

Copyright, Trademark and Moral Rights: An Introduction for the Visual Artist

This is an overview of copyright, trademark, and moral rights law for *visual* artists. It intentionally omits references to performance and musical arts. This information is for educational purposes, and should not be considered legal advice. The aim of this material is to provide sufficient information to allow the artist to:

- Understand the issues in advance,
- Be better prepared to address infringement, and
- Avoid infringing the work of others.

For comprehensive and up-to-date information visit the **U.S. Copyright Office** and the **U.S. Patent and Trademark Office**. Another good source of information is the ***Legal Guide for the Visual Artist*** by Tad Crawford.

Intellectual property rights (Copyrights, Trademarks, Trade secrets, and Patents) protect original creations such as writing, artwork, designs, and inventions. Visual artists are also protected by moral rights. This material covers the rights that are most important to the visual artist:

- **Copyrights** recognize an artist's exclusive right to reproduce and distribute his or her work;
- **Moral rights** recognize an artist's right to protect his or her reputation;
- **Trademarks** (including trade dress) protect an artist's goodwill when he or she places products in trade.

If their rights have been infringed, artists may look to how courts decided similar cases. Remember that each case of suspected infringement is fact-specific. Two seemingly similar cases may result in different decisions because of one important difference in the facts. For this reason, looking at similar cases will not be a good predictor of infringement. Many infringement cases settle because there is so much gray area.

Additionally, decisions in some cases may not be followed in an artist's jurisdiction. Lower courts are not required to follow decisions of courts in different jurisdictions; they are only required to follow decisions of higher courts within their jurisdiction (state or federal). So, lower courts in other jurisdictions may render different decisions in cases that have similar facts.

Artists who are concerned about infringement of their work should seek the services of an attorney.

The best defense is a good offense!

1. Register your artwork with the **U.S. Copyright Office** today. At least once a year register all new work created that year. You can do it online or by mail.
2. Include copyright information on any reproductions you authorize, including © symbol, work title, artist, and date. You can also place the information somewhere on the same surface: the back of a book cover, for artwork on the front; the table of contents page for an image in a magazine.
3. Educate your customers and collectors about copyright and provide written notices of copyright protection whenever appropriate.

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Copyright Law

What does copyright law protect?

Copyright law protects original creative work that has been ‘fixed in a tangible medium’ in such a way that it can be perceived, reproduced, or communicated for more than transitory duration.¹ Copyrights protect the expression of original and creative works. Copyrights do not protect ideas, processes, procedures, and other such concepts; these can be protected under patent and other laws. Designs that make useful articles more attractive do fall under copyright law.

What rights are protected under copyright law?

Copyright law enables artists to monetize their work by granting them exclusive rights to:

- Reproduce the work;
- Prepare derivative work (based upon preexisting work);
- Distribute copies to the public, e.g., by sale, licensing, or leasing;
- Display the copyrighted work in public.

Are copyrights transferrable?

Yes, copyrights can be transferred in whole or in part. Transfer should be done in writing and recorded with the **U.S. Copyright Office**. The transfer of ownership of a physical work of art does not automatically convey copyrights to the new owner.

When does copyright protection start and how long does it last?

Copyright protection arises (*vests*) in the creator when the work is created unless the creator transfers one or more of those rights to another, or unless the work is considered work for hire. *Work for hire* is defined as work within the scope of employment or a contribution to a collective work. In general, copyright protection extends for the creator’s life plus 70 years. Duration calculation is complex and depends on whether a work was produced before 1978. Works for hire have a duration of 95 years from publication or 120 years from creation, whichever is shorter.

When does the creator not have copyrights to their work?

Copyrights belong to the employer or to the person who commissions a piece of art if the art is created within the scope of employment. In deciding whether the work for hire exception applies, courts look at the degree of control that the employer maintained over the creator and how the work was accomplished. A typical commission to create a painting of a person’s house or pet is not considered work for hire.

Copyright also vests in an employer if the work is commissioned as a contribution to a collective work, such as a motion picture, translation, instructional text, or supplementary work.² In the case of contribution to a collective work, there must be a signed agreement indicating the work is for hire.

Copyrights protect:

- Original creative work that has been ‘fixed in a tangible medium’
- The expression of original and creative works

Copyrights **do not** protect ideas, processes, procedures, and other such concepts.

Written agreement is not required to transfer copyrights for works done within the scope of employment but written agreement is required to transfer rights in a contribution to a collective work.

Is an artist required to register work with the Copyright Office?

An artist is not required to register their work, but registration with the U.S. Copyright Office and a Certificate of Registration are required in order to file a lawsuit in federal court. Timely registration has the added benefit of making the creator eligible for statutory remedies (more on statutory remedies below).

Artists are strongly advised to register their work, which can be done by individual pieces or as a collection. A collection includes works that are published together, such as the illustrations in a comic book.

For works created since 1989, no notice or publication is required to secure copyright protection.

What are the benefits of timely registration with the Copyright Office?

Timely registration means that a work is registered prior to infringement or within three months of publication; otherwise only damages and profits will be available as a remedy. Even if registration is not timely, there is a benefit to registering. Courts give deference to the U.S. Copyright Office and works registered within five years of publication are presumed to be protected by copyright, making it more difficult for an opponent to successfully argue that the copyright is not valid.

How do you register with the Copyright Office?

The U.S. Copyright Office makes it easy to register by mail or online. Visit www.copyright.gov for more information. The fee for registering one work of art is \$35. The fee for registering multiple unpublished works by the same artist or multiple published works if they are all first published together in the same publication (collection) is \$55. Artists choosing to register online can submit copies of their work (described as 'nonreturnable deposits') electronically or by mail.

What is the timeline to claim copyright infringement?

A copyright owner is entitled to file a civil claim against an infringer as long as the suit is filed within three years *after the claim has accrued*. Courts may interpret this as within three years of when the copyright owner learned (or should have learned) of the infringement or as within three years of when the infringement actually began.

What remedies are available for copyright infringement?

Remedies include:

- A court order to stop infringement until the case is decided.
- Liability for actual damages (and profits to the infringer). The copyright owner must present proof of the infringer's gross revenues and the infringer must show proof of related expenses or how their profits are attributable to other factors.
- Statutory damages – i.e., damages fixed by law. Statutory damages are capped at \$30,000 but can go as high as \$150,000 for willful infringement. The court may also award reasonable attorney fees to the prevailing party. Statutory remedies and attorney's fees are only available for works that have been properly registered with the U.S. Copyright Office.

Copyright lawsuits must be filed in federal court. Artists may be able to file lawsuits in state courts under other legal theories, such as misappropriation of ideas, unjust enrichment, and unfair competition, but the reality is that such claims are rare in Vermont.

What is the Fair Use limitation on copyright protection?

Fair Use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. Four factors are considered in establishing Fair Use:

- Purpose and character of the use (commercial, nonprofit educational, social commentary, parody)³;
- Nature of the copyrighted work (highly creative, factual);
- Amount and substantiality of the portion used in relation to the work as a whole;
- Effect of the use upon the potential market for or value of the copyrighted work.

In assessing the Fair Use of a copyrighted work in parodies or social commentary pieces, the courts look to see whether *no more than the amount necessary* of the material is used to achieve the purpose of the parody.

Analysis of *purpose and character* may favor Fair Use if the new work is *transformative*, i.e., uses the image in a different way. An image taken from a purely decorative piece that is incorporated into a work of social commentary has been found to be transformative. On the other hand, simply transferring an image to a new medium (e.g., from painting to photograph) is not sufficient to be considered transformative if the image serves the same purpose as the original. Transformation supports but does not guarantee a finding of Fair Use because the other factors must also be weighed.

A user who is concerned they do not meet the Fair Use standard should consider asking permission to reference the artist's work. Permission may involve licensing and associated fees. Simply acknowledging the source of the copyrighted material is not a substitute for permission.

What is copyright infringement?

Copyright infringement is the unauthorized use of copyright-protected work.

To prove infringement, an artist must establish a valid copyright and present evidence of:

- **Access.** Proof that the infringer had access to the copyrighted work; access can be demonstrated by showing that the work had been published or exhibited and that the infringer could have seen it, and
- **Probative similarity.** This means that an average observer would recognize the alleged copy as having been taken from the copyrighted work. Probative similarity exists when similarities arise that would not be expected if two works were created independently. In determining probative similarity, the copyright owner's entire work (including protected and non-protected elements) is considered and compared with the alleged infringer's work.

Can an artist ask an internet service provider to take down infringing material posted online?

The Digital Millennium Copyright Act requires content owners, such as internet service providers (e.g., YouTube), to police copyright infringement. Internet providers are not held liable for transmitting copyright-protected content as long as they adhere to notice and take down procedures. All service providers are required to post detailed procedures

An image taken from a purely decorative piece that is incorporated into a work of social commentary has been found to be transformative.

on how copyright owners can inform providers of copyright infringement and ask them to take down the infringing material.

For example, YouTube has a **form** for creators to submit a copyright infringement notification and takedown notice. See also **Google's Permission Page**.

Examples of copyright infringement

Every piece of visual art is made up of a combination of copyrightable and non-copyrightable elements. Non-copyrightable elements include colors, fonts, and general subject matter. "Style is not copyrightable, but specific pieces of art created as the expression of a style are copyrightable."⁴ To establish copyright infringement, a court will look to the combination of composition, design, color palette, shadows, lines, juxtaposition of elements, etc., that result in a unique creative expression.

In the case *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, *Reader's Digest* sued another publisher for copyright infringement for using a cover that was very similar to that of *Reader's Digest's* popular journal.⁵ The court decided that fonts and the placement of text on the cover were not copyrightable individually, but that the combination of elements led to a unique design that was entitled to protection. *The Conservative Digest* might look like a parody of the original cover, but it had the same purpose – to sell publications. The court found that the combination of elements that made up the cover design were so similar that copyright infringement had occurred.

Moral Rights

What are moral rights?

The Visual Artists Rights Act (VARA) recognizes that visual artists have the right to protect their reputation. These moral rights include:

- The right to be credited for one's work;
- The right to deny authorship of artwork;
- The right to disassociate with artwork that has been distorted, mutilated, or modified in such a way that it could adversely affect the artist's reputation.

The above rights are described as the rights to *attribution* and *integrity*. VARA also enables visual artists to prevent the modification or destruction of artwork if the work is of recognized stature or if the destruction will negatively impact the artist's reputation (imagine destroying the most famous painting of a living artist). Moral rights laws are included as a separate section of the copyright statute.

What meets the definition of visual art, giving rise to moral rights?

Visual art includes a painting, drawing, print, or sculpture in a single copy, or limited editions of not more than 200 copies (or casts, for sculpture) that are numbered and signed/marked by the artist. Visual art also includes photographs produced for exhibition purposes only, in single copy or limited to 200 copies that are numbered and signed. Items that have a visual aspect but that are produced for merchandising or marketing purposes are not included in the definition of visual art. Posters, diagrams, and maps are not considered works of visual art under the VARA definition.

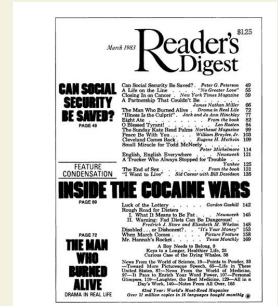


Figure 1. Cover of Reader's Digest.

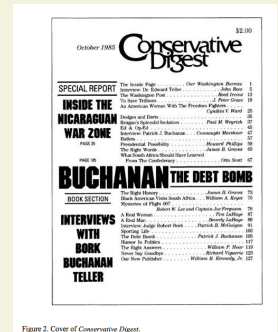


Figure 2. Cover of Conservative Digest.

Moral rights include:

- The right to be credited for one's work
- The right to deny authorship of artwork
- The right to disassociate with artwork that has been distorted, mutilated, or modified in such a way that it could adversely affect the artist's reputation

Whom do moral rights protect and for how long?

Moral rights apply only to the creator(s) of a work. They cannot be transferred and they generally last only for the life of the creator (although it is wise to check for works created before December 1, 1990). Thus moral rights do not extend as long as other copyright rights.

In the event of co-creators:

- The moral rights endure for the life of the last surviving creator.
- Either party can waive the moral rights. For example, if two artists co-create a sculpture and sell it to the owner of a building, one artist could waive the right of both to be notified if the building is going to be destroyed.

Can an artist waive their moral rights?

An artist may waive moral rights, but only if done in writing:

- for a specific piece of artwork, and
- for specific uses of that piece.

Transfer of ownership of a work or of any exclusive copyright does not constitute a waiver of moral rights. For example, moral rights are not waived when an artist sells a sculpture and delivers it to the buyer, or when the artist allows a publisher to publish photos of the sculpture in a book.

Are there exceptions to moral rights?

Modifications to the artwork that are due to the passage of time or to conservation efforts are not considered destruction (unless the conservation efforts were grossly negligent) and thus do not constitute an infringement of moral rights.

As a general rule, moral rights do not protect reproductions of original works. If an artist agreed to have their visual art incorporated into a building in such a way that removal of the art would destroy the building, then moral rights do not apply. If the work can be removed without damaging the building, then moral rights apply unless efforts to notify the artist were unsuccessful or unless written notice was sent to the artist and the artist failed to respond within 90 days.

What are the registration requirements to enforce moral rights?

There are no registration requirements to enforce moral rights. Unlike other copyright rights, the law does not require a certificate of registration with the U.S. Copyright Office in order to initiate a moral rights lawsuit.

What remedies are available in cases of moral rights infringements?

All remedies available under copyright law are available in an action for infringement of moral rights.

Examples of moral rights infringement

For example:

- An artist sells a sculpture and the purchaser paints the sculpture to match a company logo;
- Artwork is exhibited without indicating the name of the artist.

Trademark and Trade Dress

What does trademark law protect?

Trademark law has two purposes:

- To protect consumers from confusion by making a product or service distinctive⁶;
- To reward producers who create value in a brand (goodwill) and protect it from those who would take unfair advantage by appropriating the symbol or look of that brand.

Trademark law creates a right to file a civil lawsuit against any person who uses a mark that is likely to deceive, mislead, or confuse consumers as to the origin of a product. Depending on where the trademark has been registered, lawsuits can be filed in federal or state court.

What constitutes a 'mark'?

Almost anything that can be perceived by a human can be a mark, including: words, numbers, images, symbols, slogans, graphic designs, colors, sounds, three-dimensional configurations – even scents and textures (although these are rare). For the visual artist, typical marks include the artist's name, signature, and logo.

To receive trademark protection, a mark must either be:

- **Arbitrary** (a unique word like EXXON);
- **Suggestive** (requires a consumer to exercise some imagination, e.g., COPPERTONE);
- **Distinctive** and has acquired a **secondary meaning** such that the consumer identifies the mark with a specific producer. For example *apple* on its own is a common word, but *Apple* in the context of computers is distinctive and has gained a secondary meaning as the logo of a computer company.

Marks are generally registered for a type of product within one of 45 established classes. Use of a mark by one producer in relation to one type of product does not prevent another producer from using the mark term for another type or product in the same class – as long as there is no risk of consumer confusion. For example calendars and illuminated signs are two types of products that fall within Class 40 (cards, pictures, and signs). It is possible for a company producing calendars and another producing signs to use the same name if there is no confusion.

What is trade dress?

Trademark law also prohibits misrepresenting the nature, characteristics, qualities, and geographic origin of a product in commercial advertising or promotion. This is the concept of trade dress. Historically it referred to the packaging of the product but the term has come to mean the total overall appearance of the product, including the shape and design of the product itself. Trade dress features include: size, shape, color, color combination, texture, graphics, and sales techniques.

Trade dress is treated much the same way as a trademark, although there is no presumption of distinctiveness for trade dress. This means that whereas a trademark may be considered to have become distinctive because consumers associate it with a company (like *Apple* for computers), no trade dress characteristics are considered inherently distinctive. Trade dress can be contested after five years, and it is not valid outside the location where the product is traded.

Trademarks:

- Protect consumers from confusion by making a product or service distinctive
- Reward producers who create value in a brand (goodwill) and protect it from those who would take unfair advantage by appropriating the symbol or look of that brand

When does trademark protection go into effect?

Trademarks are:

- Valid for up to ten years;
- Can be renewed indefinitely for periods of ten years as long as the mark is in continuous use otherwise it is subject to cancellation.

To maintain a valid mark, an *Affidavit of Use* must be filed between the fifth and sixth year and a renewal application must be filed within the year before the end of the ten-year period.

Historically, trademark protection was only available if you registered the mark. Today a process exists for registering intent to use a mark and may be valid for up to three years.

When is it necessary to register trademark and trade dress?

Unlike copyright law, trademarks can be registered within the state system through the relevant office (in Vermont it is the **Secretary of State**) or in the federal system through the **U.S. Patent and Trademark Office**. A federal registration allows the owner to use the mark nationwide. Registration with the USPTO is necessary to file a claim in federal court. Registration is not necessary to acquire protection for trade dress.

When an owner applies for a trademark in the federal system, that application is open to an opposition claim until the registration is approved. The ® symbol can be applied to registered marks, whereas the ™ symbol may be applied to unregistered marks. See **Protecting Your Trademark, Basic Facts about Trademark Series**.

What remedies are available for trademark and trade dress infringement?

Remedies for trademark infringement include:

- An injunction against future printing of the mark;
- An injunction against the use of the mark in commerce;
- The owner of a registered trademark may be entitled to recover profits generated by the infringing party, damages sustained by the trademark owner, and costs associated with the lawsuit;
- A court may also order the destruction of the infringing articles.

What are exceptions to trademark protection?

Trademark protection does not extend to Fair Use of the mark, which includes reference to a competitor's mark by a competitor in advertising and noncommercial use of the mark. In such cases, mention of the other's mark must be limited to what is reasonably necessary to identify the product and may not suggest endorsement by the owner of the mark. Fair Use also includes all forms of news reporting and commentary.

How do you measure trademark infringement?

The test for measuring trademark infringement is whether the infringing mark causes confusion to the consumer as to the origin of the goods. In order to prove infringement, a plaintiff must prove:

- The infringer used the mark in commerce;
- Use is likely to lead to the confusion of an appreciable number of ordinary consumers.

If the issue is trade dress, the plaintiff must also show that the feature in question is nonfunctional, i.e., that protection will not prevent others from competing effectively in the sale of the product. If alternative competing designs are available, the trade dress is likely to be found nonfunctional.

Courts look to a number of factors to assess the likelihood of confusion, such as:

- The intent of the infringer
- Whether there was actual confusion
- The strength of the mark
- The quality of the product
- The extent to which the infringer is likely to enter the mark owner's market.

Examples of trademark and trade dress infringement for visual artists

In order to file a claim of trademark infringement, the artist must have a product in the course of trade and have registered a trademark. The more common type of infringement for visual artists is likely to relate to trade dress, i.e., whether the overall appearance of the infringing article is likely to confuse consumers and lead them to believe that the article was produced or endorsed by the artist. An example of trade dress infringement would be the outside packaging or cover of a calendar that uses a combination of style, fonts, layout, and even a name so similar to that of the artist's calendar that it confuses buyers.

In general, an artist cannot have exclusive trademark rights in an artistic style and infringement is more likely to be related to copyright. An example of trademark infringement for the visual artist is an infringing print with a logo or signature that resemble the artist's logo or signature so closely that the buyer is likely to be confused as to the real identity of the artist.

Trade dress cases are fact-specific and courts will look at all the features that make up the appearance of the article. Different courts have reached different decisions as to what constitutes trade dress infringement of articles involving the visual arts. In *Hartford House v. Hallmark*, the Tenth Circuit court found that the combination of features of a greeting card were nonfunctional and granted protection to the trade dress.⁷ In *Romm Art Creations v. Simcha Int'l, Inc.*, the federal district court found that limited editions and fine art posters of the artist's works were entitled to trade dress protection.⁸ This decision by a lower court has not gained support in other (higher) courts. Arguably cases in which the sole issue is the artist's work itself should be filed as copyright claims.

1 Examples of works not fixed in a medium: choreography or spontaneous music that has not been recorded. Garden design and food presentations have been found to be of transitory duration.

2 Supplementary work includes illustrations, maps, revisions, and commentary that accompany a larger work.

3 Not charging for copies of a copyrighted work does not mean it is not considered infringement.

4 Ted Crawford, *Legal Guide for the Visual Arts*, p. 19.

5 *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d 800 (1987 D.C. Circuit).

6 Federal law allows for the registration of trademarks for services, but Vermont law does not.

7 *Hartford House v. Hallmark*, 846 F.2d 1268 (10th Cir 1988).

8 *Romm Art Creations v. Simcha Int'l, Inc.*, 786 F.Supp. 1126 (E.D.N.Y. 1992).

Helpful Links

U.S. Copyright Office

[Electronic Registration page](#)
[Circular 1: Copyright Basics](#)
[Circular 1c: Make Sure Your Application Will Be Acceptable](#)
[Circular 3: Copyright Notice](#)
[Circular 4: Copyright Office Fees](#)
[Circular 9: Work Made For Hire](#)
[Circular 15a: Duration of Copyright](#)

U.S. Patent and Trademark Office

[Vermont Secretary of State, Trademark Registrations](#)

Books

Legal Guide for the Visual Artist. Tad Crawford. Allworth Press, NY (2010).

Intellectual Property. Dan Hunter. The Oxford Introductions to U.S. Law (2011).

The Intellectual Property Handbook: A Practical Guide for Franchise, Business and IP Counsel. William A Finkelstein and James R. Sims III, Ed. (2005) American Bar Association, Forum on Franchising, Section of Intellectual Property Law.

Getting Permission: How to License Clear Copyrighted Materials Online Off. Richard Stim. Nolo. October 2013, 5th Edition.

Many of the books are now available electronically online.

Online References

[Code of Best Practices in Fair Use for the Visual Arts](#). College Art Association. Feb 2015.

[Fair Use App \[interactive online application\]](#). New Media Rights. July 2015.

["Moral Rights Basics."](#) Betsy Rosenblatt. Harvard Law School (1998).

["Pragmatism, Economics, and the Droit Moral."](#) Thomas Cotter. 76 North Carolina Law Review 1 (1997).

["Waiver of Moral Rights in Visual Artworks."](#) U.S. Copyright Office (Accessed January 2016).

Resource Organizations

New York Volunteer Lawyers for the Arts

1 East 53rd Street New York, NY 10022
212.319.2787 ext. 1 **Email: vlany@vlany.org**

VLA provides pro bono (no-fee) arts-related legal representation and education to low-income artists and nonprofit arts and cultural organizations. Services include a legal hotline open Monday to Friday, 10 a.m. to 6 p.m. 212.319.2787 ext 1. VLA also has an Artists Over Sixty program that program provides legal services and education to senior artists to address age-specific legal and business issues.

Volunteer Lawyers for the Arts of Massachusetts

15 Channel Center St #103 Boston, MA 02210
617.350.7600

The Volunteer Lawyers for the Arts of Massachusetts provides legal services, advice, and education programming to artists and cultural organizations in Massachusetts. The VLA accomplishes its mission through the work of a panel of nearly 400 attorneys who volunteer their time and services to provide legal counsel, education, and organizational support to the Massachusetts arts community. The VLA provides legal assistance to artists (any discipline) and arts and cultural organizations of all disciplines. In order to obtain legal assistance from the VLA, we request you submit an Application for Legal Assistance and pay an application fee. In order to qualify for free legal assistance, your income must fall below a certain level, determined by the VLA.

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by Mansfield Law, LLC,
Manchester, Vermont 05255

www.mansfieldlawvt.com

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