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ARTICLE

UNDERSTANDING INTELLECTUAL PROPERTY: A GUIDE FOR ARTISTS

James Creekmore and Andrew P. Connors[†]

“I saw the angel in the marble and carved until I set him free.”

- Michelangelo -

An artist never knows when inspiration might strike. While we are not artists, the artists that we know live for that inspiration every day of their lives. Not knowing when it might strike, they carry sketchpads and notebooks for jotting down their ideas—to preserve their inspiration while they can. Their attention is to their craft, not to the law that may inhibit or reward their creations. And so while artists create with pens and paintbrushes, they may forget about one of their most important tools—their lawyer.

This Article examines some common intellectual property issues that artists face.¹ It begins by explaining the general premise of American intellectual property law as providing a means to exclude others from using intangible things. In Part II, it examines U.S. copyright law and reviews how artists might claim or run afoul of its protections. It includes a discussion of several important concepts, including the “work-for-hire” doctrine, licensing, and fair use. Part II also touches upon the right of publicity, an important, somewhat-related concept especially relevant to photographers. In Part III, this Article examines trademark law and whether it precludes the depiction of brands in artwork. Part III also touches on related First Amendment concerns that have served to protect claims of trademark infringement by brand owners. Part IV concludes this Article.

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1. A professional artist should also not overlook the value of corporate and business law, which governs the formation of business entities and contracts and can protect artists from liability. Although this Article touches upon some of these issues within the context of intellectual property, these areas of law are outside of this Article’s scope.

I. UNDERSTANDING INTELLECTUAL PROPERTY

Intellectual property law allows people to protect certain intangible property interests.² Some commonly misconceive intellectual property law as authorizing or enabling people to take certain action. Indeed, the authors of this Article have repeatedly encountered people that have fallen into this trap—those that mistakenly believe that they cannot create something without first acquiring some kind of legal right to do it. Of course, while it often is a prudent business decision to obtain copyright, trademark, or patent protection for a particular thing or endeavor, it nevertheless is not a requirement. Intellectual property protection provides negative rights of exclusion, not positive rights of action.³ Once the boundaries of a particularly protected thing are set out by the appropriate device, e.g., a copyright registration,⁴ a trademark registration,⁵ or a patent claim,⁶ the rights-holder—the “owner” of the intellectual property—has the ability to take legal action to exclude others from invading the boundaries of the property.⁷ What an “invasion,” or *infringement*, of the property interest looks like will depend upon the particular kind of intellectual property protected, and any particular invasion of the interest must generally be

2. See, e.g., 17 U.S.C. § 106 (2012) (setting forth exclusionary rights for authors of creative works, i.e., copyright); 35 U.S.C. § 271 (2012) (setting forth exclusionary rights for patent holders).

3. See *K-Mart v. Cartier*, 485 U.S. 176, 185 (1988) (“Trademark law, like contract law, confers private rights, which are themselves rights of exclusion.”); *Crown v. Nye Tool Works*, 261 U.S. 24, 35 (1923) (noting that government awarded patent rights confer “in . . . essence . . . the right to exclude others from making, using or vending his invention”); *Salinger v. Colting*, 607 F.3d 68, 78 (2d Cir. 2010) (noting that “[l]ike a patent owner, a copyright holder possesses the right to exclude others from using his property.” (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982))).

4. See generally 17 U.S.C. §§ 401–412 (2012).

5. See 15 U.S.C. § 1051 (2012).

6. See 35 U.S.C. § 112 (2012) (setting forth the rules for providing legal claims in a patent specification).

7. See sources cited *supra* note 2.

enforced by the rights-holder in a civil action,⁸ except for those narrow circumstances where criminal punishment exists.⁹

At least four major kinds of intellectual property protection exist: copyrights, trademarks, patents, and trade secrets. Other intangible rights, like the right of publicity, also play an important role in intellectual property problems, as we will discuss later in this Article.¹⁰

This Article does not focus on patents or trade secrets; however, to distinguish them from other forms of intellectual property, a brief description of these kinds of intellectual property is in order. Patents come in two major varieties: utility and design.¹¹ A utility patent protects an invention, that is, “any new and useful process, machine, manufacture, or composition of matter,” including any improvements thereof.¹² The invention must be novel¹³ and non-obvious,¹⁴ and the inventor must disclose the patent in a patent application in a manner sufficient so that the public can reproduce the invention.¹⁵ In exchange for releasing this information to the public, the public grants the inventor a twenty-year monopoly on the invention.¹⁶ A design patent, in contrast, protects the non-functional, ornamental design of a functional object;¹⁷ its term lasts fourteen years.¹⁸ Finally, trade secrets protect particular kinds of information from

8. See 15 U.S.C. § 1125(a) (2012) (providing for a civil action for trademark infringement); 17 U.S.C. § 501(b) (2012) (“[T]he legal or beneficial owner of an exclusive right under copyright is entitled . . . to institute an action for any infringement.”); 35 U.S.C. § 271(e)(4) (2012) (describing the myriad of civil damages and other relief possible in a suit for patent infringement).

9. For example, criminal copyright violations tend to occur in cases of illicit piracy and mass, business-oriented distribution. See 17 U.S.C. § 506 (2012).

10. See *infra* Parts II–III.

11. See 35 U.S.C. § 101 (defining a utility patent); *id.* § 171 (defining a design patent). A third and much less common form of patent protects new plant varieties. See *id.* § 161.

12. *Id.* § 101.

13. *Id.* § 102(a).

14. *Id.* § 103.

15. *Id.* § 112(a).

16. *Id.* § 154(a)(2).

17. See *id.* § 171 (defining a design patent as protecting an “ornamental design for an article of manufacture”).

18. *Id.* § 173. Artists might appreciate the great value of design patents when they consider that an aesthetic design, like the rounded bevel design of the Apple iPad, is protectable by a design patent. See U.S. Patent No. D504889 (filed Mar. 17, 2004); U.S. Patent No. D593087 (filed Jan. 5, 2007); U.S. Patent No. 618677 (filed Nov. 18, 2008); U.S. Patent No. D604305 (filed Jun. 23, 2007).

public disclosure. The information, by its nature, must be confidential,¹⁹ and the owner of the trade secret must take reasonable steps to keep it secret.²⁰

Our discussion will focus on the kinds of intellectual property relevant to artists: copyrights and, to a lesser degree, trademarks. We will also mention other issues relevant to the creation and use of artwork, namely, the right of publicity, as well as First Amendment protections that may override an intellectual property interest. We discuss these issues in further detail below.

II. COPYRIGHT PROTECTION AND THE ARTIST

Copyright is as old as the country itself. The Founding Fathers granted Congress the authority to issue copyrights to authors of artistic works in Article I, Section 8, Clause 8 of the United States Constitution.²¹ Today's copyright laws protect any (1) original work of authorship (2) fixed in any tangible medium of expression that is (3) capable of being perceived, reproduced, or otherwise communicated.²² A work of authorship means a creative work, e.g., a book, painting, drawing, graphic design, music, or movie.²³ The work of authorship need not have artistic merit but rather just some *minimal* creative spark.²⁴ To be original, the work must have been independently created without copying; it need not be different from an existing work.²⁵ Finally it must be fixed, e.g., written down, saved in computer memory, or put in some other fixed form.²⁶ Copyright exists as

19. See, e.g., Virginia Uniform Trade Secrets Act, VA. CODE ANN. § 59.1-336 (2012).

20. *Id.*

21. Interestingly, the Founders referred to artistic works as "Science." See U.S. CONST. art. I, § 8, cl. 8.

22. 17 U.S.C. § 102(a) (2012).

23. See *id.* (giving a list of exemplary works).

24. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 [A]-[B] (1990))).

25. *Id.* ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works).").

26. See 17 U.S.C. § 102(a) (2012) (requiring that a copyrightable work be "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

soon as such a work is created, and the rights immediately vest in the author.²⁷ These rights include the right to reproduce, the right to publicly display, the right to distribute, and the right to create derivative works.²⁸

A. *Considering Ownership of Copyright*

With these concepts in mind, an artist's first task is to consider how to retain ownership of and to protect his creations. A common issue arises when an employee or freelance artist creates something for his employer or client. Who owns the work? That depends.

1. Employee-Created Works

A work created by an employee belongs to his employer, so long as the work was made within the scope of employment.²⁹ Under this circumstance, the employer is the "author" for the purpose of copyright law; at no time does the employee ever have any rights to the work.³⁰ To determine whether a work is made within the scope of employment, the law considers "the hiring party's right to control the manner and means by which the product is accomplished."³¹ The law further considers

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.³²

27. *Id.* ("Copyright in a work protected under this title vests initially in the author or authors of the work."). For a full discussion of the legal issues arising in transfer of copyright ownership, see Andrew P. Connors, Note, *Dissecting Electronic Arts' Spore: An Analysis of the Illicit Transfer of Copyright Ownership of User-Generated Content in Computer Software*, 4 LIB. U. L. REV. 405 (2010).

28. 17 U.S.C. § 106 (2012).

29. *Id.* § 201(b); *id.* § 101 (defining "works made for hire").

30. See *id.* § 201(b) (making the employer the author in this circumstance).

31. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

32. *Id.* at 751–52 (footnotes omitted).

Of course, the employer and employee can always contract around this default copyright-ownership rule; for example, an employee might find it beneficial for the employer to expressly define certain kinds of work outside of the scope of employment.³³ These are the kinds of issues an artist should consider in an employment context.

These issues become even more interesting when we consider the ownership dynamic of the copyright in a work created as part of a freelancing project. In the authors' experience, these deals frequently involve no kind of written agreement governing the ownership of the copyright in the created work. As we further discuss, failing to have a written agreement in these circumstances is a big mistake for the person paying for the creation of the work.

2. Work Made for Hire

A freelance project might be a "work made for hire," a very specific kind of work specially defined in the Copyright Act.³⁴ A "work made for hire"³⁵ must be "a work specially ordered or commissioned for use"³⁶ (1) "as a contribution to a collective work,"³⁷ (2) "as a part of a motion picture or other audiovisual work,"³⁸ (3) "as a translation,"³⁹ (4) "as a supplementary work,"⁴⁰ (5) "as a compilation,"⁴¹ (6) "as an instructional text,"⁴² (7) "as a test,"⁴³ (8) "as answer material for a test,"⁴⁴ or (9) "as an atlas."⁴⁵ If the work fits in one of these categories, then a writing signed by *both parties* will make the work a "work made for hire."⁴⁶ The creator, or "author," of the work, for the purposes of copyright law, is the commissioner of the work,

33. In the authors' experience, this frequently occurs in the academic context.

34. 17 U.S.C. § 101.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* § 201(b).

and all the rights associated with the work immediately vest in the commissioner, not the freelancer or actual creator.⁴⁷

3. A Transfer of Ownership and Things In-Between

If the work is not a “work made for hire” under the very specific definition provided in the Copyright Act, then the commissioner must obtain a transfer of ownership from the creator.⁴⁸ Again, recall that copyright vests immediately with the author;⁴⁹ if the work is not a “work made for hire,” it follows that the commissioner is not the author—the actual creator is. This means that the creator retains the copyright to the work—the right to distribute, the right to reproduce, the right to publicly perform, and others.⁵⁰ To obtain those rights, the commissioner must therefore obtain a transfer of ownership. The Copyright Act requires this transaction to be in a writing signed by the author.⁵¹ Thus, an oral transfer is a nullity.⁵²

This does not mean that an artist necessarily has carte blanche to bring a copyright infringement suit where no signed writing exists. The artist must still account for an implied, nonexclusive license that “can be given either orally or [may be] implied from conduct.”⁵³ A nonexclusive license need not be in writing, since the Copyright Act requires only transfers of ownership to occur by a signed writing.⁵⁴ “Such an implied license does not transfer the

47. *See id.* (defining the commissioner as the author).

48. As the reader will see, this is because the commissioner is not the author, with whom the rights reside. *See infra* note 49 and accompanying text; *see also* ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS, app. 2–9D (2012).

49. *See* 17 U.S.C. § 201(a) (vesting copyright ownership in the author).

50. *See id.*

51. *See id.* § 201(b).

52. *Id.* A circuit split does exist regarding whether an oral agreement entered into before the creation of the work can be memorialized after the work and thereby create a work made for hire. *Compare* Schiller v. Nordisco Corp., 969 F.2d 410, 413 (7th Cir. 1992) (holding that a “work made for hire” agreement must precede the creation of the work to be effective), *with* Playboy Enters. v. Dumas, 53 F.3d 549, 559 (2d Cir. 1995) (holding that such a writing can come after the creation of the work so long as it memorializes an oral agreement that was made before the creation of the work).

53. Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505, 514 (4th Cir. 2002).

54. The Act only requires a writing when transferring ownership, which excludes nonexclusive licenses. *Compare* 17 U.S.C. § 204(a), *with* 17 U.S.C. § 101 (defining a “transfer of copyright ownership” as “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights

ownership of a copyright; rather, it 'simply permits the use of a copyrighted work in a particular manner.'"⁵⁵ Even giving "mere permission" to use a copyrighted work, or not objecting to its use, "is equivalent to [granting] a nonexclusive license and is not required to be in writing."⁵⁶ Of course, it follows that the artist can revoke an implied license, or can otherwise cure any ambiguity, by expressly declining permission to use the artist's work.⁵⁷

Given these considerations, a freelance artist has great leverage where the artist never transferred ownership in the work to the client by a signed writing and a dispute later arises. In the authors' experience, this circumstance arises fairly frequently. Artists and clients will often fail to work out ownership beforehand, or if they do, they will fail to do so in writing. As a practical point, it never benefits a business relationship to purposely arrange the relationship to leave a copyright "trap" that could spring when the relationship goes south. Therefore, as a business practice, it is best to spell out ownership in a written, signed contract beforehand, so that all parties understand and can rely on their ownership interests in the work to be created under the relationship.

B. Fair Use

Where licenses and ownership provide a clear mechanism to assert a claim for infringement, fair use provides a somewhat murkier defense against infringement. Artists may consider using, and often do use, the copyrighted works of others. This is, by definition, an infringement of those works. Nevertheless, fair use permits that infringement for reasons related to free speech: "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research."⁵⁸ For the use of a copyrighted work to be a fair use, it *must* fall into one of these categories.⁵⁹ If the use satisfies this threshold, the defense then hinges on the application of the following four factors:

comprised in a copyright, whether it is limited in time or place of effect, but not including a nonexclusive license").

55. *Nelson-Salabes*, 284 F.3d at 514 (quoting *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996)).

56. *I.A.E., Inc.*, 74 F.3d at 775.

57. *See id.*

58. 17 U.S.C. § 107 (2012).

59. *See id.*

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶⁰

Contrary to popular opinion, the fact that a use of a copyrighted work is for profit does not disqualify the use from being a fair use.⁶¹ As is the case any time factors are applied, a judge will ultimately determine whether a particular use is a fair use.

As a practical matter, there are *always* risks in relying on a fair use defense for artistic expression. While the defense might apply, it is, after all, a *defense*, which means as a practical matter it must be raised in court and its proponent will have the burden of proving its existence.⁶² Thus, an artist that decides to sample lyrics or to integrate another's illustration into his own work will have to face the possibility of having to see his fair use assertion recognized by a court.⁶³ The risk comes not only with the uncertainty of what a court will hold, but also with the certainty of the great expense litigation will entail. Thus, to remove uncertainty, an artist that wishes to use another artist's work will often benefit from simply licensing the copyrighted work that the artist wishes to integrate into his own work; this will remove the risk and replace it with the certainty of a relatively low royalty or lump sum payment.

C. *Copyright and the Right of Publicity*

Copyright, however, is not the only legal right that might commonly inhibit the publication of an artist's work. In photography especially, the artist should consider the separate problem of his subject's right of

60. *Id.*

61. *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (holding that a for-profit rap parody of Roy Orbison's classic, *Pretty Woman*, could be a fair use).

62. *Id.* at 590. According to the U.S. Supreme Court, "[s]ince fair use is an affirmative defense," its proponent might have to introduce "evidence about relevant markets," which could prove difficult in particular cases. *Id.*

63. *See id.*

publicity.⁶⁴ Where copyright gives the artist the exclusive right to produce and display his work, copyright does not necessarily give the artist the positive right to display it in the first place. In certain contexts, the subject of an artist's work may have the right to stop (or recover damages for) the unauthorized use of his likeness. For instance, in Virginia, no person may use another's "name, portrait, or picture . . . without having first obtained the written consent of such person."⁶⁵ Without that written consent, the person whose name or likeness is used in this manner may recover compensatory damages and may receive an injunction to cease the use of his likeness in something like a photograph.⁶⁶ Thus, while an artist who takes a photograph may have the right to stop others from reproducing that work as a matter of copyright, the subject of the photograph may nonetheless have a superseding right to stop the display of the photograph altogether if (1) the photographer does not obtain a proper release from the subject and (2) the photographer uses the photograph in an impermissible way.⁶⁷ An artist must always keep this problem in mind; the simple solution is for the artist to always get a written release whenever a real person is the subject of the artist's work, even if that person is dead.⁶⁸

III. TRADEMARK LAW, FREE SPEECH, AND THE ARTIST

Trademark law is not usually something that should concern an artist, apart from how the artist brands his business. As we shall see, however, trademark law can rear its head when an artist decides to depict a trademark in his artwork.

What is a trademark? A trademark is a source indicator—it indicates that the product comes from a particular producer.⁶⁹ It is, in essence, a legal embodiment of the goodwill of a company.⁷⁰ Accordingly, a trademark

64. VA. CODE ANN. § 8.01-40 (2013).

65. *Id.*

66. *See id.*

67. *Id.*

68. Rights of publicity often survive the life of the person. *See id.*

69. *See* 15 U.S.C. §§ 1125(a), 1127 (2012) (providing that trademark infringement occurs when a likelihood of confusion as to the "origin, sponsorship, or approval" of goods occurs); *cf.* *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31 (2003) (noting that the origin of goods "is the producer of the tangible product sold in the marketplace").

70. *Cf. Dastar*, 539 U.S. at 32 (noting that federal law "prohibits actions like trademark infringement that deceive consumers and impair a producer's goodwill").

must be distinctive,⁷¹ and infringement occurs where the use of a distinctive mark creates a likelihood of confusion in the marketplace.⁷² Trademark infringement does not occur if the use of the mark is “nominal,” or is a fair use, that is, if a person uses the mark to identify or to discuss the underlying product associated with the mark.⁷³ For instance, Burger King may broadcast a commercial comparing its food to McDonald’s food without infringing McDonald’s trademark. This is true in part because a nominal use makes it clear that the trademark used belongs to someone else and is not associated with the user’s product or service.⁷⁴

For the artist, trademark issues arise where the artist decides to depict a trademark as part of an artistic work. Depending on the circumstances, such a depiction may not run afoul of federal trademark law; in fact, it may be protected speech under the First Amendment. Take the case of *University of Alabama Board of Trustees v. New Life Art*.⁷⁵ New Life Art, owned by artist Daniel A. Moore, created artwork that captured famous University of Alabama football scenes, down to the colors, logos, and other trademark indicia of the Alabama Crimson Tide football team.⁷⁶ Although Moore had done this for years, sometimes with a license and sometimes without, the University decided that he needed a license to depict the University’s trademarks in all of his artwork.⁷⁷ Moore refused, and so the University brought a trademark infringement action against him.⁷⁸

The case worked its way up to the United States Court of Appeals for the Eleventh Circuit, and the court rejected the notion that Moore needed a license to depict history in this manner.⁷⁹ In the court’s words, trademark protection should be construed “narrowly when deciding whether an artistically expressive work infringes a trademark.”⁸⁰ The court, in

71. See *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 209–11 (2000) (demonstrating that a trademark must be distinctive because copying a non-distinctive mark could not cause market confusion, and therefore could not be a valid trademark).

72. 15 U.S.C. § 1125(a) (2012).

73. *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 214–16 (3d Cir. 2005).

74. See *id.*

75. *Univ. of Ala. Bd. of Trs. v. New Life Art*, 683 F.3d 1266 (11th Cir. 2012).

76. *Id.* at 1269–72.

77. *Id.*

78. *Id.* at 1270.

79. *Id.* at 1282–83.

80. *Id.* at 1278.

accordance with other federal circuits, concluded that it must “carefully ‘weigh the public interest in free expression against the public interest in avoiding consumer confusion.’”⁸¹ Thus,

[a]n artistically expressive use of a trademark will not violate the [federal trademark law] unless the use of the mark has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless it explicitly misleads as to the source or the content of the work.⁸²

In light of this case and the free speech protection it recognizes, an artist that depicts a trademark in his artwork may have a good defense against a claim of trademark infringement, depending on the circumstances. Where the artist depicts his observations regarding a historical event, she will have a good defense, as in *New Life Art*. In other circumstances, such as the bald use of a trademark removed from real-world observations, the artist may not fare as well. As with many legal problems, facts and circumstances matter, and risk management is also a consideration. Nevertheless, this case presents an important tool in defense of the artist.

IV. CONCLUSION

In this Article, we have reviewed some common legal issues that concern artists. We have also highlighted the practical considerations at play with these issues. Copyrights provide a powerful tool of exclusion for an artist, but can also cause problems for an artist if he uses another’s work improperly or without permission. Using pictures of others without written releases can also cause problems. Finally, depictions of trademarks in artwork also come with unique pitfalls. Understanding these problems can help an artist direct his energies to what really matters: his creation.

81. *Id.* (quoting *Cliff Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989)).

82. *Id.*