ARTIST RIGHTS: COPYRIGHT, FAIR USE AND INFRINGEMENT

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COPYRIGHT, FAIR USE AND INFRINGEMENT

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ABOUT THE INSTRUCTOR:

Atreya Mathur is the Director of Legal Research at the Center for Art Law. She received her Master of Laws from New York University School of Law where she specialized in Competition, Innovation, and Information Laws, with a focus on copyright, intellectual property, and art law. She is an attorney from India and also co-founded m e r a k i consultancy, a consultancy service focused on legal academia and higher education in law.

At the Center she conducts legal research on an array of art and law related topics including copyright law, artificial intelligence and art, contracts, artists rights, estates and legal issues in contemporary and digital art. She publishes articles; conducts and teaches art & law workshops; addresses legal inquiries, contract reviews and conducts interviews with artists on general legal concerns. She has had her papers on copyright, art, international trade, and corporate governance published in several international journals and blogs including the European Journal of Sustainable Development, the Lawyers' Committee for Cultural Heritage Preservation, Center for Art Law and the New York University Intellectual Property & Entertainment Law Journal, and in the New York State Bar Entertainment, Arts & Sports Law Journal. She has also presented her papers and research at the Central European University in Budapest and at the International Conference on Sustainable Development in Rome.

She has instructed several workshops on intellectual property, copyright and contracts for attorneys and artists at various universities, non-profits, art organizations and institutes.

ABOUT THE CENTER FOR ART LAW

Center for Art Law is a Brooklyn-based nonprofit with a global perspective. We create and disseminate educational resources and programming to advance a vibrant arts and law community.

Launched in 2009 as an online resource, the Center evolved into a premier educational organization that provides learning and networking opportunities to constituents worldwide. Today, the Center is the only independent art law entity in the United States dedicated to researching, gathering, and sharing law and visual arts information for the benefit of artists, students, lawyers, academics, and many more.

HISTORY OF COPYRIGHT IN THE UNITED STATES

In the United States, the protections offered by copyright law first emerged in 1790, This first copyright law was originally Modeled off Britain's Statute of Anne, Although the copyright laws in the united states have undergone many changes, the original law was quite limited in scope, and protected only books, maps, and charts for only fourteen years with a renewal period of another fourteen years.

Major revisions to the act were implemented in the following years: 1831, 1870, 1909, and 1976. The 1976 copyright act, minus certain added provisions, the 1976 act contains the FRAMEWORK for the copyright laws we all know and love today. you can find the ENTIRETY of the copyright act by looking for title 17: of the united states code.

The reasoning behind the creation of copyright laws in the united states lies in the text of the constitution itself, in article 1, Section 8:: "Congress shall have the 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."

Additional Resources:

- US Const. Art 1. Sect. 8
- 17 U.S.C.§ 101 - 1511
- https://www.copyright.gov/timeline/
- https://www.arl.org/copyright-timeline/#:~:text=The%20First%20Congress%20implemented%20the,Statute%20of%20Anne%20(1710).

WHAT IS COPYRIGHT?

A copyright is a creator's exclusive right to their particular artistic or literary expression of an idea or concept.

Copyrights only last for a specific period of time, and the amount of time that they last are broken up into two different categories depending on when a work was created. Works created on or after January 1, 1978 receive copyright protection for a term lasting the length of the author's life, plus 70 years after the author's death. The second category includes works that existed but were not published or copyrighted on January 1, 1978. These works are able to receive copyright protection for the life of the autor plus either 70, 95 or 120 years DEPENDING on the nature of the authorship. In this second category, all works are guaranteed at least 25 years of statutory protection.

Why do these time periods of protection exist? Well, this goes back to the policy considerations in place when copyright laws were first created. Copyright laws exist to foster the creation and distribution of intellectual works for the public welfare and by this standard copyright laws give authors a reward for their contribution to society.

SUBJECT MATTER OF COPYRIGHT PROTECTION

Copyright, a form of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed. This protection is available to both published and unpublished works in the U.S., regardless of the nationality or domicile of the author. See 17 U.S. Code § 102.

These categories should be viewed broadly. For example, the code used to create computer programs may be registered as a "literary work." Maps and architectural plans may be registered as "pictorial, graphic and sculptural works." A dance could be registered as both a choreographic work (if written down or otherwise recorded) and as an audiovisual work (if filmed).

To be protected by copyright, the work must be more than an idea. It must be fixed in a "tangible form of expression." This means the work must be written or otherwise recorded. This is because a copyright does not protect an idea or plan: it protects the expression of that idea or plan.

In addition, copyrightable work must be original. It must not be copied from someone else and must contain a minimal level of creativity on the part of the author. As mentioned, facts, well-known phrases and lists of names or ingredients, in and of themselves, are not copyrightable. However, if these items are organized or expressed in an original manner, then a copyright would protect that organization or expression, although not the actual facts or lists contained.

SUBJECT MATTER OF COPYRIGHT PROTECTION (CONTINUED)

In other words, copyright protection extends only to an author's original, creative contribution to a work.

Examples of copyrightable works include:

- Literary works
- Musical works, including any accompanying words
- Dramatic works, including any accompanying music
- Pantomimes and choreographic works
- Pictorial, graphic, and sculptural works
- Motion pictures and other audiovisual works
- Sound recordings, which are works that result from the fixation of a series of musical, spoken, or other sounds
- Architectural works

Copyright does not protect:

- Ideas, procedures, methods, systems, processes, concepts, principles, or discoveries
- Works that are not fixed in a tangible form (such as a choreographic work that has not been notated or recorded or an improvisational speech that has not been written down)
- Titles, names, short phrases, and slogans
- Familiar symbols or designs
- Mere variations of typographic ornamentation, lettering, or coloring
- Mere listings of ingredients or contents

SUBJECT MATTER OF COPYRIGHT PROTECTION (CONTINUED)

There are other forms of intellectual property available that may protect what is not covered under copyright law. For example, copyright does not protect names, titles, slogans, or short phrases; and in some cases, these things may be protected as trademarks.

Additional Resources:

- Jeanne C. Fromer & Christopher Jon Sprigman, Copyright Law: Cases and Materials v3.0 (2021)
- United States Copyright Office, “What does Copyright Protect?”
- United States Copyright Office, Circular 1, Copyright Basics, "What Works Are Protected."
- United States Copyright Office Circular 33, “Works Not Protected by Copyright.”
- Copyright Clearance Center, “What Is (and Isn’t) Protected by Copyright?”

Relevant Cases:

- Burrow-Giles Lithographic Co. v. Napoleon Sarony 111 U.S. 53 (1884)
- George Bleistein v. Donaldson Lithographing Co. 188 U.S. 239 (1903)
- Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991)
- Alfred Bell & Co. v. Catalda Fine Arts 191 F.2d 99 (2d Cir. 1951)

WHEN IS A COPYRIGHT CREATED?

According to 17 U.S.C. 102 Copyright protection exists 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." This is a lot of words, and it can be a lot to parse through. So let's break it down--A work receives a copyright, and copyright protection if it is: (1) Original, (2) Has an Author, (3) fixed in a tangible medium. We'll discuss each of these factors in more detail later on within this packet.

You'll notice that none of those three factors for copyright protection include registration--that's because you don't need to register your works with the united states copyright office in order to RECEIVE copyright protection. Once the work is created, so long as it falls under all three categories, it is protected! This is not to say that registration is useless--registration is a necessary step for enhanced protection of your works. For example, registration is required if you wish to pursue litigation for the infringement of your exclusive copyright holder rights.

You may have heard about a "poor man's Copyright," in reference to the act of mailing yourself a copy of the work that you have created. while there is no provision within the copyright act discussing this, and although this is not a substitute for registration, while this may help you establish a date of creation, it doesn't do much else.

Additional Resources:

- https://copyrightalliance.org/faqs/obtain-copyright/
- https://www.copyright.gov/title17/92chap1.html
- https://www.copyright.gov/circs/circ01.pdf

AUTHORSHIP AND OWNERSHIP

The Copyright Act does not define either "author" or "authorship"; those terms can be understood only by implication from various provisions in the statute, and by the interpretation of the meaning of those terms provided in the opinions of federal courts. See 17 U.S. Code § 201.

Generally, under copyright law, the creator of a work (such as the author of a book, the photographer who took a picture, the artist who painted a painting, a musician who recorded a song, and so on) is referred to as the author or originator. The person or entity who has the legal rights to publish, modify, and republish the work is referred to as the owner.

Copyrights are generally owned by the people who create the works of expression, with some important exceptions:

- If a work is created by an employee in the course of his or her employment, the employer owns the copyright.
- If the work is created by an independent contractor and the independent contractor signs a written agreement stating that the work shall be "made for hire," the commissioning person or organization owns the copyright only if the work is (1) a part of a larger literary work, such as an article in a magazine or a poem or story in an anthology; (2) part of a motion picture or other audiovisual work, such as a screenplay; (3) a translation; (4) a supplementary work such as an afterword, an introduction, chart, editorial note, bibliography, appendix or index; (5) a compilation; (6) an instructional text; (7) a test or answer material for a test; or (8) an atlas. Works that don't fall within one of these eight categories constitute works made for hire only if created by an employee within the scope of his or her employment.

AUTHORSHIP AND OWNERSHIP (CONTINUED)

- If the creator has sold the entire copyright, the purchasing business or person becomes the copyright owner.

Assigned Rights:

An author writes a manuscript and sells (i.e., “assigns”) the ownership rights to a publishing company. The author has given up any rights to that manuscript.

Work for Hire:

A writer (or photographer, painter, or other creator) is hired by a business, individual, or any other paying client to create a written work for that client as part of a specific agreement. This is referred to as a “work for hire” arrangement, and the client who pays for the work gets the authorship and ownership rights to it.

Employer-Employee Relationship:

A video game developer creates a new video game on the company’s money as part of their employment. The employer is the author and owner of the work.

AUTHORSHIP AND OWNERSHIP (CONTINUED)

Additional Resources:

- Upcounsel, "Authorship and Ownership Issues: Everything You Need to Know"
- VerSteeg, Russ, "Defining "Author" for Purposes of Copyright." American University Law Review 45, no.5 (June 1996): 1323-1366
- Authors Alliance, "Authorship and Ownership in U.S. Copyright Law" (May 2014)

Relevant Cases:

- Alexander Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic 52 U.S.P.Q.2d 1609 (S.D.N.Y. 1999)
- Cindy Lee Garcia v. Google, Inc. 786 F.3d 733 (9th Cir. 2014) (en banc)
- Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018)

TANGIBLE MEDIUM OF EXPRESSION

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. See 17 U.S. Code § 102.

This definition brings up several key components that are required before a work can be considered to be “fixed in a tangible medium of expression.”

Authority of the Author:

The recording has to be done either by or under the authority of the author. This means that, if you record a concert without permission, it doesn’t count as fixation the purpose of the law with regard to the performance. Though you would still have copyright in your video, it would not mean the performers had fixed it for the purpose of copyright.

Permanence:

The work has to be saved in some permanent way so that it can be communicated to someone else at another time. If the copy of a work only exists for as long as it takes to transmit or communicate it, then it is not fixed.

TANGIBLE MEDIUM OF EXPRESSION

Permanence: (continued)

A work may be considered Be Fixed While Being Transmitted, If a work is fixed as it is being transmitted, such as recording a live TV segment as it goes over the air, it counts as being fixed for the purpose of this law.

Bringing this back to the original question, the issue of "tangible" has more to do with the second element: Permanence. Regardless of whether or not you can touch the copyrighted work, if it is stored in some permanent (or even semi-permanent) medium that enables copying, accessing or transmission of the work by others, it is considered to be fixed into a tangible medium.

Relevant Cases:

- James E. Zalewski v. Cicero Builder Dev., Inc. 754 F.3d 95 (2d Cir. 2014)
- Williams Electronics, Inc. v. Artic International, Inc.
- 685 F.2d 870 (3d Cir. 1982)

ORIGINALITY

In order to receive copyright protection, according to the copyright act, a creation must be an "original work[] of authorship." however, the phrase "original works of authorship," from the copyright act is left without a concrete definition. Further, According to relevant case law, a work must be original to the author in order to receive copyright protection. See Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 347 (1991). This requirement is in two parts, first we have the standard of the original to the author, and second we have the standard of the original works of authorship.

Original to the author is simple to explain: the work must have been independently created, i.e. it must not be a mere copy of an existing work. this is because copyright only protects the portions of a work that are original.

Now back to the million dollar question: what does it mean to have an original work. Well, the standard applied to works of authorship asks that works have a "modicum of creativity" in order to receive copyright protection.

what does modicum of creativity mean? Firstly, modicum of creativity does not mean unique or never seen before. Unlike patent laws, originality in the copyright field does not require that a work be "novel" or new. We can see this standard applied in our everyday life. Multiple people can paint a still life of the same bowl of fruit, but each individual work will receive its copyright protection despite the fact that there are multiple versions of the same view.

ORIGINALITY

In actuality, the requisite level of creativity is extremely low; even a slight amount will suffice. An author's expression does not need to be shown or presented in a new or innovative or SURPRISING way, but it also cannot be something routine or mechanical or traditional to the point that the work does not require creativity whatsoever.

While the threshold for creativity may be extremely low, there is are works that may not satisfy the creativity element. One exceptional study of this can be found in compilations of facts.

Originality in compilations of fact:

Although facts and ideas cannot be copyrighted, the compilation of such works can receive protection, provided that it reaches the modicum of CREATIVITY threshold.

Previously, originality was established by the "sweat of the brow" concept. First, This test, accepts industry and effort as sufficient to establish originality even when such effort lacks imagination or judgment. Essentially, if you put in a lot of effort and work into the work, this theory would allow it to be deemed as "original." The current standard however dismisses this concept. Instead, more recent court cases have insisted that the compilation must display originality in the "selection, creativity and judgment in choosing"' the compiled materials. This standard still stands today.

ORIGINALITY

Additional Resources:

- HR Rep No 1476, 94th Cong, 2d Sess 51 (1976)
- S Rep No 473, 94th Cong, 1st Sess 50 (1975).
- https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4136&context=lcp
- https://www.copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf

Relevant Cases:

- See Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 347 (1991).
- Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940).
- Baker v. Selden, 101 U.S. 99 (1879).
- United States v. Steffens, 100 US 82 (1879).
- United States v. Witteman, 100 US 82 (1879).
- United States v. Johnson, 100 US 82 (1879).
- Harper & Row, Publishers, Inc. v Nation Enterprises, 471 US 539, 556 (1985).
- Konor Enterprises, Inc. v Eagle Publications, Inc., 878 F2d 138, 140 (4th Cir 1989).

EXCLUSIVE RIGHTS

Copyright grants a number of exclusive rights to copyright owners. See 17 U.S.C. § 106.
A defendant would be said to infringe by violating any of these exclusive rights without a defense.

- Reproduction right — the right to make copies of a protected work
- Derivative works— based on the work to alter, remix, or build upon the work)
- Distribution right — the right to sell or otherwise distribute copies to the public
- right to create adaptations (called derivative works) — the right to prepare new works based on the protected work
- Performance and display rights — the rights to perform a protected work (such as a stage play) or to display a work in public. This bundle of rights allows a copyright owner to be flexible when deciding how to realize a commercial gain from the underlying work; the owner may sell or license any of the rights.
- In the case of sound recordings, to perform the work publicly by means of a digital audio transmission.

Can a copyright owner transfer some or all of his specific rights?
When a copyright owner wishes to commercially exploit the work covered by the copyright, the owner typically transfers one or more of these rights to the person or entity who will be responsible for getting the work to markets, such as a book or software publisher. It is also common for the copyright owner to place some limitations on the exclusive rights being transferred.

EXCLUSIVE RIGHTS (CONTINUED)

For example, the owner may limit the transfer to a specific period of time, allow the right to be exercised only in a specific part of the country or world, or require that the right is exercised only through certain media, such as hardcover books, audiotapes, magazines or computers.

If a copyright owner transfers all of the rights unconditionally (and retains nothing), it is generally termed an "assignment." When only some of the rights associated with the copyright are transferred, it is known as a "license." An exclusive license exists when the transferred rights can be exercised only by the owner of the license (the licensee), and no one else — including the person who granted the license (the licensor). If the license allows others (including the licensor) to exercise the same rights being transferred in the license, the license is said to be non-exclusive.

The U.S. Copyright Office allows buyers of exclusive and non-exclusive copyright rights to record the transfers in the U.S. Copyright Office. This helps to protect the buyers in case the original copyright owner later tries to transfer the same rights to another party.

Transfers of copyright ownership are unique in one respect. Authors or their heirs have the right to terminate any transfer of copyright ownership 35 to 40 years after it is made.

EXCLUSIVE RIGHTS (CONTINUED)

Additional Resources:

- Copyright Alliance, “Copyright Exclusive Rights”
- Good Attorneys at Law, “Six Rights of Copyright”

Relevant Cases:

- Three Boys Music Corporation v. Michael Bolton 212 F.3d 477 (9th Cir. 2000)
- Ronald H. Selle v. Barry Gibb 741 F.2d 896 (7th Cir. 1984)
- Saul Steinberg v. Columbia Pictures Industries, Inc. 663 F. Supp. 706 (S.D.N.Y. 1987)
- Jacobus Rentmeester v. Nike, Inc. 883 F.3d 1111 (9th Cir. 2018)

MORAL RIGHTS

In the U.S., one of the main purposes of copyright law is to protect a copyright owner's economic rights. This is one of the inspirations behind the limited monopoly afforded to rights holders under copyright law. These economic rights, such as the ability to make and distribute copies, don't protect against injuries to an artist's reputation or honor. They are intended to allow copyright owners to profit from copyrighted works. This system of incentives is meant to encourage creativity, and to help individuals support themselves as they pursue their creativity, whether that be in painting, architecture, or literature.

Moral rights are intended to protect a creator's "honor or reputation". In addition, moral rights cannot be transferred to another individual or to a corporate entity. They remain with the creator of a work, even if the rest of that creator's copyright is transferred.

https://library.osu.edu/site/copyright/2017/07/21/moral-rights-in-the-united-states/#:~:text=Moral%20rights%20are%20not%20often,protection%20under%20U.S.%20copyright%20law.

https://www.copyrightlaws.com/moral-rights-in-u-s-copyright-law/

FAIR USE

Fair Use is the phrase that so many of us know and love when it comes to justifying our work against infringement. However, what most people outside of the legal field don't realize is that if fair use is part of the discussion, infringement on another work has ALREADY happened. Fair use is an affirmative defense—think of it as a "yes, but" kind of phrase. "Yes, I infringed on an existing copyright, BUT I think that my work is different enough, or impactful enough, that I should get away with it." Fair use is decided on a case-by-case basis, so although it may be relied upon by a lot of creatives, there's really no way to guess with 100% accuracy if a creation will fall under its umbrella.

There are four factors that are considered when determining whether a work falls under the fair use doctrine, the courts look at the following factors from section 107 of the Copyright Act:

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

Each of these four factors looks at different parts of the work, it's use, and it's overall impact. Because this test is a balancing one, it looks at all four factors in the totality of the circumstances presented. Therefore, there is not one factor that is determinative of fair use, although some are weighted more heavily than the others.

FAIR USE (CONTINUED)

Purpose and Character of Use:

Looking at the first factor, the court looks at the "purpose and character of the use, including whether such use is of a commercial or is for nonprofit educational purposes." The purpose of the use refers to what the work is for such as: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," However, it is not enough that a work meets a specific category of purpose, there are plenty of non-profit or educational uses of a work that may not fall under fair use. Therefore, the character of the use is also considered in this factor. Here, we can look at whether the work is used for parody or satire, if the work is being used for a commercial nature, and the degree to which the work is transformative.

Now, what exactly does it mean for a work to be transformative? You already need to have an original work of authorship for your work to receive a copyright, doesn't that mean that by being original it's already transformative? Well, not necessarily. In order for a work to be transformative it must add something new, with a further purpose or different character, and do not substitute for the original use of the work. Think of it this way, does your new work change the message or meaning of the one you're infringing upon? If yes, then it is likely a transformative work.

Nature of the Copyrighted Work:

The second factor of the Fair Use Doctrine does not look at the infringing work, but takes a look instead at the original work that was infringed on. This factor analyzes the level to which the work that was infringed upon fulfills a copyright's purpose of encouraging creative expression as a whole. Or, in simpler terms, it determines how creative the work really is. In terms of protection of copyrighted material, there is a hierarchy of expression. Works

FAIR USE (CONTINUED)

Nature of the Copyrighted Work (Continued):

that are original receive the highest protection, derivative works--or works based on other source material (think about the movie version of your favorite book)—receive a medium level of protection, and compilations of facts receive the least amount of protection.

This factor also considers whether the work that was infringed upon was previously published or not.

The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole:

The third factor looks to the amount of the original work that is used in the infringing work. This is not only a quantitative analysis, but a qualitative one as well. While the quantitative portion may simply look to how much of the original work was transplanted into the new work, the qualitative portion looks to how much of the "heart and soul" of the original work was taken and used. It is entirely possible that a work may only have a small amount copied and taken into the new piece, however, if that small portion is the "heart" of the work, that small piece may prevent the new work from receiving protection under the Fair Use Doctrine.

The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work.

The final factor reviews the effect the infringing work has on the existing or future market of the original work. Questions that can be asked during this analysis may include: whether the original work was planning on expanding into that market (think a work of art that is now made into merchandise); whether the infringing use is displacing the original (taking away sales, etc).

FAIR USE (CONTINUED)

Once each of the factors has been analyzed, the courts take a look at the totality and make a decision on whether or not the Fair Use Doctrine should apply. As stated previously, this is not a sure thing by any means, and the case by case analysis of the works at issue could just as easily work for, or against you.

Additional Resources:

- https://www.copyright.gov/fair-use/more-info.html#:~:text=Fair%20use%20is%20a%20legal,protected%20works%20in%20certain%20circumstances.&text=Nature%20of%20the%20copyrighted%20work,purpose%20of%20encouraging%20creative%20expression.
- 17 U.S.C. §107

Relevant Cases:

- Rogers v. Koons, 960 F.2d 301 (1992)
- Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985)
- Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)
- Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)
- Cariou v. Prince, 714 F.3d 694, 784 F. Supp. 2d 337 (S.D.N.Y. 2011)
- Bleistein v. Donaldson Lithographing Company, 188 U.S. 239 (1903)
- Fairey v. Associated Press, No. 09-01123 (S.D.N.Y. 2010)
- Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792 (9th Cir. 2003)
- Supreme v. McSweeney, Nos. 13 Civ. 1588 (S.D.N.Y. filed Mar. 8, 2013)

SOCIAL MEDIA CONSIDERATIONS

When you upload your work on social media, whether it be an image, a photograph, or a song, you still retain ownership of that work. However, all social media platforms require users to sign terms of agreement prior to their engagement on their platform. These agreements are also known as “click wrap agreements” or “click through agreements” because acceptance of these contracts is done by a click-through function. These agreements are the terms and conditions that stipulate the relationship between you, the user and the platform. In all click wrap agreements, there is a clause in which you, the user, enter into a licensing agreement that allows the platform to use your work in ways they see best fit.

One of the main ways social media platforms use the content that you, the user, posts on their site is for advertisement purposes. For example, if you post a short video on Tik Tok and that video goes viral, the platform can use your video in a commercial without needing to consult you, let alone compensate you for it. This is because you have licensed out the work to Tik Tok once you clicked “I agree” in the click wrap agreement. Although you are still the owner of that content, your licensing agreement limits the way in which you have control over it. This licensing agreement is also what keeps you, the user, from being able to pursue legal action over copyright infringement. (Nicholas Bunch, The Courtroom, Can Artists Sue Social Media Companies? July 2021)

SOCIAL MEDIA CONSIDERATIONS (CONTINUED)

What If Another User on Social Media Uses My Work?

What if a user on a social media platform repurposes your work, does copyright infringement take place in that instance? Well, depending on the situation, the answer might be, yes. In some cases, you might even be able to pursue legal action and claim monetary damages. While you have entered into a licensing agreement with the social media platform, this does not mean you have entered into an agreement with all the users on that social media platform.

Unfortunately, this also does not mean you can go after the social media platform because this infringement has taken place. While the rapid rate of information exchange on social media can help perpetuate copyright infringement and even allow others to infringe on your copyrights, social media platforms cannot be held responsible for this. This protection that social media platforms enjoy stems largely from the Digital Millennium Copyright Act. This law essentially protects social media platforms including Instagram, Facebook, and all others from liability if their users violate another user's copyrights. While social media platforms largely perpetuate the flow of information that naturally encourages violations of copyrights, the law was enacted to protect this free flow of information. (Nicholas Bunch, The Courtroom, Can Artists Sue Social Media Companies? July 2021)

SOCIAL MEDIA CONSIDERATIONS (CONTINUED)

Additional Resources:

- Colorado State University, Copyright 101: Guidelines for posting potentially copyrighted material on your social media accounts
- Nicholas Bunch, The Courtroom, Can Artists Sue Social Media Companies? (July 2021)
- Lizzie Plaugic, The Verge, "The story of Richard Prince and his $100,000 Instagram art?" (May 2015)
- Burnway, "What You Should Know Before Posting Your Art on Social Media" (August 2017)
- Rom Kulik, "Size Matters? When Copyrights, Social Media, And Art Collide" (August 2020)
- Steve Schlackman, "Losing Copyrights through Social Media" (January 2016)

Relevant Cases:

- Sinclair v. Ziff Davis, LLC, No. 1:18-cv-00790 (S.D.N.Y. Apr. 13, 2020).
- McGucken v. Newsweek, LLC, No. 1:19-cv-09617 (S.D.N.Y. June 1, 2020)
- Ashley Cullins, "Volvo Can't Evade Photographer's Suit Over Instagram Post" (September 2020)
- Graphic Artists Guild, "Three Gains for Visual Artists"
- Hannah Jane Parkinson, "Instagram, an artist and the $100,000 selfies – appropriation in the digital age" (July 2015)

COPYRIGHT, FAIR USE AND INFRINGEMENT

Blanch v. Koons (2*d Cir. 2006*)

Welcoming the Newcomers, Kent Monkman (2019) references thirteen works of art in the galleries of the Metropolitan Museum of Art, New York.

COPYRIGHT, FAIR USE AND INFRINGEMENT

Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018)

Kelley v. Chicago Park District (February 15, 2011 in the United States Court of Appeals, Seventh Circuit)

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Fleurs de Villes (2021), New York

Read more here: Atreya Mathur, Copyright Protection in Short-Lived Artworks: A Study on "Fixation" in Contemporary Floral Exhibitions, Center for Art Law (2022).

Installation view of Richard Prince's exhibition "Portraits" at the Museum of Contemporary Art Detroit. Photo courtesy of MOCAD.(https://news.artnet.com/art-world/richard-prince-appropriation-instagram-1696413)

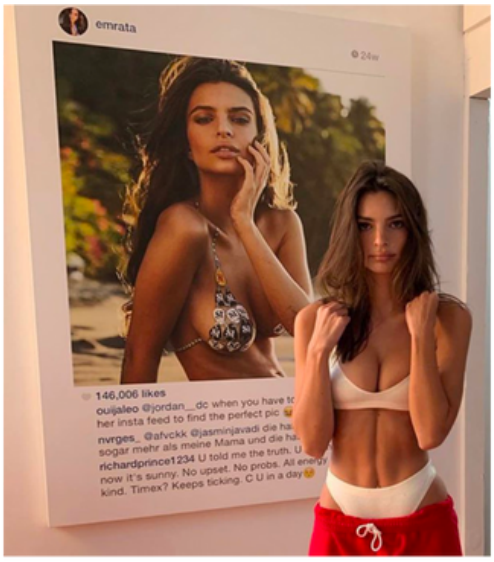
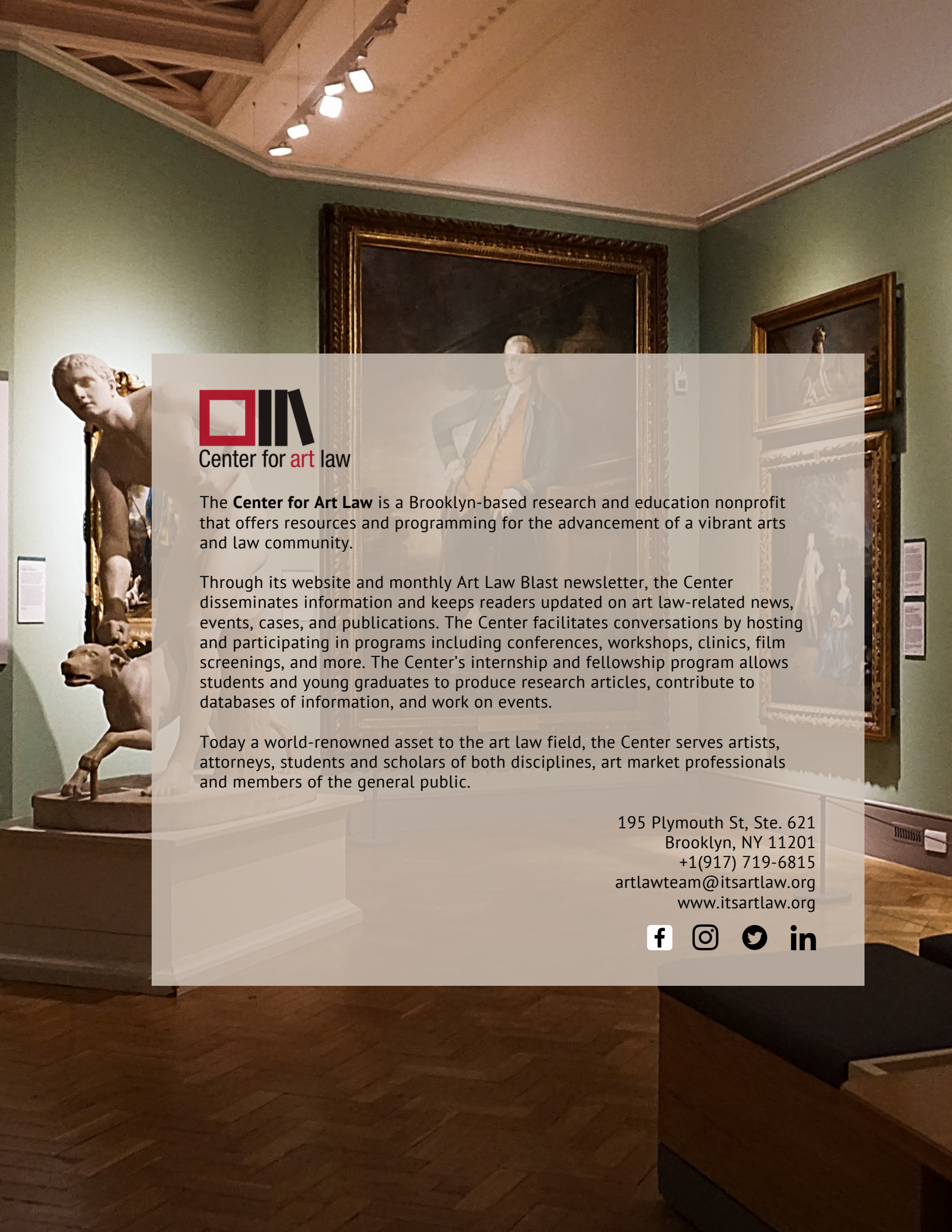


Photo credit: https://blog.photoshelter.com/2019/12/richard-prince-appropriates-instagram-genius-or-charlatan/



Center for art law

The **Center for Art Law** is a Brooklyn-based research and education nonprofit that offers resources and programming for the advancement of a vibrant arts and law community.

Through its website and monthly Art Law Blast newsletter, the Center disseminates information and keeps readers updated on art law-related news, events, cases, and publications. The Center facilitates conversations by hosting and participating in programs including conferences, workshops, clinics, film screenings, and more. The Center's internship and fellowship program allows students and young graduates to produce research articles, contribute to databases of information, and work on events.

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