

Review #1: Art and Law

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Artists' Moral Rights

- Greece, 7th Century B.C. - first recorded time that artists began claiming authorship of paintings and sculptures.
- France: origin of recognition of artists' moral rights in the 19th century.
- Moral right = right of "personality"—not property.

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Right of Integrity

- Artist has the right to insist on the work being presented in its intended form, even after sale.
- Distortion or misrepresentation of work damages the artist's identity and reputation.
- Example: Buffet's refrigerator: 6 panels painted on the refrigerator—then purchaser dismantled and attempted to sell individually.

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Right of Attribution

- Artist has the right to insist that the work be associated with his/her name.
- Also can prevent his/her name from association with work that is not his/her own.

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Right of Disclosure

- Artist has the right to determine when a work can be made public and to withhold or withdraw work from public display.
- This right recognized in Europe, but not in U.S., where property rights concepts prevail when works sold. Buyer has the right to display, under U.S. law.

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Moral Rights in U.S. Law

- U.S. law has taken a strong property rights position in all areas.
- Moral rights in artworks conflicts with property rights concepts in ways that were disturbing to Americans (and still are!).
- California and New York first states to enact moral rights statutes. (1982 and 1984, respectively.)

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Visual Artists Rights Act

- Federal legislation passed in 1990.
- Defines “visual art” as painting, drawing, sculpture in single copy or limited edition, and photos produced for exhibition in limited edition.
- Excludes posters, maps, diagrams, models, videos, web sites, advertisements, and work for hire.

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VARA Provisions

- Right of attribution: right to claim ownership and prevent false use of name.
- Right to prevent intentional distortion, mutilation, or modification of work in way prejudicial to reputation of artist.
- Right to prevent destruction of a work of “recognized stature.”
- Rights endure for life of the artist (or last survivor, if joint work).

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VARA Rights Waiver

- VARA rights may be waived by written agreement.
- Joint work: waiver of one artist good for all.
- Implication: contracts for sale of artwork often contain waiver of VARA rights.

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VARA and Copyright Compared

VARA	Copyright
Right of personality (reputation of artist)	Property right (monetary interest of artist)
Limited scope of coverage	Broader coverage of art and design work
Duration: life of artist	Duration: life + 70 years
Nature of protection: protects how artwork itself is treated after sale (unless waived).	Protects artist against unauthorized duplication of work and income disruption from copies. ¹⁰

Copyright Protection

- With copyright, artist has the exclusive right to:
 - ◆ Copy
 - ◆ Distribute, sell
 - ◆ Display
 - ◆ Prepare derivative works
 - ◆ Prevent unauthorized exercise of rights stated above.

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Transfer of Copyright

- When artwork sold, artist may transfer some or all of copyrights.
- 3 elements here:
 - ◆ Creator of the artwork
 - ◆ Owner of the physical artwork
 - ◆ Owner of each of the copyrights.

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Copyright Law Changes

- First U.S. copyright law passed in 1909.
- Duration: 28 years, renewable for another 28 years.
- New law passed in 1976, effective 1978. Changed duration to life of artist + 70 years.
- Renewal periods also extended with new law.
- Bottom line: works created before 1923 are in public domain. Works created later may still be copyrighted.

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Copyright Notice and Registration

- Works created after 3/1/1989 are copyrighted regardless of proper use of the © notice symbol when published.
- Not necessary to register work with copyright office, but advisable:
 - ◆ Registration increases damages available if infringement occurs.
 - ◆ Necessary before any enforcement lawsuit can be filed.

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Copyright originality requirement

- “Original” not same as unique. Two people can copyright the same creative work simultaneously produced, as long as did not copy each other.
- Must contribute something innovative and creative to the work, even if humble.
- Example: Uncle Sam banks
 - ◆ Changes not sufficiently innovative to make it original (metal to plastic, change in size and a few other details).

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Reproductions and copyright

- Uncle Sam bank was an example of a reproduction that lacked originality.
- Other reproductions have been considered original—Rodin’s *Hand of God* sculpture reproduction was original because of complexity of producing the reproduction, given the subject matter.

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Uncle Sam bank



Hand of God, Rodin

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Copyright and Photographs

- Problem: how can photos ever be “original?”
Are copies of another image, by nature.
- Portrait photo case: portrait photos are copyrightable because of creative decisions that go into posing, shooting, and developing the photograph.
- Creating color transparencies of original artworks are not copyrightable, because lack originality.
Are exact copies, with no creative contribution.

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Ideas and expression in copyright

- Copyright protects the expression of an idea, not the basic idea itself.
- *Franklin Mint* case: copyright does not cover the idea of cardinals perched on branches, but does cover the creative expression of the idea. If expression is different, each is considered “original.”

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Transfer of copyright

- Owner may transfer copyrights in artwork in whole or in part.
- Transfer of the material object does not transfer the copyright unless there is an agreement to that effect.
- Right of display: goes along with transfer of ownership of the object. Other rights remain with the artist, unless specified in sales contract.

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Museums and copyright

- Museums typically want not only the right to display the work but also the right to reproduce in form of photos for catalog and promotional materials and reproductions for the museum shop.
- Some insist on exclusive transfer of all copyrights; others have ethical objections and get only specified rights.

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Collectors and copyright

- Similar position to museum's, except that they don't necessarily need to promote the object.
- Rights of reproduction and making derivative works should be negotiated when the work is sold to the collector.
- Resale royalties: Accepted practice in Europe, but not in U.S. except in California, where artists entitled to 5% of gross sales price upon each resale of work.

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Copyright and expressiveness

- Objects can be copyrighted only for their expressive qualities, not for functional elements.
- Utilitarian objects can be copyrighted, but must have artistic elements that are separate from strictly functional ones.
- Example: silver and gold belt buckles were copyrightable because of design.

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Works for Hire

- Major issue for artists and designers working for companies.
- If work is considered "for hire," then copyrights belong to the employer, not to the artist or designer.
- Two classes of "works for hire:"
 - ◆ Work prepared by an employee within scope of employment
 - ◆ Contributed work agreed to be a work for hire.

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Works for Hire

- Most disputes involve who is an “employee” under the first class.
- *Community for Creative Non-Violence v. Reid* (case involving the Christmas sculpture showing homeless people on a steam grate) set the standard for “works for hire” as the same agency test to distinguish an employee from an independent contractor.
- Each situation decided on its own facts, unless there is a written agreement about the status of the work.

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Joint Work

- If work is considered joint, then all the parties involved in its creation share ownership of the work and the copyright.
- Each joint owner can agree on behalf of all others.
- “Joint work” = prepared by two or more authors with the intention that their creative contributions be merged into a single, inseparable work.

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Joint Work

- Much design work is not only “work for hire,” but “joint work,” as well, given the way design work is created.
- Illustrators and photographers may also be involved in “joint work” when they work with an art director who makes significant creative decisions along the way.
 - ◆ *Strauss* case: art director was joint creator of photographs because designed layout and supervised photo shoots.

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Copyright Infringement: What is “copying?”

- *Steinberg* (case involving *New Yorker* cover) set standard that is applied here:
 - ◆ Question: is there such substantial similarity that an average lay observer would recognize that the alleged copy was appropriated from the original?
 - ◆ The copy need not be the same in every detail, as long as the overall result is substantially similar.

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Transformation as Defense

- *Campbell* case set the standard that it was not copyright infringement if the original was used only as raw material, but new value was added by a new aesthetic and expression.
- Appropriation art cases especially fall under the transformation standard: how much change is enough?

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Fair Use Exception

- The Fair Use clause allows use of copyrighted work for purposes of criticism, comment, news reports, teaching, scholarship, and research.
- Comes up often for all copyright situations, involving both text and images.

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Fair Use Factors

- 4 factors considered:
 - ◆ Purpose of the use (use for profit? Or public benefit?)
 - ◆ Character of the copyrighted work (factual? creative?)
 - ◆ Proportion of the work used.
 - ◆ Effect of the use on the market value of the original work.

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Parody Defense

- In visual art context, the claim is often made that a use falls under the Fair Use exception because it was intended as a parody of the original.
- To be effective, the parody must be a comment about the actual artwork on which the piece is based. Jeff Koons has used the parody defense unsuccessfully because his comments are about the state of society at large, not about a particular work.

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De Minimus Defense

- Another recognized exception to copyright infringement claims is the *de minimus* defense.
- Theory is that, although there is technically infringement, it is so minimal that it did no damage to the copyright holder.
- Defining how “minimal” it needs to be happens with case-by-case analysis.
- *Sandoval* case: appearance of 10 photos for a brief time in a film was considered *de minimus* infringement.

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Copyright Remedies

- Copyright statute gives 2 options for damages:
 - ◆ Copyright owner’s actual damages or profits of the infringer
 - Profits = gross revenue minus expenses
 - ◆ Can elect statutory damages instead
 - \$750–\$30,000 for usually
 - Up to \$150,000 for willful infringement.
- Can also ask for injunction to stop infringing use of the images.

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Trademark

- Trademark is a distinctive motto, symbol, or emblem associated with a particular manufacturer.
- Idea: makes this product and the producer distinctive from other similar products.
- Trademarks can be registered with the Patent Office, but don’t need to be registered to be recognized.

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Trade Dress

- Trade dress is more general than trademark, but is similar: it is a “look and feel” of a product that consumers associate with a particular brand.
- Elements of a trade dress claim:
 - ◆ Trade dress is non-functional
 - ◆ Trade dress has acquired a secondary meaning, referring to the source of the product.
 - ◆ The competing product is confusingly similar, resulting in confusion among consumers.

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Trade Dress and Copyright

Trade Dress	Copyright
Broader protection of similarity in the "look and feel"	Narrower definition of "copying" (transformation defense)
Duration=time of use of product	Duration=life of artist + 70 years
Proof of violation requires consumer confusion	Proof of infringement based on images only
Requires secondary meaning	Not required

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