

**COPYRIGHT FOR PERFORMING, LITERARY AND VISUAL ARTISTS**

A PUBLICATION OF TEXAS ACCOUNTANTS AND LAWYERS FOR THE ARTS

## ACKNOWLEDGMENTS

This booklet was inspired by two booklets written in 1988 by Sue Shaper, of Butler & Binion, and by Richard Siluk, of Baker & Botts. Copyright law has changed in some significant ways since 1988. We have combined and updated the law from those two booklets, eliminated duplication, and added our own twists to this tale.

—the authors

We would like to thank Tim Headley, Esq., of Haynes & Boone, L.L.P., Randall E. Colson and John Moetteli for taking on the task of updating this booklet. Artists all over the nation contact us searching for information to guide them through the maze of government regulations and requirements. We are grateful on their behalf and on our own behalf for the clarity and helpfulness of this publication. We would also like to thank Ernst & Young, L.L.P. for typesetting the booklet.

—Texas Accountants and Lawyers for the Arts

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Tim Headley, Randall E. Colson, John Moetteli, and Texas Accountants and Lawyers for the Arts

## **A FEW WORDS ABOUT TEXAS ACCOUNTANTS AND LAWYERS FOR THE ARTS**

Texas Accountants and Lawyers for the Arts is a nonprofit, tax exempt organization dedicated to assisting the art community in Texas. A pool of more than 500 volunteers enables TALA to provide services throughout the state through TALA's Houston headquarters.

TALA directly assists eligible artists and nonprofit arts organizations by providing mediation services as well as a referrals to appropriate volunteers for art-related legal and accounting problems. TALA is active throughout the state of Texas as a sponsor of educational programs covering practical topics such as: the business aspects of music, writing, and v arts careers, and contract negotiation. TALA also trains artists and volunteers in arts mediation techniques.

Currently, in addition to this handbook, TALA publishes a Newsletter and a quarterly Art Law and Accounting Reporter, as well as the following handbooks:

- Taxation of the Visual and Performing Artist not have a cop
- Establishing Tax-Exempt Arts Organizations in Texas received
- Financial Management of Nonprofit Arts Organizations: missing
- A Practical Guide for Fiscal Survival owner the profi
- Responsible Management: Duties and Liabilities of ing, or Directors, Officers and Trustees of Nonprofit Arts Organizations;
- Pas de Deux: Labor and Employment Issues in the Arts and Nonprofit World Insurance: A User-Friendly Guide for the Arts and Nonprofit World

TALA receives funding from the Texas Commission on the Arts, the Cultural Arts Council of Houston/Harris County, law and accounting firms, corporations, private foundations, and many concerned individuals.

Call or write TALA at the following locations for additional copies of this booklet.

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## INTRODUCTION

Creating a literary or visual work, or a work of performing art, draws from two important resources: the artist's tremendous talent and labor. Another important resource available to the artist, after she finishes her creation, is copyright law. Without the protection afforded by copyright law, artists could not derive economic value from their works. But for copyright law, any work that was capable of being fixed in paper or film, or in any other tangible material, could be freely copied and distributed, and the artist would receive nothing.

The value that artists provide is so fundamental that the United States Constitution states that

*"The Congress shall have power...*

*"To promote the progress of science and useful arts, by securing for limited times to authors and Inventors the exclusive right to their respective writings and discoveries"*

U.S. Const, art. I, § 8, cl. 8.

With these principles in mind, we have tried to present some of the basics of the Copyright laws of the United States. We have limited this booklet to the information that most artists typically seek. We have not covered all aspects of copyright law. Furthermore, we have not covered contract principles which govern the transfer of rights in your works and the income that hopefully you will receive from your works. Additionally, various other federal and state laws, such as rights of privacy, rights of publicity and free speech rights might impact creation and performance of your artistic works.

For those of you who have been "surfing" on the Internet, you have surely come across the acronym "FAQ", which stands for "Frequently Asked Questions". We tried to use copyright FAQ's as the main headings of this booklet. The less-frequently asked questions we put at the end of this booklet in Appendix H. Also for you Internet users, in Appendix A we listed some World Wide Web sites that have helpful information relating to copyright law.

This booklet is intended to address the FAQs shared by artists, as well as some additional questions. The opinions in this booklet are those of the authors, and not necessarily of their employer or TALA. This booklet is not a substitute for legal counsel. If you want legal counsel about your specific situation, call TALA: you may qualify for free legal counsel from one of TALA's volunteers.

## WHAT DO COPYRIGHTS PROTECT?

Copyrights protect anything that can be placed in a tangible medium; anything from letters to novels, choreography to movies, jingles to opera, and photos to "fine art". Section 102(a) of the Copyright Statutes defines what is subject to copyright protection:

Copyright protection subsists, in accordance with this title, in original works of authorship 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 works of authorship include the following categories:

- (1) literary works<sup>1</sup>;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works; term co
- (5) pictorial, graphic, and sculptural works<sup>2</sup>;
- (6) motion picture<sup>3</sup> and other audiovisual<sup>4</sup> works;
- (7) sound recordings<sup>5</sup>; and date set forth in
- (8) architectural works.<sup>6</sup>

Section 103 of the Copyright Statutes expounds on Section 102(a) and provides:

(a) The subject matter of copyright as specified by Section 102 includes compilations<sup>7</sup> and derivative works<sup>8</sup>, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.<sup>9</sup>

### "Original Works of Authorship"

<sup>1</sup> "'Literary works' are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied." 17 U.S.C. § 101.

<sup>2</sup> "Pictorial, graphic, and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article defined in this section, shall be considered a pictorial, graphic, or sculptural to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101.

<sup>3</sup> "Motion pictures' are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." 17 U.S.C. § 101.

<sup>4</sup> "'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." 17 U.S.C. § 101.

<sup>5</sup> See Appendix F for more information about sound recordings.

<sup>6</sup> 17 U.S.C. § 102(a).

<sup>7</sup> "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works." 17 U.S.C. § 101.

<sup>8</sup> "A derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'." 17 U.S.C. § 101.

<sup>9</sup> 17 U.S.C. § 103.

Your work merely has to be original. Courts, following the adage, "beauty is in the eye of the beholder", have refused to require additional elements such as ingenuity, novelty, or artistic merit before upholding copyright protection. The artist's work does not have to interest everyone; it can bore many. Mechanical drawings and simple freehand sketches, for example, are protectible under copyright.<sup>10</sup>

### **Original With You**

First, the words of the author must be original to him or her. If two individuals independently wrote the exact same play, without access to the other's work, both works would be considered original to the author and each author would be entitled to copyright protection in his or her work. Because neither author copied the other's play, each would be free to market his play ' and license copyrights in the play for profit, without violating the other's rights. 17 U.S.C. § 101

If an author who, not having any exposure at all to the Disney versions of *Pocahontas*, independently created a script which, by mere chance, happened to read identically to that of the Disney production, he would not have violated Disney's copyrights. However, due to the striking similarity, Disney would be entitled to an inference that its work was copied. Under these facts, the inference would almost be impossible to rebut. If the judge or jury were somehow still convinced that the work was not copied, the owner of the independently created work would not be liable for copyright infringement.

### **Originality of Expression**

Courts have also held that to be original, a work must possess originality of expression. Slogans, names, titles and simple phrases, symbols utilizing common geometric shapes, and certain designs do not possess originality of expression, and therefore are not entitled to copyright protection.<sup>11</sup>

### **"Fixed In Any Tangible Medium Of Expression"**

Next, the work must be "fixed in any tangible medium." Section 101 of the Copyright Statutes provides that:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.<sup>12</sup>

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<sup>10</sup> 17 U.S.C. § 101-102; protected as "pictorial, graphic and sculptural works."

<sup>11</sup> Works falling under this category may, under limited circumstances, be protectable under the Trademark laws when they are used to identify goods or services. *See* 15 U.S.C. § 1114(1), and *Maidenform, Inc. v. Munsingwear, Inc.*, 195 U.S.P.Q. 297 (S.D.N.Y. 1977).

<sup>12</sup> 17 U.S.C. § 101.

Courts have taken a very broad view of what constitutes a tangible medium. The general rule is that if the work can be recorded such that it can be played back or read, it most likely qualifies as being "fixed in a tangible medium", and therefore is entitled to protection.

Because copyrights do not protect something that has not been fixed in a tangible medium of expression, even the most eloquent speech is not protectable under copyright law until it has been written or recorded. Section 102(b) of the Copyright Statutes also provides some additional examples of what is not protectable by copyright:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.<sup>13</sup>

Because the free exchange of ideas is an essential element of a democratic society, ideas themselves cannot be monopolized via the copyright laws.<sup>14</sup> It is only the artist's particular *expression* of his or her idea which can be protected. Therefore, it is permissible under the copyright laws for someone to express the same idea to others, even when the idea represents an old concept, developed by another author.<sup>15</sup>

For example, if a cartoonist had depicted a character wearing shoes with backward soles, it would not have been an infringement of the cartoonist's copyrights for someone else to copy the *idea*, and apply for a patent on such a shoe.<sup>16</sup> The U.S. Supreme Court has upheld this interpretation in a case in which it stated that a painting based on the same theme as a copyrighted work does not infringe the copyright if its only similarity is the use of a common thematic concept.<sup>17</sup> However, the more bizarre and original the recap theme, the more likely it is that a court will carve out an exception, or look to other laws, such as trademark law, the common law of unfair competition, or misappropriation law, to protect the artist's original creation.

### **HOW DO I GET MY COPYRIGHTS?**

Copyright protection is automatic once your original expression is fixed in tangible form. Therefore, protection is simultaneous with the recording of the work. In the case of a book, copyright attaches as each sentence is typed on the wordprocessor. In the case of a performance, copyright attaches when the performance is recorded on film, on paper, on videotape, or on some other medium.

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<sup>13</sup> 17 U.S.C. § 102(b).

<sup>14</sup> *Id.* § 102(b).

<sup>15</sup> The idea may be protectable as a trade secret, or with a patent, if the circumstances permit and if the subject matter falls within that which is protectable by these other means.

<sup>16</sup> However, the copier would not have qualified as the "inventor" under the patent laws. Such a patent exists. *See* U.S. Patent No. 3,823,494, issued on July 16, 1974 to Cecil Slemper. It is entitled "Footwear With Heel and Toe Positions Reversed".

<sup>17</sup> *Franklin Mint Corp. v. National Wildlife Art Exch.*, 575 F.2d 62, 64-64 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978).

## HOW LONG DO MY COPYRIGHTS LAST?

Generally speaking, your copyrights last from creation of your work until 50 years after your death."<sup>18</sup> Because the copyright laws have changed over the years, the duration of copyrights in a work depends upon when the work was created. The various rules are summarized in Appendix B.

## WHAT ARE MY RIGHTS?

### The Author's Copyrights

As an author, you should know your rights. Only then can you derive the maximum economic benefit from your works of art. Your rights are specific, and include more than merely the right to prevent someone's unauthorized copying. Section 106 of the Copyright Statutes lists your rights:

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) 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, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>19</sup>

In addition to these rights, if your painting, drawing, print, or sculpture qualifies as a "work of visual art", then you have other rights, commonly known as "moral rights". These are set forth in Appendix G.

### Collective Works

Suppose that someone creates an anthology of stories, or creates a magazine that is composed of a number of articles or stories from various authors. Who owns what? The overall work is

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<sup>18</sup> 17 U.S.C. § 302(a). On the other hand, the "moral rights" of attribution and integrity are enforceable only during the lifetime of the author. *See* 17 U.S.C. § 106A.

<sup>19</sup> 17 U.S.C. § 106. However, 17 U.S.C. § 109(c) provides that "...the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."

called a "collective work".<sup>20</sup> Each separate contribution is owned by its respective owner and the creator of the collective work must obtain permission from the owner (if it is still subject to copyright) before it can be added to the collective work. However, once permission is obtained, Section 201(c) of the Copyright Statutes provides that:

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.<sup>21</sup>

### **Your Rights To Use Others' Works**

When you use others' ideas to stimulate your own creativity, should be aware of the boundaries between permissible use and copyright infringement. The Copyright Statutes allow one section for the author's exclusive rights, section 106, and then devote fourteen sections to limitations on those rights, sections 107 through 120. Two of those sections will impact you more than the rest. Section 107 describes the 'fair use' limitations, and section 110 describes the exemptions of certain performances and displays, such as classroom performances, or performances "in the course of services at a place of worship". We have reproduced section 110 in full in Appendix C.

Most people have heard the expression 'fair use' used with respect to copyrights. However, most people stop with learning those two words and substitute their own idea of what constitutes "fair" use. The Copyright Statutes set forth what constitutes "fair use", and the courts have further elaborated on it. Section 107 states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use including whether such use is of a commercial nature or is for nonprofit educational purposes,<sup>22</sup>
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyright work as a whole; and

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<sup>20</sup> "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101.

<sup>21</sup> 17 U.S.C. § 201(c).

<sup>22</sup> The "crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562, 225 USPQ 1073 (1985).

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>23</sup>

It might be difficult for you to determine in advance whether a use of a work qualifies as a fair use.<sup>24</sup> So, we have listed below some of the more common permissible uses of others' works:

- copying portions of a work for the purpose of parodying that work;<sup>25</sup>
- recording, on your home VCR, a TV program for viewing at a later time;<sup>26</sup>
- copying, by a library patron, of a single magazine article for private study;<sup>27</sup>
- copying, by a library patron, of an entire book for private study, if the library "has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price";<sup>28</sup>
- selling, or otherwise disposing of, a lawfully-made copy of a copyrighted work (but not renting or leasing the copy),<sup>29</sup> and displaying publicly a lawfully-made copy of a work, "to viewers present at the place here the copy is located."<sup>30</sup>

### **May I modify, rearrange, or record someone else's work?**

The modification, rearrangement or recording of a work results in the creation of a derivative work. You may not properly create a derivative work of a third party's work unless the work is not copyrighted, or you have obtained permission from the copyright owner.

### **It I modify, rearrange or record someone else's copyrighted work, what do I own?**

If you add original work to the modification, rearrangement or recording, then you hold the copyright in that portion you created. However, your right to make use of the work as a whole will still be subject to the permission of the owner of the underlying work.

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<sup>23</sup> 17 U.S.C. § 107.

<sup>24</sup> For a thorough analysis of the four factors as applied to literary works, see *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 37 F.3d 881 (2d Or. 1994) (copying scientific articles to archive in your personal files is not fair use). Of course, the safest course of action is to obtain permission before using another's work.

<sup>25</sup> *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 29 USPQ2d 1961 (1994) (reversing the Sixth Circuit's finding that a parody of the copyrighted song "Pretty Woman" was not a "fair use" under section 107).

<sup>26</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417,449, 220 USPQ 665 984). The question was whether Sony's selling of the copying equipment violated plaintiffs' rights under the Copyright Statutes. The Supreme Court said "no", because "time-shifting" for those watching a television program enlarges the viewing audience, and does not impair plaintiffs' commercial right in the value of the copyright.

<sup>27</sup> 17 U.S.C. § 108(d).

<sup>28</sup> 17 U.S.C. § 108(e).

<sup>29</sup> 17 U.S.C. § 109(a). This is referred to as the "doctrine of first sale" doctrine cannot be used to justify the renting or leasing of computer programs or phonorecords. See 17 U.S.C. § 109(b)(1)(A).

<sup>30</sup> 17 U.S.C. § 109(c). He may not, however, broadcast an image of the copy to be viewed at other locations other than the location of the copy.

**If I modify, rearrange or record someone else's work that is no longer subject to copyright, do I have a copyright in the new work?**

If you add original elements to the modification, rearrangement, or recording, then you hold a copyright in the new work.

**NAFTA And Its Effect On Your Rights**

The North American Free Trade Agreement Implementation Act revived copyright protection in certain motion pictures whose country of origin is a NAFTA signatory.<sup>31</sup> In order for the copyright to be revived, the copyright to the motion picture must have entered the public domain in the United States because it was published without the notice required under the Copyright Act of 1976 as originally enacted, on or after January 1, 1978, and before March 1, 1989. The revived copyright has the term that it would have had, were it not to have lapsed in the first place.

Therefore, one should pay particular attention to the copyright date of foreign films which had fallen into the public domain due to failure to provide notice. The copyright in some of those works is now enforceable, meaning that copying, or the production of a derivative work based on the motion picture, is a violation of one of the exclusive copyrights of the original owner.

**NOTICE**

**Why Should I Warn Others About My Copyrights?**

Works published before March 1, 1989, generally lost all copyright protection if they were published without a copyright notice. For all works published on or after March 1, 1989, there is no longer a requirement that copyright notice be placed on the work. However, even for works published on or after March 1, 1989, we strongly encourage you to put a copyright notice on each work, because it lets people know who the copyright owner is (for possible licensing), and it also prevents an infringer from claiming that his infringement was innocent.

**How Do I Warn Others About My Copyrights?**

Each visually perceived copy of a work may contain a notice. The notice must be placed on the copies in a manner and location to give reasonable notice of the claim of copyright. The notice must consist of the following three elements:

- (1) the symbol © (the letter C in a circle), or the word "Copyright", or the abbreviation "Copr."; and
- (2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient.... and
- (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.<sup>32</sup>

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<sup>31</sup> 17 U.S.C. § 104A.

<sup>32</sup> 17 U.S.C. § 401(b).

The following are examples of proper copyright notices for published works:

Copyright 1996 John Doe  
 © 1996 Jane Doe  
 Copr. 1996 John Doe

If the work is unpublished, an appropriate notice would be:

Unpublished Work © 1996 Jane Doe

A special form of notice is required for phonorecords of sound recordings. The notice must be placed on the surface of the phonorecord, phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright. The form of notice consists of following three elements:

- (1) the symbol (the letter P in a circle); and
- (2) the year of first publication of the sound recording; and
- (3) the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.<sup>33</sup>

The following is an example of proper notice:

©1996 John Doe

## REGISTRATION

### Why Should I Register My Work?

Registration is not required to preserve your copyrights. However, you must register your copyright before you are allowed to sue someone who infringes your work. As a further incentive to register your copyright, unless you register your copyright within three months after first publication, or prior to someone infringing your work, whichever is later, the judge is not allowed to give you "statutory" damages of between \$200 and \$20,000 (\$100,000 if the infringement was willful), and is also not allowed to order the infringer to pay your attorneys' fees.

### How Do I Register My Work?

Registration of a copyright is a fairly simple matter. Copyright forms and instructions can be obtained by calling the Copyright Office Forms Hotline at 202-707-9100. If you call the hotline, you will need to know the name of the forms you desire. Most libraries should have forms and

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<sup>33</sup> *Id.*

instructions that can be copied. The easiest way to find information on the forms and instructions is through the Internet, by contacting the Copyright Office's World Wide Web ("WWW") site at <http://lcweb.loc.gov/copyright>.

Along with the completed registration form, you will have to provide a deposit of the work being registered, and your check or money order for the filing fee.<sup>34</sup>

The following table lists the forms you will need to register your works.

<b>COPYRIGHT REGISTRATION FORMS</b>	
To Register a Copyright In:	Use Form:
published and unpublished nondramatic literary works	TX
serials, works issued or intended to be issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely (periodicals, newspapers, magazines, newsletters, annuals, journals, etc.)	SE  Short Form/SE and Form SE/GROUP (specialized SE forms for use when certain requirements are met)
a complete month's issues of a daily newspaper when certain conditions are met	G/DN
published and unpublished works of the performing arts (musical and dramatic works, scripts, plays, pantomimes and choreographic works, motion pictures and other audiovisual works)	PA
published and unpublished works of the visual arts (pictorial, graphic, and sculptural works, including architectural works)	VA
published and unpublished sound recordings, and combined musical composition and sound recording where both are owned by the same party	SR

<sup>34</sup> In 1998, this nonrefundable filing fee was \$20.00.

## WHEN DO I NOT OWN ALL THE COPYRIGHTS IN MY WORK?

Who has the right to license or sell subsidiary rights in the work for profit? While the answer is obvious in the case of a single author, the answer is not quite so obvious in other situations.

As a reminder, regardless of what is discussed below regarding ownership, do not forget contract law. Regardless of who the author can always agree to assign all his rights in the work to someone else.

### When, As A Full-time Employee, You Create Within The Scope Of Your Employment

The copyrights in a “work made for hire” belong to the employer, not the author/creator. The Copyright Statutes define a “work made for hire” as:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.<sup>35</sup>

The Copyright Statutes explicitly state who owns the copyrights in a “work made for hire”:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.<sup>36</sup>

What if Mr. Rich (businessman) offers to commission you to make a giant sculpture, which he will put in front of his mansion, or in front of his corporate headquarters. He tells you that he also wants to take a picture of it, and sell postcards and other things with that picture on it in his nationwide chain of arts and crafts stores. You look forward to several months of work, and copyright royalties for the rest of your life from the copies of your creation. After Mr. Rich talks to his lawyer, he offers to pay for the sculpture by putting you on his payroll while you are creating the sculpture, so that you can “have a steady job”. After you show your first few check stubs to your friends, they tell you that Mr. Rich hired you in order to automatically own all the copyrights in your creation. Can Mr. Rich really get all your copyrights that way? Yes, if a court decides that you qualify as an “employee”.

“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are 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

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<sup>35</sup> 17 U.S.C. § 101.

<sup>36</sup> 17 U.S.C. § 201(b).

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."<sup>37</sup>

### **When, As An Independent Contractor, You Agree That Your Work Will Be A "Work Made For Hire"**

Notice that subsection (2) of the definition of a "work made for hire" applies to only nine categories of works. As an independent contractor, you can agree beforehand that your creative work will be a "work made for hire", 'but unless the work falls into one of those nine categories, you still own copyrights in that work.<sup>38</sup> Some courts have also added the a requirement to subsection (2) that the written instrument must be signed *before* you begin your work.<sup>39</sup>

### **When You Are A Joint Author**

Where there are joint authors, the authors are considered co-owners the work.<sup>40</sup> Joint authorship applies to a joint work, which "is prepared by two or more authors with the intention that their contributions merged into inseparable or interdependent parts of a unitary whole."<sup>41</sup>

But what does this really mean to the joint authors? The courts have determined that co-ownership of a copyright entitles each author to separately pursue the exploitation of the work. However, each author must share the profits gained by his individual exploitation of the work. Of course, joint authors are free to contract among themselves and thus agree not to share profits, or devise their own method of allocating the profits between themselves.

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<sup>37</sup> *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 109 S.Ct. 2166, 2178- 79 (1989) (footnotes omitted) (holding that the sculptor of the sculpture entitled "Third World America" was an independent contractor, rather than an employee, of the association and, thus, the sculpture was not a "work made for hire"). But cf. *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567-68, 151 USPQ 666 (2d Cir. 1966) (interpreting the 1909 Copyright Act, and stating that an independent contractor is an "employee" and a hiring party an "employer" for purposes of the statute if the work is made at the hiring party's "instance and expense"). The Second Circuit followed this precedent 29 years later in *Playboy, Enterprises Inc. v. Dumas*, 34 USPQ2d 1737, 1744 (2d Cir. 1995), to hold that paintings prepared by an independent contractor for Playboy magazine before January 1, 1978 were "works made for hire".

<sup>38</sup> The language of the statute was not complied with in two regards: (i) architectural drafting does not fall within the nine enumerated categories of activities which may be done by independent contractors "for hire" . . . ." *M.G.B. Homes, Inc. v. Amemn Homes, Inc.*, 903 F.2d 1486, 1492 (11th Cir. 1990).

<sup>39</sup> *Schiller & Schmidt, Inc. v. Nonlisco Corp.*, 969 P.2d 410, 23 (7th Cir. 1992) (Posner, J.) (holding that ten agreement precede the creation of the work). But see *Playboy Enterprises Inc. v. Dumas*, 34 USPQ2d 1737, 1744 (2d Cir. writing requirement of Section 101(2) can be met by a writing executed after the work is created, if the writing confirms a prior agreement, either explicit or implicit, made before the creation of the work")

<sup>40</sup> "Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work." 17 U.S.C. § 201(a).

<sup>41</sup> 17 U.S.C. § 101. "A person who merely describes to an author what the commissioned work should do or look like is not a joint author for purposes of the Copyright Act. . . . The supplier of an idea is no more an 'author' of a program than is the supplier of the disk on which the program is stored." *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989).

## When You Assign Or License Your Copyrights

What if you, the owner of the copyrights in your work, decide you want to transfer rights in the work to another? How does the transfer work? A copyright is just like any other personal property, in that it can be transferred in whole or in part.<sup>42</sup> However, in order to transfer the copyright in your work to another (including "transferring" by an exclusive license), the Copyright Statutes require that the transfer be in writing and be signed by the owner of the copyright, or by the owner's duly authorized agent.<sup>43</sup>

Any of the exclusive rights granted to a copyright owner, and any permutation of those rights, may be transferred and owned separately.<sup>44</sup> Use your creativity here! You can divide up your copyrights, giving non-exclusive and exclusive (Just so long as they do not conflict!) licenses to various people in the manner which gives you the greatest economic benefit. See Appendix D for samples of forms you can use for this purpose. A copyright is considered to be personal property. But, as you know, it isn't like a desk or a computer that you carry away with you when you buy it. When the rights in a copyright are sold, there is nothing physical to be transferred. So, how do you know that you are the rightful owner? When there are conflicting transfers (note that in such a case the owner has done something seriously wrong), the transfer signed first prevails if it is recorded with the Copyright Office within one month after its execution in the United States (or within 2 months after signing outside the United States) or any time before the later transfer.<sup>45</sup> Where there is a conflict between a transfer of ownership and a written nonexclusive license, the written nonexclusive license prevails if it was signed before the transfer was signed, or before recordation of the transfer.<sup>46</sup> As you might expect, in order for the later transfer or nonexclusive license to prevail, it must be made in good faith, without notice of the prior transfer, and, in the case of conflicting transfers, for valuable consideration.

## Termination of Transfers

Of course a copyright owner can contract with third parties to provide that the copyrights he granted in his work will terminate at a particular time or after a particular event, but, in addition, if the work was created after January 1, 1978, and if it was not a work made for hire, his copyrights automatically are eligible to revert back to him thirty-five years later, if he gives proper written notice within a five-year window.<sup>47</sup> Despite this right to terminate, it must be kept in mind that a derivative work created with permission of the owner before termination may continue to be utilized. For termination of rights granted prior to January 1, 1978, please consult Appendix E.

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<sup>42</sup> 17 U.S.C. § 201(d).

<sup>43</sup> 17 U.S.C. § 204(a).

<sup>44</sup> "Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title." 17 U.S.C. § 201(d)(2).

<sup>45</sup> 17 U.S.C. § 205(d).

<sup>46</sup> 17 U.S.C. § 205(e).

<sup>47</sup> 17 U.S.C. § 203.

## WHAT CAN I DO TO COPIERS?

When another party exercises one of your exclusive rights in your copyrighted work without your permission, then he has "infringed" your rights in the work. When this happens, you are entitled to sue the infringer in federal court. However, before you may file suit, you must first file your copyright registration with the Copyright Office.

The Copyright Laws allow the copyright owner to ask the court to "enjoin" (stop) the continued infringement of the copyright (this is known as an requesting an 'injunction').<sup>48</sup> The copyright owner may also request that the infringing articles be destroyed. Additionally, the copyright owner is entitled to either (i) the copyright owner's damages and the infringer's profits (to the extent they exceed the copyright owner's damages) or (ii) if certain preconditions are met<sup>^</sup> The above are on, just sit by and let damages build up, but must bring suit within three years Sta after the claim accrued.<sup>49</sup>

In order to encourage the registration of copyrights, the Copyright Laws provide:

no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Statutory damages range from \$500 to \$20,000, and may be increased to \$100,000 if the infringement is committed willfully, and reduced to \$200 if done innocently.<sup>50</sup> In essence, this relieves the copyright owner from actually proving his damages or the infringer's profits.

## CONCLUSION

The copyright laws provide an interesting, if not complex, mechanism to allow authors and performers to benefit from their labor and talent. Don't forget that copyright law is merely the framework for the protection of your creations. In order to profit from your creations, you will be confronted with contracts that we have not discussed. Ask TALA for help.

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<sup>48</sup> 17 U.S.C. § 502.

<sup>49</sup> 17 U.S.C. § 507(b). Even if you wait less than three years, that may be too long, if the infringer can prove that your delay was unreasonable. "The defense of laches requires proof that the party bringing the suit engaged in unreasonable and inexcusable delay that prejudiced the defendant." *MacLean Associates, Inc. v. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 780 (3rd Cir. 1991) (citing *Waddell v. Small Tube Prods., Inc.*, 799 F.2d 69, 74 (3d Cir. 1986)).

<sup>50</sup> 17 U.S.C. § 504.

## APPENDIX A: HELPFUL WORLD WIDE WEB PAGES

The list below contains a number of World Wide Web ("WWW") Internet sites that should be helpful in locating additional information. Because of the dramatic expansion of the WWW this list should be considered merely a starting point for your journey. If you have a question on a particular topic, you should conduct a search using any one of the various search engines available on the WWW (such as those found at [www.sarch.com](http://www.sarch.com)). We included a few blank rows for you to add the addresses of your own favorite sites.

World Wide Web URL	Description
<a href="http://www.law.cornell.edu/usc/17">www.law.cornell.edu/usc/17</a>	Copyright Act of 1976
<a href="http://lcweb.loc.gov/copyright">lcweb.loc.gov/copyright</a>	United States Copyright Office homepage
<a href="http://www.ascap.com">www.ascap.com</a>	American Society of Composers, Authors and Performers home page
<a href="http://bmi.com">bmi.com</a>	BMI home page
<a href="http://nmpa.org">nmpa.org</a>	National Music Publishers' Association, Inc. home page. Also provides access to The Harry Fox Agency, Inc.
<a href="http://www.hayboo.com">www.hayboo.com</a>	Haynes and Boone, L.L.P. home page, links to helpful legal information

While TALA hopes that the above WWW sites will help you, it does not approve or endorse any of the information that may be found at any of these sites.

## APPENDIX B: DURATION OF COPYRIGHTS

<b>Works Created On or After January 1, 1978</b>	
Single Author	From creation until 70 years after author's death <sup>51</sup>
Joint Works	From creation until 70 years after death of the last surviving author <sup>52</sup>
Works Made for Hire	The shorter of (i) 95 years from first publication <sup>53</sup> or (ii) 120 years from creation. <sup>54</sup>
Anonymous <sup>55</sup> and Pseudonymous <sup>56</sup> Works	The shorter of (i) 95 years from first publication or (ii) 120 years from creation, unless the name of one of the authors is later recorded, in which case the rules of a single or joint author apply. <sup>57</sup>

Prior to January 1, 1978, only published works were protected by the copyright law. During this period, copyright protection was gained by placing the proper copyright notice on the work. An unpublished work could be protected under state law, provided it remained unpublished. On January 1, 1978, all copyright laws were consolidated under federal law, and the term of that date.<sup>58</sup>

<sup>51</sup> 17 U.S.C. § 302(a).

<sup>52</sup> 17 U.S.C. § 302(b).

<sup>53</sup> "'Publication' is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication." 17 U.S.C. § 101. Distribution to people who are under an explicit or implicit obligation to not disclose the work does not constitute publication.

<sup>54</sup> 17 U.S.C. § 302(c).

<sup>55</sup> "An 'anonymous work' is a work on the copies or phonorecords of which no natural person is identified as author." 17 U.S.C. § 101.

<sup>56</sup> "A 'pseudonymous work' is a work on the copies or phonorecords of which the author is identified under a fictitious name." 17 U.S.C. § 101.

<sup>57</sup> 17 U.S.C. § 302(c). "Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and intent with requirements that the Register of Copyrights shall prescribe by regulation."

<sup>58</sup> 17 U.S.C. § 301(a).

### Works Created Before January 1, 1978; But Not Published or Registered Before that Date

The rules for works created after January 1, 1978, apply with the following exceptions: (i) the term may not expire before December 31, 2002, and (ii) if the work is published on or before December 31, 2002, then the term cannot expire before December 31, 2047.

The rules for works created and published or registered before January 1, 1978, can become quite complex and depend upon a number of factors. The following table gives a summary of some of the most common situations. However, if a particular situation is not addressed below, you should consult an attorney.

### Works Created and Published or Registered Before January 1, 1978

Published without copyright notice

Prior to 1978 when a work was published without the required copyright notice, the owner lost control of the work and it was dedicated to the public.

### Works Created and Published or Registered Before January 1, 1978

Published with copyright notice or unpublished and registered.

Prior to 1978, works were entitled to two 28 year terms, an initial term and a renewal term.

*In Initial Term on January 1, 1978*

If the work was in its initial 28 year term on January 1, 1978, then it is entitled to a 67 year renewal term, giving a total term of 95 years. There is no special filing required to obtain the renewal term, although certain benefits may be gained if a filing is made at the proper time.<sup>59</sup>

*In Renewal Term on January 1, 1978*

If the work was in its renewal term between December 31, 1976, and December 31, 1977, inclusive, or if a renewal registration was applied for during that period, the term is extended to provide a total term of 95 years from the date copyright was originally secured.<sup>60</sup>

<sup>59</sup> 17 U.S.C. § 304(a).

<sup>60</sup> 17 U.S.C. § 304(b).

The terms listed above are only approximate, because the Copyright Statutes provide that the term of copyright protection runs until the end of the calendar year in which it expires.<sup>61</sup> So, an author could have several months added onto the term of his copyrights.

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<sup>61</sup> 17 U.S.C. § 305.

## APPENDIX C: PERMISSIBLE PERFORMANCES AND DISPLAYS OF OTHERS WORKS<sup>62</sup>

"Notwithstanding the provisions of section 106, the following are not infringements of copyright:

- (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made
- (2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if—
  - (A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a non-profit educational institution; and
  - (B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and
  - (C) the transmission is made primarily for-
    - (i) reception in classrooms or similar places normally devoted to instruction, or
    - (ii) reception by persons to whom the transmission is of the directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or
    - (iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;
- (3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;
- (4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if-
  - (A) there is no direct or indirect admission charge; or
  - (B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions;

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<sup>62</sup> 17 U.S.C. § 110.

- (i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and
  - (ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and
  - (iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;
- (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
- (A) a direct charge is made to see or hear the transmission; or
  - (B) the transmission thus received is further transmitted to the public;
- (6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization; the exemption provided by this clause shall extend to any liability for copyright infringement that would otherwise be imposed on such body or organization, under doctrines of vicarious liability or related infringement, for a performance by a concessionaire, business establishment, or other person at such fair or exhibition, but shall not excuse any such person from liability for the performance;
- (7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring;
- (8) performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission or visual signals, if the performance is made without any purpose or direct or indirect commercial advantage and its transmission is made through the facilities of:
- (i) a governmental body; or (ii) a noncommercial educational broadcast station (as defined in section 397 of title 47); or (iii) a radio subcarrier authorization (as defined in 47 CFR 73.293-73.29S and 73.593-73.595); or (iv) a cable system (as defined in section 111(f)).
- (9) performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose or direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8)(iii), *Provided*, That the provisions of this clause shall not be applicable to

more than one performance of the same work by the same performers or under the auspices or the same organization.

(10) notwithstanding paragraph 4 above, the following is not an infringement of copyright: performance of a nondramatic literary or, musical work in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a non-profit veterans' organization to which the general public is not invited, but not including the invitees of the organizations, if the proceeds from the performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. For purposes of this section the social functions of college or university fraternity or sorority shall not be included unless the social function is held solely to raise funds for a specific charitable purpose.

**APPENDIX D: FORMS FOR TRANSFERS OF OWNERSHIP  
TRANSFER OF COPYRIGHT**

For valuable consideration, the receipt and sufficiency of which is hereby acknowledged, \_\_\_\_\_ ("Owner"), whose address is \_\_\_\_\_, assigns and transfers to \_\_\_\_\_, whose address is \_\_\_\_\_, all of the Owner's right, title, and interest in the copyrights for the works described below, except for the copyrights listed below as being retained by Owner:

Description of Works	Copyrights Retained

\_\_\_\_\_  
Owner's signature

State of \_\_\_\_\_

County of \_\_\_\_\_

Before me appeared \_\_\_\_\_ and acknowledged under oath that he/she is the person whose signature appears above, and that he/she signed this instrument for the purpose stated.

SIGNED AND SWORN TO BEFORE ME on \_\_\_\_\_, 19\_\_.

My Commission Expires:

\_\_\_\_\_

\_\_\_\_\_  
Notary Public's signature

**ART WORK SALE AGREEMENT – VERSION A**

\_\_\_\_\_ ("Artist"), residing at \_\_\_\_\_, and  
\_\_\_\_\_ ("Purchaser"), residing at \_\_\_\_\_,  
\_\_\_\_\_, agree as follows:

1. Artist sells to Purchaser the original work of art described below (the "Work"):

Title: \_\_\_\_\_

Medium: \_\_\_\_\_

Dimensions: \_\_\_\_\_

2. The purchase price of the Work is \$ \_\_\_\_\_, payable as follows:

\_\_\_\_\_  
 \_\_\_\_\_

3. Artist retains all copyrights in the Work, including the right of reproduction in all media, and all other rights not expressly listed below:

\_\_\_\_\_  
 \_\_\_\_\_

4. Purchaser shall not permit the Work to be reproduced without the written consent of Artist.

\_\_\_\_\_  
 Artist's (or Artist's Agent) signature

\_\_\_\_\_  
 Purchaser's signature

\_\_\_\_\_  
 Date

### ART WORK SALE AGREEMENT - VERSION B

\_\_\_\_\_ ("Artist"), residing at \_\_\_\_\_  
 and \_\_\_\_\_ ("Purchaser"), residing at \_\_\_\_\_  
 \_\_\_\_\_, agree as follows:

1. Artist sells to Purchaser the original work of art described below (the "Work"):

Title: \_\_\_\_\_

Medium: \_\_\_\_\_

Dimensions: \_\_\_\_\_

2. The purchase price of the Work is \$ \_\_\_\_\_, payable as follows:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

3. Artist retains all copyrights in the Work, including the right of reproduction in all media, and all other rights not expressly listed below:

\_\_\_\_\_  
 \_\_\_\_\_

4. Purchaser shall not permit the Work to be reproduced without the written consent of Artist.
5. Artist shall have the right to borrow the Work from Purchaser:
  - a. for one period of up to forty-five days each calendar year for the purpose of exhibiting the Work (Artist shall give not less than ninety days' advance written notice to Purchaser); and
  - b. for one period of up to thirty days each calendar year for purpose of reproducing the Work (Artist shall give not less than sixty days' advance written notice to Purchaser).

Artist shall be responsible for payment of all shipping charges, and Artist shall insure the Work, or shall assume responsibility for the reasonable market value of the Work, which market value shall be agreed upon in good faith, in writing, beforehand, by the Artist and Purchaser.

6. A copy of this Agreement or a written statement setting forth the conditions contained in paragraph 5 of this Agreement shall accompany any fore subsequent sale or transfer of the Work, which sale or transfer shall be subject to those conditions.
7. The risk of loss of or damage to the Work shall pass to Purchaser on the date of this Agreement.

This Agreement is made in the State of \_\_\_\_\_ on the date set forth below.

\_\_\_\_\_  
Artist's (or Artist's Agent) signature

\_\_\_\_\_  
Purchaser's signature

\_\_\_\_\_  
Date

**APPENDIX E: TERMINATION OF TRANSFERS AND LICENSES**  
(covering extended renewal term)<sup>63</sup>

The following is an excerpt from Section 304(c) of the Copyright Statutes, addressing termination rights in certain instances.

(c) *Termination of transfers and licenses covering extended renewal term.* — In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by the subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978 whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the author, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that

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<sup>63</sup> 17 U.S.C. § 304(c).

author is the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before the date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the

termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under the title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

## APPENDIX F: SOUND RECORDINGS

What is a Sound Recording?

The Copyright Statutes define sound recordings as:

works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.<sup>64</sup>

The author of a sound recording is the performer, or the neer who captures, processes, and fixes the performer's sound recording, or both of them. Copyright in a sound recording as, or a substitute for, copyright in the underlying musical composition.

### Exclusive Rights in Sound Recordings

"The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4)."<sup>65</sup> Those four exclusive rights are:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or rental, lease, or lending; ...
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>66</sup>

"The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."<sup>67</sup>

### Compulsory Licensing of Nondramatic Musical Works

The rights of an owner of a nondramatic musical work to reproduce and distribute copies of the work are subject to compulsory licensing under Section 115 of the Copyright Statutes. Although there are some fine details of the compulsory licensing mechanism that should be consulted before obtaining a compulsory license, in essence any person may obtain a compulsory license to make and distribute phonorecords (not movies or other audiovisual works) of a nondramatic musical work. The distribution must be to in public for private use. The license is possible only

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<sup>64</sup> 17U.S.C. §101.

<sup>65</sup> 17 U.S.C. § 114(a).

<sup>66</sup> 17 U.S.C. §106. However, 17 U.S.C. § 109(c) provides that "... the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."

<sup>67</sup> 17 U.S.C. § 114(b).

if the original phonorecords were rightfully distributed in the United States.<sup>68</sup> This right is commonly known as the "mechanical right".

The license also allows one to make a musical arrangement of the work to conform to some particular style or manner of interpretation, as long as the basic melody and fundamental character of the work are not changed. Interestingly, the arrangement is not protectable as a derivative work without the consent of the copyright owner.<sup>69</sup>

In order to obtain a compulsory license, and avoid becoming an infringer, you must notify the copyright owner of your intention to obtain a compulsory license within thirty days after making the recording, and before you distribute the phonorecord.<sup>70</sup>

The statutory royalty rate as of January 1, 1996 was the greater of (i) \$.013 per minute of playing time or (ii) \$.0695.<sup>71</sup> If the phonorecord is rented, leased, or lent, then the royalty is due each time the phonorecord is rented, leased, or lent.

In order to further encourage registration of copyrights, and to make royalty payments possible, the owner must be identified in the registration or other public records of the Copyright Office to be entitled to receive compulsory license royalties. If the owner is not so identified, then there is no right to recover royalties for any previously made and distributed phonorecords.<sup>72</sup>

### **Negotiated Mechanical Rights and Royalties**

Because the compulsory licensing mechanism of the Copyright Statutes does not include works that have not been recorded and distributed in the United States, and also because of the strict payment terms, most owners of nondramatic musical works allow private organizations to contract for and collect their mechanical royalties. In certain instances, the mechanical royalty rate is negotiable with a ceiling at the compulsory royalty rate. The Harry Fox Agency, Inc., established by the National Music Publishers' Association, Inc., represents most nondramatic musical work owners and undertakes to collect mechanical royalties and to pay the owners.

### **Synchronization Right**

The synchronization right is the right to use music for nondramatic uses, such as background music in a film, television show or other program. Again, the Harry Fox Agency, Inc. represents most owners of sound recordings and the underlying musical work and handles the collection and distribution of royalties.

### **Performing Rights Organizations**

Certain performing rights organizations, such as the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music Incorporated (BMI) and the Society of European Songwriters, Authors, and Composers (SESAC), have been formed to license and collect

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<sup>68</sup> 17 U.S.C. § 115(a)(1).

<sup>69</sup> 17 U.S.C. § 115(a)(2).

<sup>70</sup> 17 U.S.C. § 115(b).

<sup>71</sup> 17 U.S.C. § 115(c)(2), and §§ 801-803.

<sup>72</sup> 17 U.S.C. § 115(c)(1),

royalties for the public performance of nondramatic musical works. These organizations, license to virtually every venue where music is played, such as a radio station, television station, concert hall, and the local restaurant and bar. After royalties are collected from these licensees, the organizations pay royalties to the songwriters, composers and publishers for the use of their works. The royalties are generally based on statistical analyses of whose works have played the most. Membership requirements vary from one organization to another. However, a songwriter or composer generally must have a commercially recorded or published (in sheet music) composition or one that is likely performed in a venue licensed by the organization. 1

## APPENDIX G: THE "MORAL" RIGHTS FOR WORKS OF VISUAL ART

This appendix contains three sections of the Copyright Statutes: the definition of a work of visual art, the new "moral" rights of attribution and integrity (which became effective June 1, 1991), and limitations on those rights as related to buildings.

### What is a "Work of Visual Art"?

17 U.S.C. § 101 states:

A "work of visual art" is—

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

- (A)
  - (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, database, electronic information service, electronic publication, or similar publication;
  - (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
  - (iii) any portion or part of any item described in clause (i) or (ii);
- (B) any work made for hire; or
- (C) any work not subject to copyright protection under this title.

### What Are My "Moral Rights" In My Works of Visual Art?

17 U.S.C. § 106A states:

(a) *Rights of attribution and integrity.* — Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

- (1) shall have the right—
  - (A) to claim authorship of that work, and
  - (B) to prevent the use of his or her name as the author any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right

(b) *Scope and exercise of rights.* — Only the author of a work of visual art has the rights conferred by subsection (a) in that work whether the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

(c) *Exceptions.* —

(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item describe in subparagraph (A) or (B) of the definition of "work of visual art in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) *Duration of rights.* —

(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) *Transfer and waiver.* —

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright under a copyright in that work.

### **How Are My Moral Rights Affected If My Artwork Is Installed In A Building?**

17 U.S.C. § 113(d) states:

(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990 [June 1, 1991], or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless— as some additional question

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or TALA

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to

paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

(3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

## APPENDIX H: LFAQ's (LESS-FREQUENTLY ASKED QUESTIONS)

*Can a cartoon character be protected by copyright?*

If you mean can the cartoon character by itself be protected, apart from the book or strip in which it appears, and shown in a different pose, the courts are divided on that question, although most appear to say that the character is protectible. "In determining whether a character in a second work infringes a cartoon character, courts have generally considered not only the visual resemblances but also the totality of the characters' attributes and traits."<sup>73</sup>

On the other hand, any two dimensional image, whether serious or funny, is protected from copying into any other medium, whether it be by photograph, photocopy, sculpture, or scanning onto a computer screen. In other words, a three dimensional sculpture based on the two dimensional cartoon is a derivative work which infringes the original two dimensional version. The fact that the infringer transformed the two dimensional image into three dimensions does not allow him to escape the original artist's copyright.<sup>74</sup>

*Who owns the copyright when a free-lance artist is commissioned to create the work?*

This turns on whether the free-lance artist has entered into a written agreement assigning his copyright to the commissioning party. If the freelancer has assigned his copyright to the commissioning party, then the commissioning party owns it. However, if the free-lancer has not assigned his copyright to the commissioning party in writing, then the free-lancer owns the copyright.

*Are engineering drawings protected by copyright?*

Yes, technical drawings are protected by copyright as a "pictorial, graphic, and sculptural work."<sup>75</sup> It is not necessary that the subject matter protected by copyright constitute what is normally thought of as "art." Nevertheless, making the object described in the engineering drawing is not a violation of the copyright in the technical drawing. However, doing so may violate the copyright in the object described by the technical drawing.<sup>76</sup>

*May a publisher buy a painting from an artist and publish an altered version of it without the artist's permission?*

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<sup>73</sup> *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 241, 222 USPQ 101 (2d Cir. 1983) (Superman). See also *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir.), cert. denied, 459 U.S. 880 (1982); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751,754-55,199 USPQ 769 (9th Cir. 1978) cert. denied, 439 U.S. 1132 (1979) (Mickey Mouse and other Disney characters); *Sid & Marty Krofft Television Prods., Inc. v. McDonalds Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432, 433, 45 USPQ 291 (2d Cir. 1940) (Superman); *King Features Syndicate v. Fleischer*, 299 F. 533, 535 (2d Cir. 1924) (Barney Google's horse, Spark Plug).

<sup>74</sup> *Rogers v. Koons*, 960 F.2d 301, 23 USPQ 2d 1492, (2d Cir.), cert. denied, 113 S. Ct. 365 (1992) (a sculpture of puppies, copied from a photograph on a notecard, was not protected as fair use).

<sup>75</sup> 17 U.S.C §101.

<sup>76</sup> Other intellectual property rights may be violated by doing so. Trade secret or patent rights may be at issue.

No, provided that the copyright in the painting is owned by the artist and the copyright has not expired, or provided that the alteration constitutes a violation of the artist's right of attribution and integrity.<sup>77</sup> The unauthorized alteration of a work infringes the copyright owner's exclusive right to prepare derivative works based on the copyrighted work, and the publication of the altered work infringes the copyright owner's exclusive right of public distribution. If the work qualifies as a "work of visual art", and if the change prejudicially affects the honor or reputation of the author, then the change constitutes a violation of the artist's right of attribution and integrity. In this case, despite having sold the copyright, the artist may prevent the owner from making these changes. However, if the painting is a work made for hire, the copyright in the work is owned by the employer. In this case the employer is free to make changes without the artist's permission, and without regard to the artist's honor or reputation.<sup>78</sup>

*Is it necessary to get permission from the persons depicted in a photograph and/or permission from the copyright owner prior to publishing and distributing the work?*

Good practice dictates an affirmative answer to this question. Permission should be obtained from both the subject and the copyright owner prior to publication and distribution, especially for mass-marketed works like publicity posters or billboards. The subject of the work, particularly celebrities, may have a legally protected right of publicity preventing another unauthorized use of their image for commercial purposes. Non-celebrities also have a right of privacy which may allow them to take action against unauthorized users of their image. These rights are not protected under the copyright laws; rather, they are protected under state common law and statutes. These issues involve a completely separate field of law which is beyond the scope of this booklet. As might be expected, of course, the copyright owner's permission is necessary prior to publishing and distributing work.

*How about collages of portions of copyrighted publications or other works — is permission necessary from the copyright owner of each work used?*

It depends on whether a court decides that it was fair use, or when a derivative work was created.<sup>79</sup> Cutting out portions of a lawful copy of a copyrighted work is not copyright infringement, and the owner of an authorized copy may publicly display that copy without the permission of the copyright owner.<sup>80</sup> However, in a similar case, Albuquerque A.R.T. transferred artworks from a commemorative book to individual ceramic tiles. The ceramic tiles physically incorporated the copyrighted works in a form that could be sold. Perhaps more importantly, sales of the tiles supplanted purchasers' demand for the underlying works. The court held that "[b]y borrowing and mounting the preexisting, copyrighted individual art images without the

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<sup>77</sup> 17 U.S.C. § 106A.

<sup>78</sup> *Carter v. Helmsley-Spear Inc.*, 37 USPQ 2d 1020, 1028 (2nd Cir. 1995) (vacating a permanent injunction prohibiting defendants from removing, modifying, or destroying a sculpture which the plaintiffs/artists had installed in defendants' building).

<sup>79</sup> In *Ferrato v. Castro*, 35 USPQ 2d 1445 (S.D.N.Y. 1995), the defendant made a collage of several of plaintiff's photographs. The plaintiff voluntarily dismissed her own lawsuit, because she ran out of time and money, so we do not have a court's ruling on whether the defendant's collage was fair use.

<sup>80</sup> 17 U.S.C. § 109(c).

consent of the copyright proprietors ... [Albuquerque A.R.T.] has prepared a derivative work and infringed the subject copyrights."<sup>81</sup>

*How about old movie stills — is permission required from the copyright owner before copying stills and distributing these stills to the public?*

This depends on whether the copyright in the old movie is still in force. If it is, permission is required. If not, then anyone is free to copy and distribute the stills, as they have entered the public domain. If the copyright is still in force, it is irrelevant that the work is being copied from one medium to another, or that only one frame is being copied. If the copy is recognizable as such and the copyright is still in force, doing so is an infringement.

*How do you determine if a work is protected by copyright?*

A proper copyright notice indicates that the work is protected by copyright. However, the term of copyright protection may have expired, or it may be invalid for some other reason. Therefore, a basic discussion of how the term of copyright is determined is provided in Appendix B. Nevertheless, even when a work does not contain a copyright notice, it may still be protected. This is particularly true if the work was created after the Berne Convention was implemented, on March 15, 1989. In this case, no copyright notice is required. However, if the work was created prior to the Berne Convention's implementation, it is more difficult to determine if copyright protection exists. This is because having no copyright notice usually, but not necessarily, means that the work is not protected. Under the old law, limited distribution of a work without notice did not extinguish copyright protection if sufficient efforts were made to correct the error on later copies.

If the copyright is registered, information about the work can be obtained for a fee from the U.S. Copyright Office. Call 202-707-3000. One may even choose to have a search performed in the Copyright Office. However, the results will be inconclusive because registration is not required for copyright protection to exist. It is usually difficult to determine with a high degree of certainty that a work is copyright protected without contacting the author or the copyright owner.

If a work is copied in reliance on the fact that an authorized copy does not have a copyright notice on it, then as an innocent infringer, the copier will not be liable for statutory or actual damages for the period of time before he received notice from the copyright owner that the work is protected by copyright. However, the innocent infringer must show that he was misled by the missing copyright notice. A court may, if it chooses, award the copyright owner the profits which the copier realized during the period of innocent infringement. Alternatively, the court may forbid further unauthorized copying, or may require the payment of a reasonable license fee.

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<sup>81</sup> *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343, 8 USPQ2d 1171 (9th Cir. 1988), cert. denied, 489 U.S. 1018 (1989).