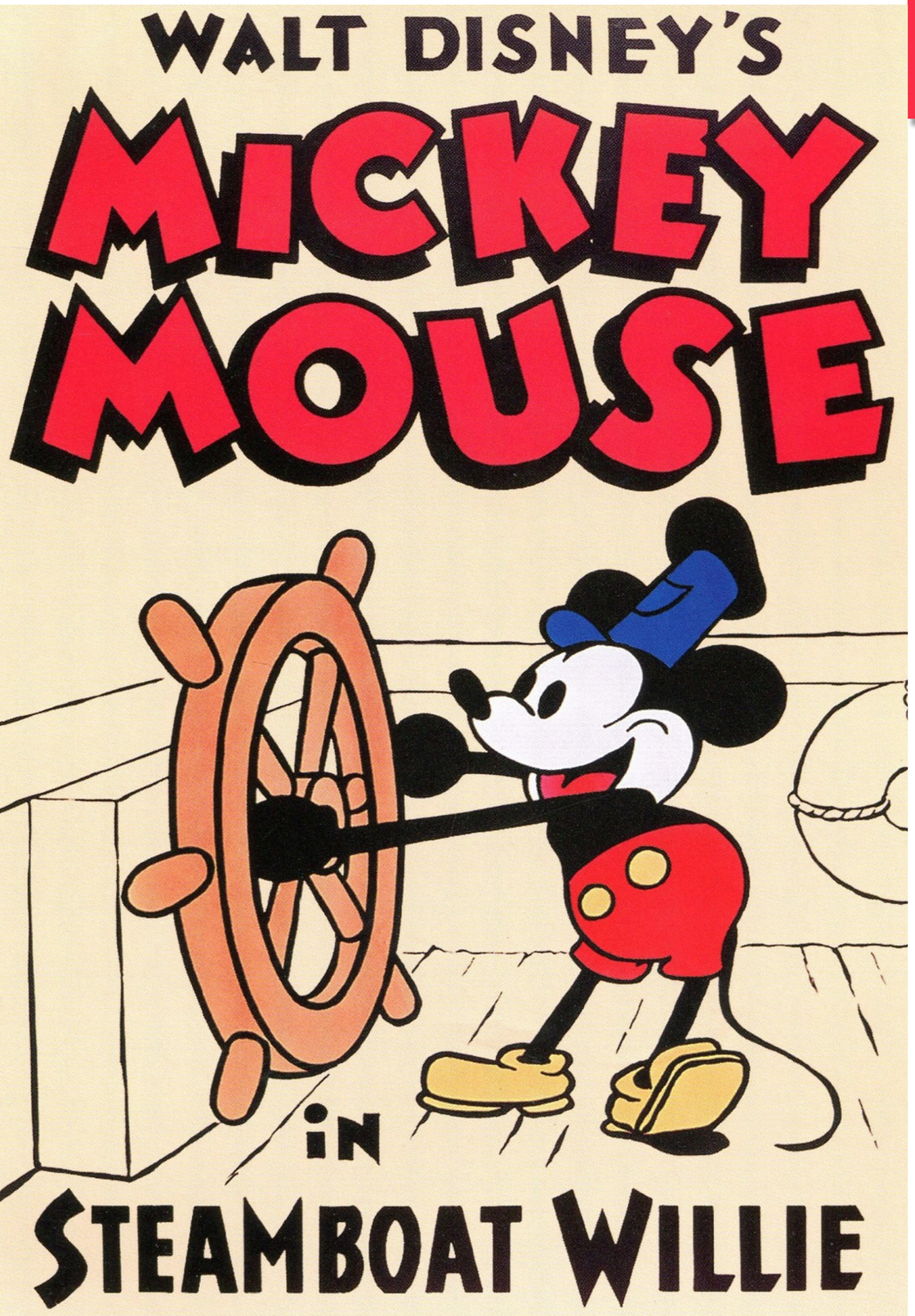
Prince appealed the case. The Second Circuit not only reversed the District Court's ruling but ***set a new standard for the fair use analysis.*** First, the Court rejected the lower court's interpretation that Prince must show that his work had a new meaning or commented on the original work. Prince's intent has no bearing on the analysis.

The Court also didn't understand how the lower court decided that Prince used more of Cariou's work than necessary, saying that the artist "must be [permitted] to 'conjure up' at least enough of the original" to fulfill its "transformative" purpose. Finally, the Court found that "Prince's work appeals to an entirely different sort of collector than Cariou's," including well-known clients such as Beyonce and Jay-Z, and would have no effect on Cariou's sales.

For now, the Second Circuit's ruling is the standard for *fair use*. However, even the court emphasized that each case must be looked at individually as each case is unique. work is considered *fair use* until a court says it is.

Cariou's Original Photo

Prince's New Work



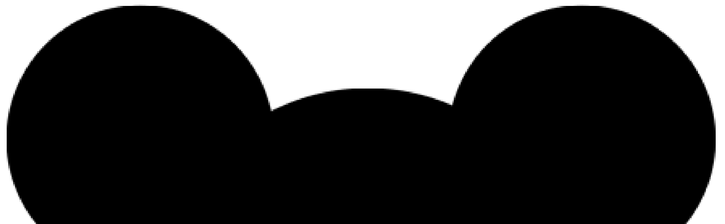
Copyright Duration and Mickey Mouse

In 1928, Disney released its first Mickey Mouse cartoon, Steamboat Willy. Copyright duration was 56 years (if renewed after 28 years) which would have put Mickey Mouse in the public Domain as of 1984. With the impending loss of copyright on its mascot, Disney began lobbying for changes to the Copyright Act, resulting in a major overhaul to the Act in 1976.

Instead of the maximum of 56 years, individual authors were granted protection for their life plus an additional 50 years, (which was the norm in Europe). For works authored by corporations, the 1976 legislation also granted a retroactive extension for works published before the new system took effect. The maximum term for already-published works was lengthened from 56 years to 75 years pushing Mickey Mouse protection out to 2003.

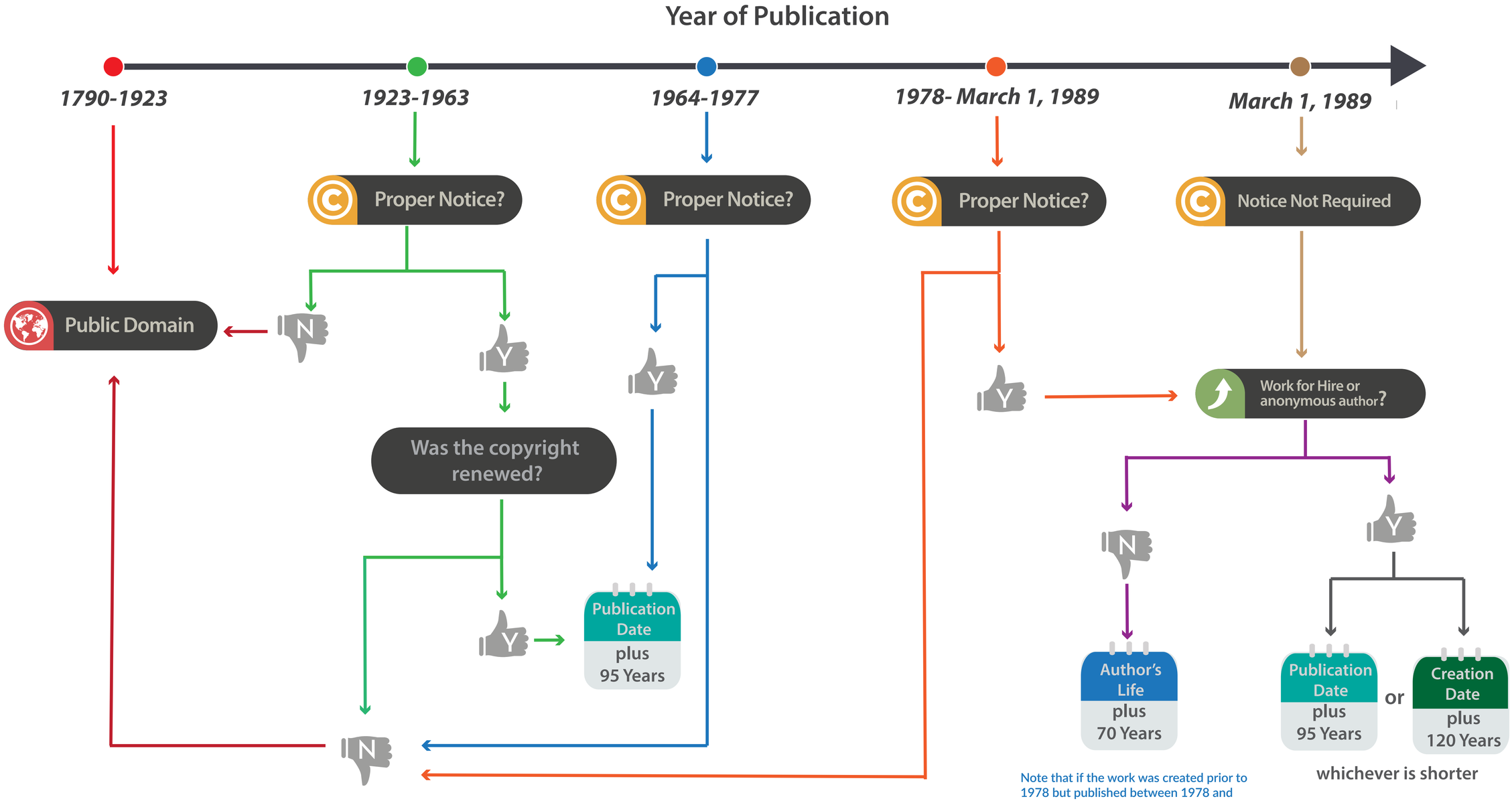
In 1998, with only 5 years left on Mickey Mouses copyright term, Congress again changed the duration with the Sonny Bono Copyright Term Extension Act of 1998. This legislation lengthens copyrights for works created on or after January 1, 1978, to life of the author plus 70 years. It also extends copyrights for corporate works to 95 years from the year of first publication, or 120 years from the year of creation, whichever expires first.

Mickey's copyright protection now ends in 2023. Disney now has only a few years to figure out how to extend that date once again.



Copyright Duration

Changes to copyright duration, as well as differences between authored works, corporate copyrights (works made for hire) and published vs. unpublished works makes it difficult to know whether older works are still protected by copyright or have entered the public domain.



Benefits of Copyright Registration

As discussed, copyright is automatic, and registration with the U. S. Copyright Office is not required. However, registration does have some distinct advantages, including monetary awards, evidence of ownership, and the ability to keep infringing products from coming into the country.

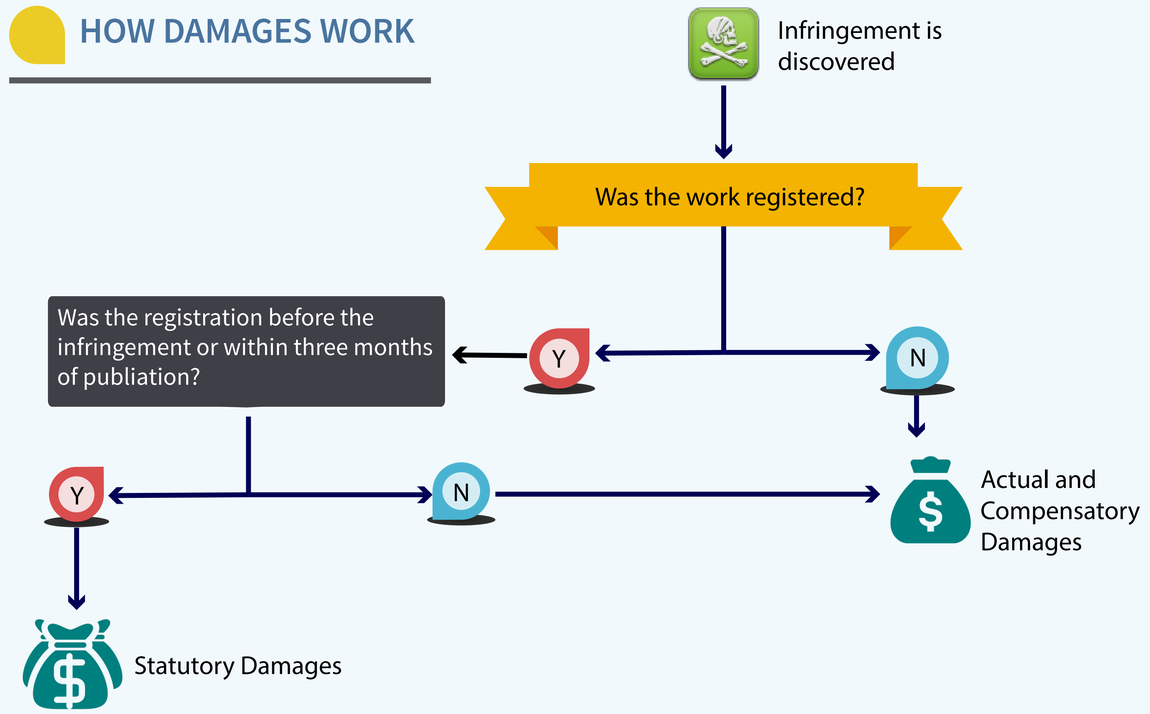
MONETARY DAMAGES

In most infringement lawsuits, the copyright holder is only entitled to actual or compensatory damage awards but registration entitles the Copyright holder to statutory damages.

What are actual and compensatory damages? Actual damages are those losses that are incurred due to the infringement. Maybe the copyright holder lost a lucrative contract, or the infringement hurt the value of the artwork; that measurable loss is the actual damages. Compensatory damages are the portion of the profit that the infringer made from the infringing activity. So if an illustration is used without permission on a pillow sold at Target, then the copyright holder is entitled to all the profits from the sale of those pillows.

Unfortunately, proving damages can be difficult. Also, the cost of a lawsuit could be more than the copyright holder would be entitled to receive, so a lawsuit may not be viable. That's where statutory damages come in.

What are Statutory Damages? Under the Copyright Act, if the copyright holder registers their work before the infringement or within three months of making the work public., the copyright holder can receive a minimum award of $750 and $30,000 per infringement, plus attorneys fees and costs. Also, if the infringement is proven to be willful, (for example, the infringer continues to use the image even after a request is made for removal) then awards can go up to $150,000 per infringement. Adequate evidence of the actual damages suffered, or the profits reaped by the infringer, are not necessary. However, those factors may help in determining the statutory damage award. The important aspect of statutory damages is the high likelihood of receiving attorneys fees. In cases where damage awards are too low to bring a lawsuit, having legal fees paid for by the infringer will make it easier to find a lawyer to take the case.



EVIDENCE OF OWNERSHIP

If copyright registration occurs within 5 years of publishing the work, your registration will provide you with prima facie evidence (i.e. satisfy a basic level of proof) of the validity of your copyright. In fact, in order to sue someone for copyright infringement, U.S. works are required to have a valid copyright certificate or at least have been submitted for registration prior to initiating a copyright infringement lawsuit. Registration satisfies the first prong of an infringement lawsuit; showing of a valid copyright.

REGISTER WITH CUSTOMS

After you have a registered copyright, you can record the registration with the U.S. Customs Service to protect yourself against imported copies of your work. The U.S. Customs and Border Protection (CBP) keeps foreign pirated and counterfeit goods from being imported into the United States. The registration system is online at https://apps.cbp.gov/e-recordations/. A separate application is required for each recordation sought. The recordation fee for copyrights is $190. For a detailed report on CBP Enforcement of Intellectual Property Rights, click here.

How to Register a **Copyright**

As we discussed earlier, copyright is automatic at the time you create your work. Registration with the Copyright Office is not required. So why register at all? Because registration provides some significant benefits. And since registration is so easy, it's something you won't want to miss.

Register with eCo

eCo is the online copyright registration system. eCo is very easy to use. It walks you through the registration process, including completing a profile, providing information about the work, submitting a payment and uploading your work. **The cost is only $35 per work.** Then, in about 30 days, the Copyright Office will send you a registration certificate.

One important note; the certificate does not contain an image of your visual work, only the name of the image you uploaded. Make sure you attach a copy of the image to the certificate once you receive it, especially if you have multiple copyrighted images.

The Copyright Office also requires that two copies of any registered work be deposited with the Library of Congress within 3 months of registration. For visual works, this is usually accomplished when your work is uploaded, but in some cases, such as for a photography book, a physical deposit will be required. eCo will let you know if a deposit is necessary.

Just go to http://www.copyright.gov/eco/
and

FOLLOW THESE 3 SIMPLE STEPS

1. Complete the online form
2. Submit credit card payment
3. Upload copies of your work

For a detailed tutorial on using eCo, click here.

THE PHOTOGRAPHER'S EXCEPTION

Generally, each work requires a unique registration. However, a group of photographs can be registered under a single registration if all of the following conditions are met:

1. The same photographer took all of the photographs
2. All the photographs were first published in the same calendar year.
3. All of the photographs have the same copyright claimant(s).

The limit is 750 photos per registration. Be sure that *unpublished* and *published* images are not combined in the same registration. Copyright holders can upload the images using a .zip file. They do not have to be uploaded individually. However, be sure to use a naming convention that makes the images recognizable since the certificate from the copyright office does not include the images, only the names. We suggest using information from the files metadata such as location, date taken, time taken, or photographer's name, As an example, you can use (Location) - (Month / Day) – (Image Number).

The Digital Millennium Copyright Act (DMCA)

Visual artists often use watermarks or other identifying marks on their images to deter people from using them without permission. Yet, artists don't want make these identifying marks too intrusive. They want the protection, but at the same time not have the marks detract from the visual appearance of their beautiful creative work. A large watermark will certainly keep anyone from stealing the work, but it is also overwhelms the image. Instead, some artists will add identifying information in the corner of the image Unfortunately, in the digital age, cropping out the mark is easy and hardly a deterrence. One goal of the DMCA is to provide that deterrence by providing stiff penalties for anyone that removes identifying information from an image.

1. **A key feature of the DMCA is that it criminalizes the alteration of Copyright Management Information (CMI). So for removing a watermark, the copyright holder can receive statutory damages of up to $25,000 per violation. Actual copyright infringement is not required.**

2. **Temporary and permanent injunctions may be granted to prevent or restrain violators from using your image. That is usually the immediate concern. So if the violator removes the watermark after stealing your image, getting an injunction becomes a bit easier.**

3. **The violator may also be subject to criminal penalties. Willful violators of the anti-circumvention rules may be fined up to $500,000 and imprisoned for up to five years for a first offense. Subsequent offenses may be punished by fines up to $1,000,000 and imprisonment for up to ten years. Going forward with this action is your choice.**

However, while the penalties for removing CMI might deter some people from copying an image, very few people know that the law exists, so in practice, identifying marks rarely stop thieves. So the provision acts mostly as a punishment, usually as an additional cause of action in a copyright infringement lawsuit. (Rarely does someone buy an image legally, and then remove the watermark. The vast majority of CMI removal happens as part of an infringement.) But unlike copyright infringement, removal of CMI requires intent by the infringer. That means that the infringer must be the one who removed the identifying information, a fact which must be proven in court. For example, if a person buys an image from a stock image site, which did not have the authority to sell it, and that person uses the image on their website, the person is an infringer. However, if the image originally had the artists name at the bottom, but had been cropped out prior to the infringement, the infringer is not liable for removal of CMI.

Submitting a DMCA Takedown Notice

Websites that host user-generated material, like YouTube or Flickr, often find users uploading unauthorized copyrighted material. By hosting the infringing material, the website would normally be liable for copyright infringement, due to the strict liability nature of copyright law. The result would be that the risk of legal action would be too great for many websites that host user generated material to operate, and have a dampening effect on the internet as a whole. An additional aspect of the DMCA reduces the risk by giving hosting websites immunity ("Safe Harbor") from prosecution, as long as they act merely as a passive hosting service. The sites must follow specific rules in order to qualify for the immunity. One such rule requires that each site have a process which enables copyright holders to quickly and easily remove infringing materials. The process, however, has some flexibility as to its implementation, so each website may have slightly different approaches to the takedown process. Following the three points listed here should help anyone successfully navigate the various procedures.

False Takedowns

Sometimes takedowns are submitted mistakenly. There have been cases where takedowns are submitted maliciously, to remove work that does not infringe on a copyright, or even as anti-competitive measure. Someone might also claim *fair use*. To have the hosting site put the images back up, the DMCA requires submission of a counter notice with the same information as used in the Takedown notice.

Upon receipt of the counter-notice, the website has up to 14 days to replace the material, pending the outcom of a lawsuit is initiated. Also note that the DMCA has penalties for knowingly making false claims in a DMCA takedown notice or counter-notice. If someone falsely initiates a takedown or a counter notice, then the copyright owner can win damages, including legal fees and court costs in a lawsuit. For a sample takedown notice, click here.

1 Find out where to send the takedown notice.

Most major websites will have a section devoted to DMCA infringement notices. Look for a web form, email address, fax number or mailing address on the website where you can report intellectual property infringement. Links are often buried in the website's terms and conditions or at the bottom of a home page under the title "intellectual property."

2 Make sure your takedown notice is complete

The law requires that the notice:

- Be in writing;
- Provide the name, address and telephone number
- Identify the infringing work, by name, by description, or an image;
- Identify where the infringement ocurred by giving the specific internet address (URL) where the infringement can be found;
- Contain a statement that the takedown request is made in good faith, is being submitted under penalty of perjury, that the information in the notification is accurate, and that the request is being submitted by the copyright owner or the owner's agent.
- Be signed by the copyright holder or the owner's agent.

It is also a good practice to give the year you created the material and provide a link to your website showing the work.

3 Check back to make sure your takedown was complied with.

Websites are required to remove the infringing material immediately if the takedown request complies with the law. When the material is removed, the website is required to give notice to the person who posted it and advise them that they can submit a counter-notice if they believe that the material is not infringing your rights. If no counter-notice is submitted then the material should remain off that website.

Copyright Ownership for Employees

As a general rule, the author of a creative work is the one that holds the copyright. However, under certain special circumstances, known as "**Works Made for Hire,**" the copyright holder may be someone other than the creator. There are two types of *works made for hire*, each having specific criteria under which the copyright is owned by someone other than the creator.

Employees When an employee creates artwork as part of his or her employment, the copyright will be owned by the business. In most cases, whether someone is an employee is obvious, but in many cases, particularly in the graphic design industry, employment is not so clear cut. Just as in Employment Law, being called an employee, freelancer or independent contractor is not enough to define that role, despite both parties agreeing to that role. Classifying someone as an employee or freelancer depends heavily on how much control the employer has over the employees' work.

Some factors the court will look at in deciding the status of a creator are:

1. What are the skills required to create the work?
2. Who provides the necessary tools?
3. Where is the work created?
4. Can the employer assign work to the creator?
5. How long has there been an employer / employee relationship?
6. Does the employee have predefined working hours?
7. How is the employee paid?
8. Does the employee receive benefits?

No single factor will decide the outcome, but instead they are taken as a whole to see how much control the employer has over how the work was created. The analysis is not always easy. A creator who works everyday at a company office, using their equipment and resources, receives healthcare, yet is paid an hourly rate, may or may not be an employee.

Copyright Ownership for Freelancers

Freelancers For works that are specially commissioned or ordered from freelancers, the copyright remains with the freelancer. Mistakenly, many purchasers believe they are the owners but the purchaser only receives a license to use the work. It's not surprising, after all, the buyer asked for the work to be created and paid for it; Why wouldn't he or she own it? However, the creativity came from the freelancer. Unlike an employees situation in which the creator is under the control of the employer, the freelancer has much more freedom. The freelancer uses his or her own tools, decides when the project will be scheduled, and bills the client directly. Control differentiates the freelancer from the employee and as such, the freelancer retains the copyright.

However, under specific circumstances, the buyer can claim the same rights as en employer. The buyer receives the full copyright if there is:

1. A written agreement signed by both parties;
2. that specifically states that the work is a "*work-made-for-hire*;"
3. and, the work must be one of these nine types:
   - a contribution to a collective work,
   - part of a motion picture or other audiovisual work,
   - a translation,
   - a supplementary work,
   - a compilation,
   - an instructional text,
   - a test,
   - material for a test,
   - or an atlas.

A Hypothetical *Work Made For Hire* Scenario

Imagine you are an animator. “Character Films” hires you to create animated characters as part of an ongoing series of educational film shorts. These characters will change for each installment. Character Films gives you a monthly fee to create three characters per month, which is paid through the same auto-pay system they use for their hired employees. But the company does not withhold your taxes. You have creative control but are provided guidelines for each character and the company has final approval.

To speed up the process, the company provides you with a desk in the office but they also buy you a high end Mac Pro for your home. You can sometimes work at home. There is no schedule for your work hours, but you are given deadlines. Character Films also allows you to use certain employees as assistants, when things get backed up. The company doesn’t keep you from working on other assignments, but they do require that Character’s work takes priority. You have a written agreement with some vague language about ownership of the works. So who owns the copyright?

An argument could be made for both you and the company under these facts. The implications of not clearly knowing who owns the copyright are serious. If you are the copyright holder, then the company only has a license to use the characters in materials that relate to the project you were hired for. But what if Dreamworks is interested in making an feature animated film based on those characters? It’s the copyright holder that will reap the rewards.

Creative Commons

Copyright gives the author the exclusive right to copy, distribute, make derivatives, and publicly display an artistic work, but any author can give those rights away. Most often, a contract or licensing agreement is used for a rights transfer but those methods generally require a specific person or organization to receive the transfer. Creative Commons, on the other hand, gives the owner a simple, standardized license giving the public permission to share and use creative work.

Creative Commons is a not-for-profit organization, which sets the standardized licenses, making it easy for authors to implement. As stated on their website, “Creative Commons licenses let you easily change your copyright terms from the default of ‘all rights reserved’ to ‘some rights reserved.’ Creative Commons licenses are not an alternative to copyright. They work alongside copyright and enable you to modify your copyright terms to best suit your needs.”

Many sites that host original creative material allow users to add Creative Commons licenses to their works. Otherwise, users can add which Creative Commons license they would like to use for an image to the file’s metadata. The terms of an agreement are often difficult to create for non-lawyers. Creative Commons makes it easy by providing six standard licenses from which an author can choose. Each license requires that the work be visually attributed to the author.

Learn more at creativecommons.com

OPTION 01

ATTRIBUTION NON-COMMERCIAL NO DERIVATIVES: This is the most restrictive license. It allows use of the work in its entirety, but it cannot be changed and only used for a non-commercial purpose.

OPTION 02

ATTRIBUTION NON-COMMERCIAL SHARE ALIKE: With this license, a user can make derivatives of the work but the derivative work must also have this license.

OPTION 03

ATTRIBUTION NON-COMMERCIAL: Same as option 2 but the derivative work can use any of the Creative Commons licenses.

OPTION 04

ATTRIBUTION NO DERIVATIVES: The work may be used, as is, with no changes but it can also be used commercially.

OPTION 05

ATTRIBUTION SHARE ALIKE: The work may altered and used it for a commercial purpose but you must license the new derivative work under this license.

OPTION 06

ATTRIBUTION: This is the most open and flexible creative Commons License. The work may be altered and used commercially and can use any Creative Commons license.

Copyright for Street Artists

1

Q: Can street art be copyrighted?

A: Yes. Any original work of authorship (whether a huge mural or a tiny scribble) that contains some minimal level of creativity automatically becomes copyrighted the moment it is fixed in a tangible medium.

2

Q: If the art is in a public place where everyone can see it, doesn't that mean it's in the public domain?

A: Nope. "Public Domain" is a legal term of art (in the legal sense, not an artistic one) which means a work in which a copyright has expired. Placing art in a public place or allowing it to be publicly viewed does not change the essential nature of the artist's copyright.

3

Q: Can graffiti be copyrighted?

A: This is a bit more complicated. First, its best if we make the distinction between sanctioned or commissioned artwork, which we will call "street art," and illegally placed images or tags which we will refer to as "graffiti."

Street art has copyright protection in the same way a painting has protection. Graffiti on the other hand. Some argue that graffiti should not be given copyright protection because the works are created through an illegal act: vandalism. As such, the product of an illegal act should not benefit from copyright protection.

Others believe that regardless of how the work was created, copyright is automatic upon its creation and the illegality of the art has little to do with whether the work meets the requirements of the Copyright Act.

So the matter is still up for debate, and the answer is… maybe?

4

Q: If I own the copyright to a piece of street art, can I stop anyone from ripping it down or painting over it?

A: Not unless the artist also owns the wall. Somewhat counter-intuitively, owning a copyright doesn't necessarily mean you own that copy of the work. You have the exclusive rights to make reproductions, distribute them and put them on public display, but the person who owns the wall also has rights in how the wall is used. If the work is the product of vandalism, there is probably not that much an artist can do to keep someone from painting over the work. However, commissioned street art may have the right to ensure that the work remains whole via the Visual Artist's Rights Act (VARA).

About the Author

Steven Schlackman

Steven Schlackman is a registered patent attorney focusing on intellectual property in the art, technology and life science sectors. Steve spent more than 15 years as an entrepreneurial business leader prior to becoming an attorney, working in jobs as diverse as sales, account management, IT, web and software development and executive level management. He has several degrees from leading universities; a Juris Doctor from University of Miami School of Law, an MS in Management from New York University, an MBA in Marketing from Zicklin School of Business (CUNY); a BA in Political Science from Tulane University, and a Biology specialization from the University of Miami. Steven is also an accomplished photographer with gallery shows in cities like New York, Miami and Istanbul.

Steve is also Chief Product Officer at Artrepreneur, an online platform that helps artists put their creative ideas to work. Artrepreneur also publishes Art Law Journal, which educates visual artists on important legal topics, such as copyright, and Artrepreneur, which focuses on the business of art.

Mark Wang

A special thank you to Mark for his cover art. Mark Wang is an Illustrator and comic artist originally from Tucson, Arizona, but is currently located in the fabled NYC. His works have been featured in the New York Times, the Wall Street Journal, the Washington Post, Etc. Sometimes his drawings are funny, and sometimes they're not. Go figure huh.

For question regarding this eBook or any other intellectual property issues, contact support@artrepreneur.com.