



CANADIAN ARTISTS REPRESENTATION /
LE FRONT DES ARTISTES CANADIENS

ADVISORY NOTE

Copyright For Visual Artists

By Sarah Yates, Garry Conway & Paul Sanderson, reprinted from *Information for Artists: A Practical Guide for Visual Artists*, CARO (Canadian Artists Representation Ontario) © April 1990

This fact sheet summarizes the copyrights that commonly pertain to visual artists. It covers the specific rights and includes some examples for practical applications.

The information in this article includes the amendments to the Canadian Copyright Act that were brought into force on June 8, 1988. It is expected that additional amendments will be made in the near future and CARO will endeavour to update this fact sheet if the amendments alter the information provided here.

This is a summary sheet only, an expert in the field should be consulted regarding any specific application of the copyright act.

Copyright

Copyright is a bundle of rights including, for example, the exhibition right and the reproduction right. Copyright enables you as the creator of any original artwork to gain financial remuneration from the sale, public exhibition, and reproduction of your artwork.

Every creator has a vested interest in copyright. It could earn you a future income even after you've sold an artwork and provides you with something to bequeath to your heirs. It is one of a group of intellectual property rights including trademarks, patents, and industrial design. Trademarks protect a name or design that distinguishes the wares or service. Patent protects a unique invention or process. Industrial design protects the features of shape, configuration, pattern or ornament of an article. Copyright, however protects "the form of expression" (painting, book, etc.) of artists, literary, dramatic, or musical work as defined in the Copyright Act.

Exhibition Right

The exhibition right was introduced into the Copyright Act in 1988 and applies to artists' works that were created after June 8, 1988. Canada is one of very few countries that have incorporated this right into their Copyright Act. This right and the reproduction right are two very important economic rights for visual artists. The exhibition right provides tremendous economic potential for artists.

The exhibition right entitles artists to receive payment when their work is exhibited in a "public exhibition" other than for sale or hire. For example: work being displayed in an art rental program or work that is being shown in a commercial gallery with the primary intention of selling it would probably not require the payment of exhibition fees.

The exhibition right applies to "artistic works" (except a map, chart, or plan or cinematographic product that is protected as a photograph). The cinematograph mentioned above should not be confused with other types of photographs; photos other than those taken from a cinematographic work are covered by the exhibition right.

Reproduction Right

Copyright includes the sole right to reproduce a work or any substantial part of it in any material form. When an artist produces a work of art the reproduction of the work can only be authorized by the artist unless permission is given to otherwise do so. Conversely an artist may not substantially copy another copyright owners work without permission. In either case the permission should be obtained in writing.

It is often difficult to ascertain whether a work has been copied substantially enough to be considered a copyright infringement. A poster or a photograph made from a painting without permission may be considered an infringement. However, if part of an image is reproduced or the reproduction is substantially modified there may not be an infringement. In such situations it is advisable to consult a lawyer. The reproduction right could provide potential income to an artist long after the original production of an artwork through repeated use of this right.

Reprography Right

Reprographic reproduction includes database storage or retrieval, as well as making visually perceivable facsimile copies of previously published material by photocopying, xerography, duplicating (from a stencil) or similar means, microform (including microfiche), transcription or drawing (including tracing) for an overhead or slide projection. Photocopying of your illustrations in books could provide additional income to you, which is afforded by the reprography right.

Moral Rights

Moral rights fall into two categories: a. the right to integrity of art work, and b. the right to paternity of the work.

a. The right of integrity enables artists to protect their artwork against distortion, alteration or mutilation for example, in a way which prejudices their reputation or honour. When the Eaton Centre tied red ribbons around the Canada Geese in Michael Snow's mobile sculpture, he was able to argue successfully, in court, that the decorations were modified to the prejudice of his reputation and honour, as a result the Eaton Centre had to remove them. The courts' decision was based on Moral rights.

b. Paternity right is the right, where it is reasonable in the circumstances, to associate your name as an author of the work either under your real name or a pseudonym and the right to remain anonymous in regard to the artwork. It is an infringement of copyright for someone who didn't create the work to claim to be its author or creator. Moral rights may also be infringed by association. This means you may protect your visual image from association with a cause, a product, service, or institution to which you are personally opposed. If you're an anti smoker, then you may prevent your artwork from being used in advertising by a cigarette company.

An infringement of moral rights is "deemed to have occurred" if in the case of paintings, sculpture, and engravings the use has caused distortion, alteration, or mutilation of the work. Neither photographs, performing arts pieces nor videos are so protected. In any proceeding for infringement of moral rights of another the infringed person is entitled to all such remedies that under the copyright act may be granted to a right. Moral rights may be waived in whole or in part but they cannot be assigned. They are held by the creator. Moral rights subsist for the same term as copyright in a work and they may be bequeathed.

Copyright Ownership

Copyright is owned exclusively. There can, however, be more than one copyright owner in a collaborative work or works such as a multimedia works. For example, where a photograph is affixed to the work, there may be copyright ownership in the photograph and the image in the photograph plus the multimedia work itself. The same applies to video and film where there may be more than one copyright owner, the video production copyright may be owned by the producer while the music and visual images in the tape may be owned by other creators.

Copyright protection lasts for the life of the creator plus 50 years after the creator's death. In a joint copyright situation, such as a video, the work is protected until 50 years after the death of the last surviving creator. The photograph is one notable

exception to the term of protection. It lasts 50 years after the negative is made.

Establishing Ownership

In Canada, copyright doesn't have to be registered. If you meet three basic requirements copyright is automatically acquired, which are:

- 1) The work must be in a material form of more or less permanent endurance. Keep any and all notes, photographs and/or drawings, which provide some evidence of your creation that is the result of a substantial degree of industry, skill, and experience.

- 2) The work cannot be substantially reproduced from another work without permission, preferably written permission. The expropriation of images from magazines or art books used as part of a collage or even in an appropriated painting where an existing art work is copied in another form may be considered a copyright infringement. If you're in doubt about the copyright on a derivative piece, consult a lawyer.

- 3) You must be a "qualified person," for example a Canadian citizen or landed immigrant, to have copyright protection under the Copyright Act.

Registration

Although copyright does not have to be registered it does provide benefits. For example, the certificate of registration makes the legal assumption that you are the copyright owner. It is the best form of protection. To register copyright in Canada, you register the title and pay the current registration fee. Forms can be obtained from any federal office of Consumer and Corporate Affairs Canada. Mail them to:

The Copyright Office
Place du Portage
Tower 1, 5th Floor
50 Victoria Street
Hull, Quebec
J8X 3X1

The work is registered by title only and no descriptive matter is allowed to be attached to the application. There are problems with any registration system as more than one work may have the same title. Untitled works are even more problematic. This underlines the reason for keeping drawings or photographs to back up your claim to copyright.

Exceptions

There are exceptions to the general rule where you may not own the copyright to your art work. Artists, who are under contract of employment to create visual images, would not own the copyright to the artwork created under a contract of employment.

The copyright on a commissioned photograph, for example belongs to the person or organization who commissioned it unless agreed otherwise. This means that the commissioner can then sell reproductions of the photographs without your permission if they so desire and without offering you any remuneration. Contract arrangements in such situations must be clearly spelled out. Read the contract carefully to determine to whom the copyright belongs before you sign away your rights.

Fair dealing is, in effect, another exception to the exclusive nature of copyright ownership. This is when any artwork is being used for private study, research, review, or a newspaper summary.

Works in the public domain are works where the term of copyright protection has expired and are no longer protected by copyright.

International Aspects

Copyright laws vary from country to country. When a Canadian artist has artwork in another country the work is governed by the domestic copyright laws in that country. Conversely when an artist from another country has work in Canada the Copyright Act in Canada would apply to such works.

In the U.S., you register copyright by paying a fee and providing a photograph, copy of a drawing or some visual proof of creation. Work in a series may be cross-referenced or subtitled. A small © in a clearly visible place -- the bottom of a sculpture, the back of a painting, or even the base of a print, plus name and date of publication -- constitutes legal notice of copyright ownership. In the U.S. this constitutes a legal notice to copyright but in Canada, although use of the symbol is recommended, it is not required. Drawings, notes or other records filed to establish your creation of the artwork in the U.S. at a specified time will substantiate your claims of creative ownership. If your work is going to be distributed or seen in many locations on either side of the border and you can afford to do it, register its copyright in both countries to ensure yourself maximum protection. In any event it is wise to place copyright notice on your work.

Using Your Copyright and Contracts

In order to receive the maximum benefit from your copyright there are a number of technical considerations. Firstly, any arrangements you make regarding your copyright should be in writing. For example, a verbal agreement is not enough to transfer copyright ownership of your artwork. The contractual arrangements with respect to copyright are either by assignment or license. With either contractual provision any economic right can have numerous uses. When you give permission to someone else for the use of your copyright you can be very specific about what you are allowing him or her to do, for how much money, and the limits of use.

License

A license can be defined as permission by a competent authority to do some act. Generally a copyright license is a license granted by the artist or artists' agent, who as the licensor and owner of the copyright is a competent authority to grant the licensee to use the artists' work, such as making reproductions from the work or publicly exhibiting the work. The license can be very specific about what use is being permitted and what fee is to be paid for the use.

Keep in mind that generally it is to your financial advantage to set a fee and charge for use of your copyrights. It is also generally to your advantage to limit the use you are giving permission to. If someone wants to reproduce your work determine how many copies they are permitted to make, the reproduction method, a time frame and the amount of remuneration you will receive. By limiting the use it allows you to use your copyright again for another use and receive additional benefit.

Assignment

An assignment of copyright transfers ownership of the copyright. If for example you assign the reproduction right of your artwork to someone else, they become the owner of the reproduction right and can use it for any purposes they may wish in accordance with the copyright act and terms of the assignment.

If you assign your copyright to someone else, state in writing exactly what rights you're assigning including what is being granted, for how long, what you are being paid for it and what territory the agreement covers.

Generally an assignment should not be given unless you are assigning your copyright to someone else to administer your right for you where you will still be able to receive benefit from the work. The most common situation where an assignment can be to your advantage is when the assignment is to a copyright collective or agency that is clearly acting in your interest. (For sample contracts for licence and assignment consult the publication *Model Agreements for Visual Artists*, which is available from CARFAC offices.)

Copyright Collectives

A copyright collective carries on the business of collective administration of copyrights. The collective contracts with artists to administer their copyright for them and this contract may be for specific copyrights, part of copyrights, or copyright in specific situations.

Once the contract between the artist and the collective is signed the collective acts on the artist's behalf with copyright users. In the visual arts this would most commonly be art galleries, publishers, educational institutions and libraries. The collective sets fee levels and the terms of use with the copyright user and issues a license containing the specific information. For the work that the collective does there

is usually a fee charged to the artist which helps cover the collective's operating expenses, these fees are most commonly set as a percentage of each transaction the collective performs for the artist.

The collective attempts to get the highest possible fees and best terms for its artists. The fees may be set differently for each transaction, standardized for particular uses, or incorporate a single fee for a broad range of uses. As an individual it is often difficult to negotiate the terms and payment for use. It is for this reason that copyright collectives were established.

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