

BEST PRACTICES IN RIGHTS CLEARANCE

SELECTION OF RESOURCES AND BEST PRACTICES FOR VISUAL ARTISTS

I. INTRODUCTION

This document summarizes tips and resources for rights clearance and licensing of copyrighted works suggested by participants in the Best Practices in Rights Clearance – Visual Arts Symposium held at Scalia Law School, George Mason University on January 18, 2018. It is not intended as a comprehensive guide, but rather a more user-friendly tool for finding key information shared by participants than the transcripts of the sessions themselves.

A. *What is Copyrightable?*

Copyright law is meant to encourage creativity and the development of new works such as songs, photographs, poems, etc. Facts and ideas are not copyrightable, only the creative expression of the author. Types of works that can be protected are listed in the Copyright Act.¹

- The rights to create derivative works, or works that adapt, modify or transform the original, are also the property of the copyright owner. For example, if an author writes a book, that author is the only person who has the right to permit the book to be adapted into a movie.

There are also limits on the scope of copyright. Therefore not every use needs to be cleared. For instance:

- The “scenes-a-faire” doctrine limits copyrights in commonly used themes or subjects in works. Such elements of works are not copyrightable, because they are the language or building blocks of creative works.
- The “merger” doctrine is the concept that if a copyrightable part of a work and a non-copyrightable part of a work are closely linked together and can’t be separated, they merge and become **non**-copyrightable.

¹ 17 U.S.C. § 102 (2017).

- In photography, creative choices the photographer makes, such as lighting, camera angles, positioning, method for developing the photos, etc. are essential to making a photo copyrightable.

B. Tips on Fair Use

Fair use is another doctrine that limits copyright and allows works to be used without the copyright owner's permission for the purposes of criticism, comment, news reporting, teaching, scholarship, or research. It is a defense to copyright infringement, but is often misunderstood by laypeople. Courts will evaluate four factors to determine whether a use is fair: a) the purpose and character of the use, b) the nature of the copyrighted work, c) the amount and substantiality of the portion taken, and d) the effect of the use upon the potential market for the copyrighted work. More information and a summary of fair use decisions in U.S. court cases can be found on the U.S. Copyright Office website.²

- Errors and omissions (E&O) insurance is often necessary for documentary filmmakers whose films may rely on fair use for some of the content used. If a mistake is made in use of trademark or copyright protected material, the insurance will cover legal costs up to the policy's maximum amount.
 - Many distributors require filmmakers to have this insurance.
 - Many E&O insurers require that a lawyer participate in examining the film's content and confirming fair use applies before issuing a policy.
- There is a three question test, written by Michael Donaldson, that is applicable mainly to non-fiction works and can be useful in making fair use determinations:
 1. Does the asset illustrate or support a point that the creator is trying to make in the new work?
 2. Does the creator of the new work use only as much of the asset as is reasonably appropriate to illustrate or support the point being made?

² U.S. Copyright Office Fair Use Index, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/index.html> (last visited Aug. 31, 2018).

3. Is the connection between the point being made and the asset being used to illustrate or support the point clear to the average viewer?³

C. *International Issues*

There is no such thing as “International Copyright Law.” Thus artists using and distributing works online need to be aware of variations in laws in jurisdictions where the works may be used. For instance, most countries do not have fair use provisions like the United States, but many have similar “fair dealing” exceptions which tend to be more prescriptive.

- In Canada, there is a fair dealing provision which allows for use of other people’s work for specific purposes: research, private study, education, parody, satire, criticism, review and news reporting.⁴
 - If the use falls within one of these purposes, then you must determine fairness by applying your facts to the following factors⁵:
 - a) the purpose of the dealing
 - b) the character of the dealing
 - c) the amount of the dealing
 - d) alternatives to the dealing
 - e) the nature of the work
 - f) the effect of the dealing on the work; and any other factors that may help a court decide whether the dealing was fair.
- In the United Kingdom, there are various types of situations in which fair dealing is a valid defense⁶:

³ Michael C. Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works*, 59 J. COPYRIGHT SOC’Y U.S.A. 477, 488-492 (2012).

⁴ Copyright Act, R.S.C. 1985, c C-42, § 29 (Can.).

⁵ CCH Canadian Ltd. v. Law Soc’y of Upper Canada, 2004 S.C.R. 339 (Can.).

⁶ Copyright, Designs and Patents Act 1988, c. 48, §§ 29-30, 32-33 (UK).

- a) where the use is for the purposes of research or private study,
- b) where it is to allow for criticism or review
- c) where it is for the purpose of reporting current events
- d) where it is for illustration in instruction, and
- e) where an excerpt is included in an anthology for educational use.

D. Tips on the Public Domain

Public domain works are works that are not protected by intellectual property laws either because the protection has expired, or because protections never applied (e.g. U.S. government works). Such works may be used freely.

- Many people see photographs and other works online and mistakenly believe that they are part of the public domain.
- It is not safe to assume that old photographs, for instance from the early 1900's are necessarily in the public domain. It is possible that the photo is still protected under copyright law because it may have been unpublished until after 1978, because copyright protection may be for 70 years after the death of the last surviving author, 95 years from the publication date, etc.⁷
- Images should not be copied from online. Image recognition technology searches for images online and can find these infringing uses.
- A good resource for understanding and calculating copyright term lengths is here:
 - <https://copyright.cornell.edu/publicdomain>

⁷ 17 U.S.C. § 302 (2010).

E. Registering your Work

Although copyright subsists in a work from the moment it is recorded in tangible form, regardless of whether it is registered or not, works can be registered with the U.S. Copyright Office, and there are certain benefits to registration. Registration allows an infringement suit to be initiated in court and affects the type of damages that are available to plaintiffs. Works can be registered on the U.S. Copyright Office's website.⁸

- Registering your copyright may likewise provide you with greater leverage when trying to protect your works, as you can use the registration as proof that you own copyright to that work.

F. Tips on Licensing

When you want to use a copyright protected work, or someone else wishes to use your protected work, a license agreement can grant permission to use protected works for certain purposes. It is important to make sure you have a license before using protected works, and to make sure that when you are licensing your work you are tailoring the agreement to the specific needs of the parties.

- Visual artists often want to put their photographs to music. The Panelists recommend a few ways for visual artists to make sure they have permission to use that music. Several commercial software packages exist that pre-package licensed music for use with imagery. Examples include:
 - Triple Scoop Music at <https://triplescoopmusic.com/>
 - Pump Audio at <http://www.pumpaudio.com/>
- When visual artists are giving others permission to use their images through a license agreement, it is important to consider the circumstances and limit how they can use the image.
- License agreements should always be in writing.
- License agreements can also include terms for renegotiation if the circumstances of the agreement change, such as licensing

⁸ *Registration Portal*, COPYRIGHT.GOV, <https://www.copyright.gov/registration> (last visited Aug. 31, 2018).

an image to an independent music publisher and requiring renegotiation if the musician signs with a label.

- With a license to create a derivative work, only the rights to the new added expression belong to the licensee, and the licensor retains the copyright in the original work.
- There is a public copyright license called a Creative Commons license that allows copyright owners to use their work. There are different types of Creative Commons licenses, depending on how the copyright owner wants the work to be used. The licenses can specify whether use can specify if the work is allowed to be used commercially, whether derivatives are permitted, if they want any use to be attributed to them, and if they wish to require that you share your work in the same manner. Information on these licenses can be found on the Creative Commons website at:
 - creativecommons.org
- If you see a work online that claims to be licensed, it is often necessary to investigate further because there are internet users who may falsely claim a use is licensed. Always investigate before deciding to use something that may be copyright protected.

G. Tips for Negotiating

Negotiating can involve an imbalance of negotiation power between the artist and the client and is difficult, but there are a few tips that can help you to ensure the agreements you enter into are solid and fair.

- It is important to make sure you are negotiating with someone who has the authority to make the agreement and carry out the terms. This prevents problems later in the work process.
- It is often a good idea to educate clients early, through online FAQs or other methods, about what you expect when it comes to transfer or licensing of rights and how pricing works for different levels of rights granted.
- Clients may want visual artists to transfer all of their rights to images or sign a work for hire agreement, but there are other options:
 - Negotiate down based on what clients actually need. Determine what rights they actually need based on how they plan to use the images. This will also save them money, because purchasing all of the rights to

images is more expensive than a more limited license.

- One way to make sure the client has all the rights they need is to give the client use of all rights in perpetuity, but the client is not allowed to sell the rights or prevent you from selling them.
 - If the client is not planning to use the images in multiple countries, the agreement can be more specific geographically and allow for broad rights in the countries they plan to use the works in.
- Pay attention to the purchase order sent by the client. Organizations may agree to a specific contract or agreement, but the purchase order may have different terms included in writing that differ from the previous agreement.
 - When negotiating prices, it can be helpful to show your client the market price for photographs using software called fotoQuote.⁹ This program generates market based quotes based on how the images will be used.

H. Tips for Contracting

Contracts are necessary for ensuring that agreements, such as licenses and commissioned work, can be recorded and upheld. Many times one party may have a contract already prepared, but it is always important to look the contract over carefully. There may be areas where the contract needs to be changed in order to make an artist or client comfortable with the agreement.

- Be clear and agree on copyright terms before beginning work or signing a contract that may transfer all rights to the client.
- Rights can only be sold if they are possessed by the artist. For example, if a visual artist does not have model releases for images, they cannot be sold to use in advertising.
- Indemnity clauses are used in contracts to determine who is liable for legal problems that may arise regarding the contract. Often indemnity clauses assign liability to the artist. It is best

⁹ <http://www.cradocfotosoftware.com/fotoquote/>

to request the indemnity clause be reciprocal. This means that if the artist makes a mistake, they will be liable, but the client will be responsible for their own mistakes. Artists want to avoid being held liable for a legal issue that was not their fault.

- If there are certain phrases that client policies require in their contracts, such as work for hire, it may be possible to alter the contract so that it contains these phrases, but it is made clear that they don't apply to this situation. Stating that the images are only work for hire if an additional fee is paid, when the additional fee is not paid by the client, could achieve this. The work for hire term would then not have effect.

I. Tips on Rights Clearance

Rights clearance is the process of checking to ensure someone who is selling a work actually has all of the rights that they are trying to sell. There are law firms that specialize in rights clearance, often for complicated works like movies where there may be many different rights involved.

- Photographers may not be able to publish pictures of certain subjects without clearing the rights to that subject with the rights owner. For example, if a model is wearing a scarf with a trademarked pattern in a shoot, the photographer would need permission from the trademark owner to publish that photo.
- If a law firm is hired to ensure that all rights are cleared in a work, there is rights clearance insurance that will cover costs if a mistake was made and a legal issue develops.

J. Additional Resources

- The Copyright Alliance provides many free resources for artists including FAQs, blog posts, and videos explaining copyright law. (copyrightalliance.org)
- The American Society of Media Photographers (ASMP) provides links to their podcast, blog, and webinars directed towards educating photographers and other visual artists on various topics and current events. (asmp.org)
- The Graphic Artists Guild provides tools & resources on their website that explain everything from business practices to copyright law. (graphicartistsguild.org)
- U.S. Copyright Office website provides instructions and FAQs about registration procedures, as well as a search tool for finding registered works. (copyright.gov)

- Other membership organizations such as the National Press Photographers Association (NPPA) and North American Nature Photography Association (NANPA) provide educational and business resources to their members. (nppa.org, nanpa.org)