CALIFORNIA LAWYERS FOR THE ARTS

WHO WE ARE?

Our Mission: California Lawyers for the Arts empowers the creative community by providing education, representation, and dispute resolution to artists. Through its leadership and services in C.L.A. strives to empower the arts sector for the benefit of communities throughout California.

What We Do:

- C.L.A. serves more than 11,000 artists annually through dispute resolution services, legal referrals, education programs, and information services.
- C.L.A. has nearly 1,800 paying members, including artists and arts organizations of all disciplines and cultural backgrounds, attorneys, accountants, teachers, and others.

Our Services:

- Lawyer Referral Service (LRS):
    - C.L.A.'s LRS is certified by the State Bar of California and handles arts and non-arts related legal issues for artists.
    - C.L.A. maintains a panel of attorneys specializing in various disciplines. Each attorney is paired with a client--for a legal consultation--based upon the client's specific legal issue(s).
- Arts Arbitration & Mediation Services (AAMS):
    - AAMS provides alternative dispute resolution services to members of the creative arts communities. Such services include: counseling; conciliation; mediation; arbitration; neutral evaluation; and meeting facilitation, all provided by neutral program coordinators working in our office locations.
    - In efforts to keep the parties from going to court and to avoid litigation costs, coordinators offer conciliation assistance, coordinate mediations held at a neutral site with trained mediators, coordinate arbitrations, or early neutral evaluations.
- Educational Events and Workshops:
    - Present educational workshops and events that focus on various arts related issues.
    - These workshops are led by attorneys or other members of the legal community to further educate creative artists on frequently arising legal issues.

Our Website: Visit our website at www.calawyersforthearts.org to:

- Learn more about our upcoming events and workshops.
- Browse our online bookstore to find many legal resources.

WHY SHOULD ARTISTS KNOW THE LAW?

- **Expression** - First Amendment and Intellectual Property law
- **Monetization** - Intellectual Property law and Contract law

COPYRIGHT LAW

What is it?

- Copyright is a legal protection that provides the creator/author of an "original work of authorship," including, literary, dramatic, musical, artistic, and other intellectual works, with an exclusive bundle of rights allowing the creator to control the use of the work.
- For example, as soon as you write a novel or paint a painting, the copyright laws automatically trigger the exclusive rights.
    - "Exclusive" means that only you, as the author, can exercise them. You may transfer these rights to another, but others may not use your original material without permission.

How Does Having a Copyright Help Me?

- You can exercise your exclusive rights to earn money (sale, reproduction, adaptation, performance, etc. of the work itself).
- You can exercise your rights through licensing (lending) or selling the rights to your work.
- You can sue parties (people, business, etc) who use your work without permission.
    - For example, if a person uses your copyrighted work without permission (or in legal terms, commits *copyright infringement*) you can make them stop and perhaps collect compensation for the damage they've caused.

What's the Purpose of Copyright?

Birth and History

- Copyright was initially conceived as a way for the British government to control and regulate printing, during the advent of the printing press and increasing public literacy.
- The British government desired to stop unauthorized printing of books without their authors' permission by enacting the British Statute of Anne (1710).
- In the West, copyright has developed as a means of protecting expression, promoting the advancement of the arts, and economic/commercial protection, rather than as a means of protecting the author's "moral" rights like crediting authors/attribution.

What's the Source of Law?

- The U.S. Constitution
    - According to the U.S. Constitution, the primary purpose of copyright is to **promote the progress of science and human knowledge**:
        - Article I, Section 8: "The Congress shall have Power … To promote the Progress of Science and Useful Arts, by securing for limited times to Authors … the exclusive Right to their … writings."
    - Thus, the goal of copyright is not to benefit the authors, but to help *incentivize* the progress of science and knowledge by making it possible for those authors to reap exclusive rewards from their creation.
- The Copyright Act of 1976
    - This is the federal law that provides for copyright protection by granting authors a bundle of intangible, exclusive rights over their work.

What Types of Works are Protected by Copyright?

- Original Works
    - Copyright protects an author's works if and to the extent that they are the author's own "**original** works of authorship."
    - "Original" means that that you did not copy the work from another's work or from the public domain without independently adding any creativity.
        - Only requires "a modicum" of creativity - or a "minimal creative spark".
        - Works that have been considered to lack even minimal creativity include a mere listing of ingredients or a telephone directory.
- Fixed and Tangible
    - Copyright protects works that have been **fixed in a tangible medium of expression** (this means that the work must be reduced to some tangible form, such as a writing, drawing, CD, DVD or a digital recording).
- Section 102 Categories
    - Copyright covers **different categories** of works. Section 102 of the Copyright Act (17 U.S.C. § 102) lists some categories of protected work, which include:
        - Literary works;
        - Musical works (which includes accompanying words or lyrics)
        - Dramatic works (which includes any accompanying music)
        - Pantomimes and choreographic works;
        - Pictorial graphic and sculptural works
        - Motion pictures and other audiovisual works;
        - Sound recordings;
        - Architectural works.
    - These categories should be viewed broadly. For example, computer programs and most "compilations" may be registered as "literary works"; maps and architectural plans may be registered as "pictorial, graphic, and sculptural works."

Types of Work that are NOT Protected by Copyright

- Ideas
    - The source of this rule is found in Section 102(b) of the Copyright Act which states that copyright protection does not extend to an "idea, procedure, process, system, method of operation, concept, principle, or discovery"
        - Rationale - the purpose of copyright will be impeded if there is a "mini-monopoly" over an idea or concept.
        - Example. A movie about Superman is protected, as is the character of Superman, but the mere idea of a superhuman crusader is not.
- Facts
    - Pure facts, whether scientific, historical, biographical, or news of the day, are not protected by copyright.
        - Source: See Section 102(b), above.
        - Obvious rationale - the spread of knowledge would be greatly impeded if one could copyright facts, and facts are not independently *created* by authors, rather they are *discovered*.

- Public Domain
    - Includes works in which the copyright is expired or lost, and works authored or owned by the federal government.
    - This concept of a 'public domain' is important because new expression is not created from thin air. All authors draw on what has existed before which form memories, experiences, inspirations and influences for their work. Without the public domain, it would be practically impossible for anyone to create any works without committing copyright infringement.
- Fair Use
    - Accordingly to the fair use rules within the Copyright Act, a person may be free to copy from a protected work for such purposes as criticism, commentary, news reporting, teaching or research. This doctrine of fair use will be discussed in more detail in a separate section.

How Do I Create a Copyright?

- An artist's copyright **automatically** comes into existence the moment an author fixes his/her original works in some tangible form.
    - For example, the moment an artist's artwork is expressed on any tangible object a copyright is created.
- Published works are *no longer required* to contain a copyright notice (i.e., © symbol followed by publication date and copyright owner's name).
    - NEVERTHELESS, it's a good idea to include a copyright notice to give notice of your claimed ownership to potential copiers.

Then Why Do I Register?

- A summary of some registration benefits:
    - You can only file a copyright infringement lawsuit if you've registered your artwork first.
        - Registration causes your work to be indexed in the Copyright Office's records, which are open to the public. They are frequently searched to find out whether a particular known work has been registered and, if so, who currently owns the copyright.
    - You have a right to receive special statutory damages and possibly your attorney's fees if your infringement lawsuit is successful.
        - Specifically, if you register your artwork prior to an infringement, or within three months of its publication, you may be entitled to special payments known as "statutory damages" and attorney fees from the person you sued.
        - You need to pay a fee for registration. The list of fees for copyright registration can be found on: http://www.copyright.gov/docs/fees.html

Types of Ownership

- Authorship - A work is initially owned by the author(s) unless it is a work for hire.
    - The employer of a work made for hire is considered the author.
        - Work made for hire is defined in §101 as: a work prepared by an employee within the scope of his or her employment; or a work specially ordered or

commissioned for use as a contribution to a collective work/a part of a motion picture/a translation/a supplementary work/a compilation/an instructional text/a test/answer materials for a test/an atlas

- Authors of a joint work are considered co-owners.
- If two people *independently* create the *same* work, *both* can be copyrighted, as both are independent creations.

What Rights Do I Have Once Copyright is Created?

What are the "Bundle of Rights"?

- Once copyright is created, Section 106 of the Copyright Act provides that you have exclusive rights to your work which include:
- **reproduction right** - this is the right to make copies of a protected work;
- **distribution right** - this is the right to sell or distribute copies to the public;
- **right to create derivative works** (adaptations, spin-offs, merchandise) - this is the right to prepare new works based on the protected work; and
- **performance and display rights** - this is the right to perform a protected work, such as a stage play, or to display an artwork in public.

How Long will These Rights Last?

- Because of frequent changes to duration during the 20th century, many rules and sub-rules exist.
- For our purposes, just know that copyright protection lasts for a long time.
  - For instance, copyright for works created after 1977 by individuals usually lasts for the life of the author plus an additional 70 years. (Section 302(a) of the Copyright Act)
  - In addition, copyright in works-for-hire last for 95 years from the date of publication, or 120 years from the date of creation, whichever occurs first. (Section 302(c) of the Copyright Act)

What is Infringement?

- Infringement is the unauthorized use of a copyrightable work.
- To sue a party for direct infringement one must prove two elements:

(1) ownership of a valid copyright, and
(2) copying of constituent elements of the work that are original.
- this element requires proof:
(i) of actual copying of the plaintiff's work by the defendant &
(1) access to the plaintiff's work; and/or
(2) probative similarities between the works.
(ii) that such copying constitutes an improper appropriation of the plaintiff's work.

How is It Applied?

- Copyright as Applied to: **Designing Crafts**
  - If you work with crafts, an issue you may have to deal with is whether your work is considered adequately "original."

        - As long as you can demonstrate some "spark" of creativity, you will make the grade. Conversely, if your work uses only common geometric or natural shapes, you may have difficulty claiming copyright protection
        - Example:
            - *Paul Morelli Design, Inc. v. Tiffany and Company*, 200 F.Supp.2d 482 (2002).
            - In 1987, Paul Morelli, a jewelry maker whose works are offered in many upscale stores created a jewelry line called "Sprinkled Diamond" The first piece was a heart-shaped pendant with a zigzag pattern of inlaid diamonds flush to the surface.
            - Within a few years, Tiffany & Co., after reviewing slides of Morelli's work, began selling a similar line of jewelry.
            - However, Morelli lost the case because, although his expert witnesses testified otherwise, the jury found that the jewelry, which consisted mainly of common geometric shapes (heart, square and circle) was **not** a type of expression that was copyrightable.
    - Thus, one lesson from this case is that copyright protects originality but not craftsmanship. The most beautifully created work may not qualify for protection if its design comprises only of basic geometric shapes that are free for all to use. In other words, the more ornate work is more likely to acquire copyright.

- Copyright as Applied to: **Typeface Designs**
    - For type designers, an important issue that comes up is whether a font design is merely a *functional* object (which cannot be copyrighted) or a work of art where some minimal creativity is involved (which can be copyrighted).
        - Basically, copyright law won't protect a functional object like a lamp or a shoe (although patent law might provide protection, see below)
        - Only the "arty" features are protected. Here's an example: You design an elephant shaped cup. You can usually claim copyright protection for the arty aspect, the elephant shape, but *not* for the cup's functional features.
    - Typeface designs typically not subject to copyright protection n the U.S. because the utility of typefaces is said to outweigh any good that may exist in protecting their creative aspects.
        - *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978).
        - The Copyright Office and Federal Regulations (Code of Federal Regulations, Ch 37 Section 202.1) currently do not consider typeface designs to be copyrightable.
    - However, there are alternative methods of protection:
        - Digital fonts of a particular design can be subject to copyright as **computer programs**.
            - In *Adobe Systems, Inc. v. Southern Software, Inc.,* No. 20710 1998 U.S. Dist. LEXIS 1941 (N.D. Cal. Feb. 2, 1998) the court held that Adobe's Utopia font was protectable under copyright.

- Here, Adobe's fonts were created from previously digitized font files in bitmap form (bitmap images are not protectable under copyright, according to the Copyright Office).
- However, the interesting part is that these font files were later imported into a computer program where an Adobe editor dragged control points to best match the outline of the bitmap image. When finished, these control points were translated into computer instructions to create the final font file.
- The court found that there was creativity in picking out those control points to create the final font file. This is because two independent font editors could begin with the same images and produce indistinguishable final fonts which look very similar, yet have very few control points in common.

■ Design patents under the **patent law** scheme (see below)

■ N*ames* of typefaces can become trademarked under the **trademark law** scheme provided certain conditions such as distinctiveness.

- This is a relatively weak form of protection because only the font name itself is being protected.

- Copyright as Applied to: **Paintings and Visual Artworks**
  - If you're an artist thinking of creating paintings using other pre-existing copyrighted materials, consider the following.
  - First, it's helpful for you to understand what a "derivative" work is.
    - A derivative work is one where you have taken an expression that already exists, add new expression to it, and end up with something new.
    - Examples:
      - A writer writes a screenplay based upon a novel. She organizes the material into cinematic scenes, adds dialogue and camera directions, and deletes material that can't be filmed. The result is a new work of authorship that's separately protected by copyright, a derivative work.
      - When you create a painting of a photograph, the painting is known as a derivative work.
  - Second, it helps for you to know when you need permission to create a derivative work.
    - However, you can use items from the public domain for your artworks. These do not require permission.
    - What about pop artists (or appropriation artists) such as Andy Warhol and Roy Lichstenstein?
      - Both Andy Warhol and Roy Lichstenstein are known for appropriating pre-existing (and probably copyrighted) images from other sources and using them as the basis for their artworks. So, have they been sued for copyright infringement?
      - In 1964, a woman named Patricia Caulfield sued Andy Warhol for copyright infringement after he used a photograph of hibiscus flowers she'd published in *Modern Photography* that he enlarged and recolored

for his *Flowers* paintings. This case was settled out of court in which Caulfield received a royalty for future use of the image as well as two of the paintings by Warhol.

- For Lichstenstein, it appears that many of his artworks would be considered "derivative works" because he had appropriated and incorporated other copyrighted expressions into his paints and prints. For example, in the work "Drowning Girl", Lichtenstein used the splash page of a romance story in DC Comics' *Secret Hearts* #83 (November 1962), lettered by Ira Schnapp, and "converted" it into a painting utilizing oil and Magna paint.
- Interestingly, it seems that Lichstenstein was never sued in court for copyright infringement. However his appropriation, which may have been considered fair use in the 1960s, may not be consider "fair use" today (as comic book artists are now respected, name-recognized, and often very established visual artists).

- Nevertheless, it pays to err on the side of caution as some artists have paid dearly for not obtaining the required permission before making a derivative work.
  - In 1985, the artist Jack Mendenhall painted a mural based on a photograph originally taken by advertising photographer Hal Davis.
  - The court awarded Davis $11,000 in damages, $4,000 in legal fees and granted him the painting's copyright. Davis was even entitled to future use of Mendenhall's mural!

What are Creative Commons Licenses?

- A type of public copyright licenses that allow the distribution of copyrighted works.
- Used when an author wants to give people the right to share, use and even build upon a work that they have created. This is different from an ordinary copyright law scheme where users of works have to first seek permission from the author. Under the Creative Commons scheme, you can freely use the author's works (under certain conditions set by the author), if that author had chosen to include his/her work under the Creative Commons scheme.
- Creative Commons provides an author flexibility (for example, they might choose to allow only non-commercial uses of their own work) and protects the people who use an author's work. In other words, you comply with the author's conditions when you use his/her work, you don't have to worry about being sued for copyright infringement.
- More information can be found in the Creative Commons website at http://creativecommons.org/

FAIR USE

What is it?

- Basically, fair use is a rule in copyright law that allows an author to make limited use of a prior author's work without asking for permission, in order to avoid being sued for copyright infringement.
- There are a wide variety of examples of fair use. Here are some examples to give you a flavor of the types of fair use:

- Commentary, criticism or parody of another author's work
- Scholarship and research wherein another author's work has been cited or quoted
- Making a copy of another author's work for teaching purposes

What's its Purpose?

- The purpose of fair use is to make exceptions where the strict enforcement of an author's economic rights would hinder, rather than promote, the growth of knowledge.
  - For example, a researcher's work depends on their ability to refer to and quote from prior scholar's work. A researcher would not be able to create new work if they were first required to repeat the research of every prior author.
- Thus, to avoid these types of results, the fair use privilege was created.

What's the Source of Law?

- The fair use "rules" are found in the Copyright Act. Specifically, Section 107 of the Copyright Act provides that "the fair use of a copyrighted work … for purposes such as criticism, comment, news reporting, teaching … scholarship, or research, is not an infringement of copyright."
- In addition, Section 107 provides 4 factors that courts consider to determine whether a work in any particular case is a fair use:
  - Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - Nature of the copyright work;
  - Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - Effect of the use upon the potential market for, or value of, the copyrighted work.
- Each of these four factors will be discussed in turn.

How Can I Decrease My Liability?

- Fair use is only a defense to a copyright infringement claim. If you use copyrighted material without permission, you may still be sued. But courts may quickly decide a very clear case of fair use.
- As mentioned, the court will be balance the four factors. Some factors have been considered to be more significant than others. If, on balance, the factors weigh in your favor, you will better your chances of avoiding a lawsuit.

<u>First Factor: Purpose and Character of the Use</u>

- Whether the subsequent work merely serves as a substitute for the original or instead "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message." *Campbell v. Acuff-Rose Music, Inc.* 114 S.Ct 1164 (1994). In other words, the more "transformative" your work is, the more likely that the first factor will weigh in your favor.
- The first factor is very significant in a court's decision.
- The following are very typical examples of transformative uses:
  - Criticism and Comment - for e.g. quoting or excerpting a work in a review or criticism for purposes of illustration or comment.

- News reporting - e.g., quoting an address or article in a news report.
- Research and scholarship - e.g., quoting a passage in a scholarly, scientific, or technical work for illustration or clarification of the author's observations.

Second Factor: Nature of Prior Work

- Generally, less protection is given to factual works (scholarly, technical, scientific works) than to "fanciful" or "creative" works (novels, poems, plays, paintings)

Third Factor: The Amount and Substantiality of the Portion Used

- Generally, the more material you take, the more likely that the third factor will weigh against you.
- "Amount": this basically refers to the *quantity* of the material in relation to the whole material which you use from the prior work. For instance, depending on circumstances, it is more likely that copying 10 words out of a whole song comprising 200 words will more likely weigh in favor of fair use.
- "Substantiality": this basically refers to the *quality* of the material you use. The more important it is to the original work, the less likely is your use a fair use. For instance, if the 10 words of a whole song relates to the "heart" of the song (the phrase "Who let the dogs out, woof, woof, woof, woof" in Baha Men's "Who Let the Dogs Out" is very likely the "heart" of that song), then your use of those 10 words is less likely to be adjudged as fair.

Fourth Factor: The Effect of the Use on the Market for, or Value of, the Prior Work

- The court considers whether similar copying by others would have a substantial adverse impact on the potential market for the original work.
- It is up to you to show that there is no harm to the potential market for the original work. It will help if your work is more "transformative" under the first factor because the more transformative the subsequent work, it will more likely be aimed at a different market from the original.

How is Fair Use Applied?.

Fair Use as Applied to: Visual Artworks

Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)

- In this case, Jeff Koons, a well-known visual artist, selected several photos of women's legs from popular magazines including one taken by Andrea Blanch. Koons scanned the photos, loaded them into his computer, manipulated and edited them, and then digitally superimposed the edited images onto a background featuring food and pastoral landscapes. Two of the eight legs featured in the final painting derived from Blanch's photo. After seeing Koons' painting, Blanch sued Koons for infringement.
- The court held that Koons' use of Blanch's photo was fair after examining the four fair use factors.
    - On the first factor (purpose and character of the use), the court held that the use was transformative, since Blanch's photo was "fodder for his commentary on social and

aesthetic consequences of mass media" for which "the use of an existing image advanced his artistic purposes".
    - On the second factor (nature of prior work), the court gave limited weight to this factor in view of the transformativeness of the use discussed in the first factor, because Koons had commented on the photo's social and aesthetic meaning rather than exploiting its creative virtues.
    - On the third factor (amount and substantiality of the portion used), the court amount taken was held to be reasonable in light of Koon's purpose to convey the 'fact' of the photograph to viewers of the painting.
    - On the fourth factor (effect of the use on the market for, or value of, the prior work), the court took into account Blanch's admission that she did not suffer any harm from Koons' use of the photo.
- In addition, Koons' artwork was used for public art display at art galleries. The court found that this fact favored fair use because the public exhibition of art is widely considered to have value that benefits the broader public interest.
- Also of note: often non-expressive elements of photographs can be used without permission by other artists.

Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) and
United Features Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993)photo.

- Two separate cases in which Jeff Koon's sculptural "parody" works were deemed to not be fair use.
- In the first, *Rogers*, Koons referenced an absurd picture of couple sitting on a bench, holding a large group of puppies on their laps. Koons sold three sculptures called "string of puppies."
- In the second, Koons used the Odie character from *Garfield* comics in a sculpture.
- Koons' used the fair use defense both case cases, citing that the use was parody.
- However, both courts held that "parody" must comment on the intellectual property being used rather than society as a whole ("satire").

What are some additional considerations?

- <u>After being denied permission from a copyright owner, can you still use his/her work without permission on the grounds of fair use?</u>
    - The Supreme Court has said yes to this question: "If the use is otherwise fair, no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use." *Campbell v. Acuff-Rose Music, Inc.,* 114 S.Ct 1164 (1994).
    - In fact, it may also increase the strength of the fair use defense, BUT it puts the creator on notice that you intend to use his/her work.

MORAL RIGHTS: VISUAL ARTISTS RIGHTS ACT OF 1990

The Berne Convention and the Birth of Moral Rights

- First accepted in Berne, Switzerland in 1886, The Berne Convention for the Protection of Literary and Artistic Works, commonly known as **The Berne Convention,** is the world's oldest international copyright treaty.
- Article 6bis of The Berne Convention enshrines **two main moral rights.**
    - The **paternity right,** which recognizes the artist's right to claim authorship and attribution of a work.
    - The **integrity right**, which recognizes the artist's right to prevent others from distorting, mutilating or modifying their work.
- Succinctly, **moral rights,** from the French phrase le droit moral, **refer to non-economic personal rights of an artist.**
- United States Congress passed the **Berne Convention Implementation Act** in 1988, making it a party to The Berne Convention. The Convention requires its signatories to recognize the moral rights discussed in Article 6bis.
- In response to this, Congress enacted the Visual Artists Rights Act in 1990, also known as **VARA.**

Fundamentals of VARA

- VARA, enacted as an amendment to the US Copyright Act of 1976, **recognizes only the moral rights of paternity/attribution and integrity.**
    - Specifically under VARA, the right of paternity/attribution encompasses:
      1) the right to be identified as the work's author; and
      2) the right to prevent the use of the author's name as the author of a work that he or she did not create.
    - Specifically under VARA, the right of integrity encompasses:
      1) the right to prevent any intentional distortion, mutilation or modification of a work of art that is prejudicial to the author's honor or reputation;
      2) the right to prevent any intentional or grossly negligent destruction of a work of recognized stature.

      Protection limited to "original work" and not reproductions, depictions, portrayals of the work; No protection for works of art incorporated into buildings that would cause its destruction if artist consented to installation before 1991 or consented to such acts after 1991 or for works that are removed from a building without causing harm where owner of the building in good faith tried to find the artist.
- **VARA only covers limited, fine art categories of "works of visual art."** This is defined more narrowly than it is under US copyright law.
    - Works of visual art are **defined as** paintings, sculptures, drawings, prints and photographic images produced for exhibition purposes.
    - Furthermore, **only artworks that exist in a single form or are signed and consecutively numbered in a limited edition of no more than 200 copies are protected.**

    - **Excluded from protection are** works made for hire, posters, maps, globes or charts, technical drawings, diagrams, models, applied art, motion pictures, books and other publications, electronic publications, merchandising items or advertising, promotional, descriptive, covering, packaging material or container, nor any work not subject to general copyright protection.
- VARA is also a fairly limited statute in that as stated above, it **only protects the owners of artworks of *recognized stature* from being intentionally or grossly negligently destroyed.**
    - This signifies that mere negligence is not enough to bring a cause of action under VARA.
- Important to note is that **VARA rights are wholly independent from copyright owner's exclusive rights.** Thus, while the artist can maintain his or her VARA rights, whoever owns the copyright in the artwork can exercise their exclusive copyright rights to that artwork.
- It has been held under *Board of Managers v. City of New York* (2003) that VARA pre-empts the rights granted under state law where equivalent rights are listed under VARA.

Duration of VARA

- For **works created on or after December 1, 1990, VARA's moral rights are granted for the life of the author,** or in cases of **joint work, until the death of the last surviving author.**
- For works created before that date, but still owned by author on that date, moral rights expire at the same time as the copyright - lifetime of the author plus 70 years. However, artists who created artworks prior to 1991 do not benefit from the right to prevent destruction of a work.

Remedies for Infringement

- **The legal remedies available for a violation of moral rights are the same as the civil remedies available for copyright infringement.**
    - Remedies: injunction, impounding, damages incurred (actual or statutory under the Copyright Act), profits or statutory damages, costs and reasonable attorney's fees.
- **Copyright registration is not required** as a prerequisite for an artist to be able to bring a federal cause of action under VARA.

Waiver of Rights

- VARA restricts the exercise of the rights of attribution and integrity **only to the author/joint authors of the artwork, regardless of whether or not they hold the copyright to the artwork itself.**
    - Thus, moral rights cannot be transferred through copyright - **however, moral rights *can* be waived.**
- Waiver instrument must be **very specific. Elements needed:**
    - 1) Creator must show consent;
    - 2) In a written and signed instrument;
    - 3) Identifying the artwork;
    - 4) Identifying the use of that work;
    - 5) With a clause limiting the waiver to the two above aspects**.**
- Waiver by one artist in artwork of joint authorship binds the entire group.
- Galleries more likely to be involved in the waiver of moral rights.

CALIFORNIA ART PRESERVATION ACT (CAPA)

What's CAPA and its Source?

- CAPA is a 1979 California law that provides legal protection for artists' moral rights.
- The source of law is Section 987 of the California Civil Code.

What's Its Purpose?

- The CAPA seeks to promote and protect artists' interests in having their works protected against alteration or destruction, as well as promoting the public interest in preserving the integrity of cultural and artistic creations.

What Kinds of Artworks are Covered by the CAPA?

- The CAPA does not cover all types of artworks.
- Like VARA, its coverage is only **limited to "fine art"**
- In deciding whether a work is of "recognized quality", the court relies on the opinions of artists, art dealers, curators, collectors and others involved with the creation or marketing of fine art (Section 987(f) of the CA Civil Code).

How Does It Protect You?

- If you create a work of art that amounts to "fine art" defined above, then the CAPA protects you against intentional physical defacement, mutilation, alteration or destruction of your work by someone else. (Section 987(c) of the CA Civil Code)
- The following case illustrates how CAPA has been invoked to protect the artist.
    - *Kent Twitchell v. West Coast General Corp et al.*
    - Between 1978 and 1987, Kent Twitchell painted the Ed Ruscha Monument on a building in downtown LA owned by the U.S. Department of Labor and occupied by the L.A. Jobs Corps Center (LAJCC). The mural was painted at the invitation of a former director of the LAJCC but Twitchell had total artistic control over the mural and its subject, famous L.A. pop artist Ed Ruscha.
    - The mural was desecrated due to structural works carried out by contractors. In particular, certain construction works (rebar) required holes be punched in the mural and patched, and in June 2006, without Twitchell's knowledge or consent, the mural was painted over with one coat of primer.
    - Amongst other claims, Twitchell filed suit under the VARA and CAPA. Twitchell obtained a large settlement for $1.1 million against the U.S. government and 12 other defendants.

How Does the CAPA square off with the VARA?

- <u>Parts of the CAPA may be preempted by the VARA</u>
    - Under the doctrine of preemption, a state law is considered invalid if it conflicts with, or is otherwise inconsistent with, or impedes federal law. This doctrine stems from the Supremacy Clause of the U.S. Constitution.
    - Here, VARA is federal law, whilst CAPA is a state law. Thus, if certain portions of CAPA (state law) are inconsistent with or impedes the purposes of VARA (federal), then

such portions will likely be invalidated. When this happens, you could end up only being able to sue under the VARA.
    - To avoid preemption, a state law must somehow be qualitatively different from a federal law so that it won't be deemed inconsistent with federal law.
        - Applying to the CAPA, the CAPA contains provisions that at first glance appear similar, but may be qualitatively different (for instance, a CAPA provision may contain an additional element which distinguishes a CAPA claim from a VARA claim) from the VARA provisions. Some of these qualitative differences are examined below.
- <u>The scope of works protected by the CAPA appears to be a little more limited</u>
    - CAPA protects against intentional mutilation, alteration, defacement or destruction of only non-commissioned original paintings, sculptures, or drawings, art in glass, of "recognized quality".
    - Under the VARA, you don't have to prove that your work is of a certain quality to protect it from alteration (unless you want to protect it against destruction).
- <u>The duration of rights are different</u>
    - VARA provides that the rights for works created after June 1, 1991, endure only for the life of the author.
    - In contrast, under the CAPA, an author's rights expire on the 50th anniversary of the artist's death.
- <u>The remedies appear to be similar (although their sources of law are different)</u>
    - Because VARA is part of the Copyright Act, remedies are basically the same as for copyright infringement, which include: injunction, impounding, actual damages, profits or statutory damages, costs and reasonable attorney's fees. The provisions on remedies for copyright infringement are found in Sections 501-504 of the Copyright Act.
    - CAPA remedies appear similar, and they include injunctive relief, actual damages, punitive damages, reasonable attorneys' and expert witness fees and other relief which the court deems proper. The remedies provision is found in Section 987(e) of the CA Civil Code.

CALIFORNIA RESALE ROYALTY ACT

Why do we need it?

- A rule in copyright law called "the First Sale" doctrine.
- This rule allows buyers of, for instance, a DVD or book to resell the physical object along with the underlying creative work to a new buyer without the approval of the owner of the underlying copyright.
- Sounds fair, right? But when it comes to the fine art, resale is a completely different monster.
    (1) to maintain value (and VARA rights) these works cannot be mass produced
    (2) there is usually an "original".
    (3) fine art frequently increases in value rather than depreciates

So what is the California Resale Royalty Act?

- California Civil Code Section 986, also known as the **California Resale Royalty Act**, entitles artists to a **5% royalty payment upon the resale of their artwork** under certain circumstances.
- This act attempts to mirror the notion of resale payments that was exemplified in a French law passed in 1920. The French law granted artists a **droit de suite -** an inalienable right to hold interest in artwork after selling the artwork.
- No federal protection exists for this right.
- Certain sales do not generate a resale royalty payment.
- **Currently, California is the only state to recognize a resale right.**

Conditions for Resale Royalty Payments

- Under CA Civil Code Section 986, an artist is entitled to a 5% resale royalty payment **provided that the following conditions are met:**
    - The artist at the time of the sale is a United States citizen or has been a California resident for at least two years.
    - The seller resides in California or the sale takes place in California.
    - The work is an original painting, drawing, sculpture or original work of art in glass.
    - The work is sold by the seller for more money than she or he paid.
    - The work is sold for a gross price of more than $1,000 or is exchanged for one or more works of art or for a combination of cash, other property, and one or more works of fine art within a fair market value of more than $1,000.
    - The work is sold during the artist's lifetime or within 20 years of the artist's death.
- **The act does not apply if:**
    - The sale is the initial sale of the work and the legal title of the work at the time of such initial sale is vested in the artist.
    - The resale of fine art is by an art dealer to a purchaser within 10 years after the initial sale by the artist to an art dealer, provided that all intervening sales are between art dealers.
    - The sale consists of a work of stained glass artistry permanently attached to real property and it was sold as part of the sale of the real property to which it was attached.

Requirements Under the Act for Qualifying Works

- Upon fulfillment of the above conditions, a seller is required to pay the artist 5% of the resale price.
    - If the artist is deceased, the payment goes to the artist's estate or heirs.
- **It is the seller's obligation to find the artist and pay the royalties due.** If the seller cannot locate the artist or the artist's heirs within 90 days of the sale, the royalty is instead paid to the California Arts Council, which then attempts to locate the artist.
- California Arts Council holds payments for up to seven years. If the organization is unable to locate the artist or the artist's heirs in that seven years, or if the artist fails to claim his or her royalty payments in that time frame, the collected money is distributed to Sacramento's Art in Public Places program.
- An auction house or gallery can act on behalf of the seller, but it is the seller's legal obligation to pay the royalty.
- Artists, their estate or heirs may donate their resale royalties to the California Arts Council.

Case Law/Examples

- Ghirardelli Square in San Francisco was sold - artist Ruth Asawa recovered $5,000 in resale royalty, which was 5% of the appraised value of the fountain she had created that was sold along with the square.
- Jack Nielsen recovered resale royalties after his sculpture had appreciated in value from $30,000 to $125,000 and was sold after the office complex it was located in was bought in foreclosure.

Lawsuits Challenging the California Resale Royalty Act

- Three-class action lawsuits have recently been filed in federal District Court by artists against powerhouse auction houses like Sotheby's and Christie's, alleging that the auction houses had not adhered to the California Resale Royalty Act. The auction house defendants filed a motion to dismiss in District Court, where they challenged the Act's constitutionality.
- Federal District Court Judge Jacqueline Nguyen granted the motion to dismiss, holding that the Act violated the Commerce Clause of the Constitution, as it appeared to cover sales in other states. As a result, artists have filed an appeal with the Ninth Circuit Court of Appeals.
- In addition to the appeal, artists filed a motion to make clear that Judge Nguyen's ruling does not make the California Resale Royalty Act ineffective. The motion asked for a stay on the invalidation of the law. This was granted by Judge Michael W. Fitzgerald, who wrote that the ruling was not binding precedent on other district courts within or outside the Ninth Circuit.
    - Furthermore, a district court cannot render a state law unconstitutional.
    - The Ninth Circuit Court of Appeals' ruling will decide the constitutionality of the act.

TRADEMARKS

What are they?

- A trademark is generally a word, phrase, symbol, or design that identifies and distinguishes the source of goods from one party from those of others.
- For example, think of an icon or word that you specifically associate w/ one consumer good.
    - **Nike** has the Swoosh,and the phrase "Just do it."
- When a mark is used to identify a good, it's called a trademark. When a mark is used to describe a service, it's a service mark. Under some circumstances, trademarks extend beyond the traditional limits of a word or picture and also provide protection for a combinations of colors, a pattern or specific packaging ("trade dress")
    - Example: the shape of the Coca-Cola bottle or the Klondike ice cream bar's silver, white and blue foil.

Purpose?

- Essentially, the purpose of trademark law is **avoiding consumer confusion**. It not only protects the public from being duped by fraudulent sellers, but trademarks also protect the investments creators have in their products or services.

Who's the boss? The sources of law.

- Trademarks are governed by both state and federal law.

- In 1946, the **Lanham Act** was passed by Congress. This act defines federal trademark protection and trademark regulation, and is still relevant today.
- State law continues to add its own protection.

How does it happen?

- Trademarks arise from use. Trademark rights automatically exist when an available mark is actually used in commerce.
- Registration is not a prerequisite.
    - Unregistered trademarks, acquired by exclusive use of an available mark, are called "common law" trademarks, and they can be created freely and organically as already described.
- So why register, then?
    - Simply, registration affords legal protection of your idea, investment, product and creation. If you're serious about your product or service, then it's worth the time and effort to add some legitimacy to your mark.

In business

- If you plan on starting a business, research trademark law and how the following can impact the existence of a valid trademark:
    - Strength of the mark (generic, descriptive, suggestive, and arbitrary/fanciful)
    - Search for similar marks and how they are used - "Would my use potentially cause consumer confusion or tarnishment?"

Lawsuits in Art

- Infringement: If a party owns the rights to a particular trademark, that party can sue subsequent parties for trademark infringement. 15 U.S.C. 1114, 1115.
    - Infringement occurs when another party uses a mark that will likely confuse consumers into believing that there is some connection, affiliation, or sponsorship between the two parties.
- Likelihood of Consumer Confusion: Usually this occurs when a trademark is used on similar goods.
    - When determining likelihood of confusion, courts usually use several factors derived from *Polaroid Corp. v. Polarad Elecs. Corp.,* 287 F.2d 492 (2d Cir.). These include:
        - (1) strength of the mark; (2) proximity of the goods, (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) types of goods and the degree of care likely to be exercise; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of product lines
- Dilution: applies when the unauthorized use of a famous mark reduces the public's perception that the mark signifies something unique, singular or particular.
    - (1) **blurring**, or (2) **tarnishment**.
        - Blurring occurs when the power of the mark is weakened through its identification with dissimilar goods.
            - Ex: Kodak brand bicycles or Xerox brand cigarettes. Neither company would peacefully coexist with these types of brands.

        - Tarnishment occurs when the mark is cast in an unflattering light, typically through its association with inferior or unseemly products or services.
            - Ex: *Toys "R" Us v. Akkaoui,* 40 U.S.P.Q.2d (BNA) 1836 (N.D. Cal. Oct. 29, 1996).

Defenses to ™ Infringement.

- First Amendment - Free Speech
    - The first amendment balances an individual's rights to free speech against the needs of society.
    - The ownership of a trademark balances an individual's right to control his or her work against society's need for access.
    - No action taken: The well-known Campbell Soup Cans by Andy Warhol could have been considered infringement of the Campbell Soup Company's trademark. They also could have demanded that Warhol procure and pay for a license to continue to use their logo in his silk-screened paintings. Instead, the company's marketing manager wrote a letter to Warhol complementing the artist.
    - Action Taken: Daniel Moore, an artist who has been painting realistic historical scenes involving the University of Alabama's Crimson Tide football team for more than 30 years, has been sued by the University for trademark infringement. Moore reproduced his paintings onto mugs and other merchandise following about a dozen license agreements between the parties. Then, in 2002, the University abruptly asserted that Moore must procure a license and pay royalties for all of his paintings.
        - Moore contended he was protected by the First Amendment.
        - The University contended Moore's paintings created a likelihood of confusion that the schools sponsored or endorsed his paintings.
        - The court determined that Moore's realistic paintings are embodiments of artistic expression protected by the First Amendment that do not violate the school's trademark rights.
        - *University of Alabama v. New Life Art, Inc.* (11th Cir. 2012)
- Fair Use - Permissible Use of Another's Trademarks.
    - The first amendment assures that we have a right to voice our ideas, assert conflicting views from which new thought is derived, and criticize thought and action of powerful forces in society.
    - Both fair use and the first amendment work to make democratic dialogue possible within a society that is dependent upon information. And fair use provides a means to access the information upon which our opinions are based.
    - Without the fair use exception to copyright and trademark, free speech would be inhibited and in some cases, eliminated altogether.
    - So what exactly constitutes fair use?
        - The Ninth Circuit (CA's circuit of courts) recognizes two types of fair use: classic descriptive fair use and nominative fair use.
            - **Descriptive fair use** utilizes the mark for its descriptive value.

- **Nominative fair use** utilizes the mark as the mark -- to refer to the competitor's goods. This defense is applicable when it is necessary to identify the services, goods or owner associated with the mark.

- Parody
    - A much better defense when not a commercial use, however, the traditional "consumer confusion" and "dilution" tests are still used.
    - EX: *Anheuser Busch v. Balducci Pubs* - a parody ad featuring "Michelob Oily" was held to be infringing and likely to cause consumer confusion and dilution.
    - EX: Haute Diggity Dog (Chewy Vuitton) case - a commercial dog toy parody was considered non-infringing and not dilution. (but fun story, Haute Diggity Dog still paid $200,000 in legal fees).

PATENTS

A patent is an exclusive IP right granted by the government that gives an artist/inventor the exclusive right to make, use, and sell a given product for a given amount of time.

- Three types of patents:
    - **Utility patent**
        - Most common type. Generally protects processes, machines, articles of manufacture, and composition of matter
    - Plant patent (new variety of plant)
    - **Design patent**
        - Granted to anyone who invents a new, original, and ornamental *design* for an article of manufacture.
        - Article of manufacture = useful object, like a table, hat, ring, belt buckle, etc.
- Broadly speaking
    - Patents grant broad legal rights, but provide very narrow protection
        - Your rights with regard to the specific design are broad, but the scope covered is limited to that specific design.
        - E.g., a patent for a belt buckle shaped like an eagle does not cover all eagle-shaped belt buckles; only those that are substantially similar to your design.
    - Registration process is time-consuming (1-2 year process) and expensive (in the thousands)
    - So when is it worth it?
        - If you have a design that is likely to be lucrative and copied

Comparison to copyright

- No need to choose between them. If your work qualifies, you can claim both simultaneously.
- Copyright is automatic protection; if your work qualifies, then it is protected by copyright law. A patent you must apply for.
- In order to get patent protection, the work must be useful, and not just art for art's sake. Copyright protects art for art's sake.
- A patent is much more expensive to obtain; copyrights are free, with a small fee if you choose to register.
- If someone infringes on your patent, it is much easier to prove than copyright infringement.

What a patent gets you:

- Excludes others from making, using, selling, or offering for sale your product for a specific term of years:
    - Utility patent: **20 years** from the filing date of the application
    - Design patent: **14 years** from the issue date of the patent

Patent requirements

- §101. Inventions patentable (patentable subject matter)
    - "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."
- Patentability Requirements:
    - **Subject matter requirements ^**
    - **Useful**
    - **Novel**
    - **Nonobvious**
- Design patent qualifications:
    - Must be new, original, ornamental, and nonobvious; can't have been published, sold, or offered for sale > 1 year before filing
    - Ornamental:
        - The design must have been created for the purpose of "ornamenting" a functional object.
        - E.g., the shape and proportions of a computer monitor
            - Such a design patent prevents others from copying the *form* of that computer monitor, rather than the way the computer monitor works (technology, etc.)
            - Other examples include the shape of a particular brand of soda bottle

First to File versus First to Invent

- Historically, the US had a first to invent standard
- Beginning on March 16, 2013 under the America Invents Act, the US will switch to a modified first to file standard:

CONTRACTS

WHAT IS A CONTRACT?

A binding agreement intentionally entered into by two or more parties where each party owes a performance to the other that they would not otherwise owe in absence of the contract.

ELEMENTS

- Mutual Assent - Offer and Acceptance
    - The parties must intend to be bound by the agreement and agree on material terms. There must be an offer to be bound by clear and definite terms, and an unequivocal acceptance of the offer by the other party.
- Consideration

- Each party must promise to do something they are not otherwise legally required to do, or promise to refrain from doing something that they are otherwise legally permitted to do, in exchange from a promise or obligation from the other party.
- The value of the respective promises do not have to be equal or even proportional

VERBAL CONTRACTS

- Verbal Contracts May be Valid!
  - Agreements between two parties may constitute a binding contract even if not in writing, so long as there is a clear offer and acceptance of identifiable terms, and the subject matter of the agreement is not one which is otherwise required to be in writing (see below):
- When a Writing is Required
  - The **Statute of Frauds** requires certain agreements to be in writing in order to be enforceable, such as contracts dealing with:
    - sale of goods for $500 or more
      - For example, sale of a painting for $750
    - performance that cannot be completed within one year from the time the contract is made
      - For example, singer agrees to perform nightly at a club for 13 months
- Proving a Verbal Contract
  - Generally, most verbal or written statements (emails, letters, written notes) that tend to indicate the existence of an agreement between the two parties may be presented to prove the verbal contract, as well as to prove the terms of the contract.
  - For example, a company verbally agrees to hire a photographer to take photos of the company's offices for marketing materials in exchange for a set fee, but there is no written agreement. The photographer may show an email from the company listing the specific images requested to prove the verbal agreement.
- Adding or Changing Terms of Written Contract
  - If a written agreement exists between the parties, verbal or written statements made before the contract was signed may be offered to add terms to the contract, but not to change any of the terms of the written contract. Statements made after the contract was entered into may add to or alter the terms.
  - For example, A documentary filmmaker hires an assistant for a project, signing a short contract that says the assistant shall be paid $500 per week for 7 months. The assistant may show correspondence indicating that they also agreed the assistant would receive a bonus at the end of the term, but not that the pay rate was to be anything other than $500

QUASI-CONTRACT - OBLIGATION WITHOUT VALID CONTRACT

- No Valid Contract
  - In some cases, parties can be obligated to act as if there were an enforceable agreement between the parties, even when there is no valid written or verbal contract (i.e., there was no acceptance or the agreement was not supported by consideration on both sides).
- Reasonable Reliance

- If one party changes his position in reliance on statements or actions of the other party, and that reliance is reasonable, a court can enforce action by the other party even where no valid contract existed.
- For example, the owner of a photography studio tells his assistant that he's going to buy her a new camera to replace an older model that she has been using because he knows that she does not have the money to replace it herself. The assistant sells the older model to a friend. The owner then says that he changed his mind and does not purchase a new camera for the assistant. Even though the owner would get nothing in exchange for the camera, the assistant can enforce the promise to buy her a camera because she changed her position by selling her camera in reliance of the owner's promise to buy her a new one.

BREACH AND REMEDIES

The consequences when a party breaches the contract depend on the nature of the breach, the subject matter of the contract, and the cause of the breach.

- Type of Breach
  - **Material breaches** allow the other party to terminate the contract
    - a breach is *material* if it deprives the other party of the main purpose of making the contract
  - **Non-material breaches** do not allow cancellation of the agreement: the non-breaching party is required to fulfill his obligations under the contract, but may sue for compensation resulting from the minor breach
- Alternative Dispute Resolution
  - Many contracts contain arbitration clauses which require any dispute between the parties to a contract to go through an arbitration proceeding rather than permitting a party to immediately sue the other. Parties can also agree to voluntarily seek arbitration.
  - Can be binding or non-binding
- Sue for Damages
  - The non-breaching party can also sue for damages, which are the financial measure of harm caused by the breach, generally aimed at compensating the party for the harm the breach caused.
    - Expectation - damages are measured by the value the party expected to receive from the completed contract
    - Reliance - damages are measured by expenditures made by the party under the agreement
    - Restitution - damages are measured by the benefit received by the breaching party
- Equitable Relief
  - Specific Performance
    - a court may require the breaching party to perform his obligations under the contract if monetary compensation (damages) would not be sufficient or if the contract involved unique goods
    - For example, a contract for the sale of the broomstick used in the Wizard of Oz is considered unique and can be enforced, but a contract for the sale of an

ordinary broomstick from a local store is not unique and will not be specifically enforced (damages can be sought instead).
        - Contracts for personal services cannot be enforced because it would be considered involuntary servitude
    - Injunction
        - An injunction is a court order to do or not do something, and may be granted where the party requesting it would face irreparable harm otherwise
        - For example, a writer may seek an injunction against a production company prohibiting the company from producing a film based upon the writer's book where the writer has not granted film rights to the company

ARTIST-GALLERY AGREEMENTS

What You Should Know

- Selling your art through a gallery constitutes a business relationship, one that benefits from the drafting of a contract.
- Know who you are dealing with ***before*** signing a contract.
    - Check the reputation of the gallery you are considering selling your art to. Use the Internet, the local Chamber of Commerce, Better Business Bureau and the Department of Consumer Affairs to see whether there have been any complaints about the gallery.
    - Check if the gallery is in compliance with all building and fire codes.
    - Check that the gallery has property and theft insurance.
    - If the gallery is a corporation, check to see that there incorporation has not expired.
    - Check to see if there are any liens against the gallery using the state's website.
- Contracts are generally written to protect the writer of the contract. Therefore, if presented with a contract by a gallery, know that their principal aim is to protect itself. As a result, artists should know what to expect and what they should ask for before entering negotiations.

Consider Consulting with an Attorney

- While self-help and education is vital, consider going through your first few contracts with an attorney to better understand the language, clauses, and obligations.

Clauses to Include to Protect the Artist

- Certain basic terms, obligations and conditions should be discussed between the artist and the gallery in order to protect the artist and rights to artwork.
- First and foremost, put the contract ***in writing*** and have ***both parties sign the contract.***
- **Include these elements:**
    - **General information**
        - Include the gallery's name, address and phone number.
        - Include the artist's name, address and phone number.
        - State the date of the contract.
        - Include an inventory list with accurate titles and descriptions of the work the gallery is receiving along with the prices of the work.
    - **Ownership**

        - Include in your contract, "any right granted herein is transferred only after full payment of final invoice."
            - This states that the artist is the owner of the work until a final sale is made and that the gallery is working on behalf of the artist.
    - **Selling price**
        - Include the sales price of your artwork. Some galleries take their commission from the original sales price whereas others add the commission to the original sales price of the artwork. Find out what the gallery you are contracting with prefers and include a clause in the contract.
    - **Commission**
        - Typically galleries receive up to a 50% commision of the purchase price. Anything higher should be unacceptable.
    - **How and when you would like to be paid**
        - Include a fixed time period, usually 30 days or less, between the completion of the sale and when the artist gets their money.
        - Be wary of contracts that pay the artist last.
    - **Delivery and retrieval of the artwork**
        - Typically the artist is required to deliver to the gallery and the gallery has the responsibility to deliver to the client or back to the artist.
    - **How often will the work be displayed**
        - Include a clause that states whether all of your work will be displayed while residing in the gallery and if not, how often the work will be displayed.
            - Because galleries often represent more artists than they have wall space for, artwork can be relegated to storage. This means that your artwork could be displayed through the gallery's website or newsletter rather than at the actual gallery.
    - **Exclusivity clause**
        - Put simply, exclusivity clauses require that you not showcase your artwork anywhere else.
        - Limit exclusivity rights to a certain time period and geographical area.
            - For new sellers, limit exclusivity to six months, no more than one year.
            - Keep the geographical limitations local or regional, not statewide or national.
        - If the gallery has more than one location, try to negotiate that you are only exclusive in certain areas.
        - Sometimes, galleries will negotiate exclusivity regarding solo shows and will allow artists to showcase their work locally in group exhibitions.
    - **Length of relationship**
        - Include whether your business relationship will continue after the sale of your work, regardless of the sale of your work, etc.
    - **Escape Clause**
        - An escape clause states that if your art does not sell during a specified period of time, preferably six months, then either you the contract is over or the contract may be renegotiated.

- **Termination Clause**
  - Look out for termination clauses that require the artist to pay back advances or initial payments made to the artist. The artist can always keep their advance so long as they uphold their end of the bargain.
- **Arbitration or Mediation Clause**
  - Consider including an arbitration or mediation clause in your agreements with nonprofit advocacy groups like California Lawyers for the Arts. This way in case a dispute arises, it will go through mediation or arbitration rather than typically more expensive litigation.
- **Copyright/Reproduction rights**
  - Include in your contract, "Any use, copyright or other right not transferred hereunder, is reserved to the Artist."
    - Artist thus retains ownership of the copyright to the work and the right to reproduce the image at well.
  - If the artist wants, they can secede this right to the owner of the work or license the copyright for specific occasions, such as a limited edition of prints.
- **Insurance**
  - Include in the contract what insurance the gallery will be providing if the work is stolen or damaged. State that it is the gallery's responsibility to insure artwork while it possesses artwork.

Consignment Contracts

- If you have an established relationship with a gallery and choose not to draft a contract, at the very least artists should create a consignment contract. This provides an inventory and description of the art that is held by the gallery.
- Include in this inventory list works that the gallery is still retaining, whether a sale has been made and whether the artist has been paid for the sale.

LICENSING BASICS

PROPERTIES LICENSED

Trademarks, Copyrights, Publicity Rights, Patented Technology, Trade Secrets, Data

WHAT IS A LICENSE?

- Grant of Rights: Grant of a limited right in the use of intellectual property, or name, likeness, or portrait of a person
  - ownership or control remains in licensor
  - scope and specific terms are determined by the parties
  - can be as expansive or as limited as desired by parties to the extent of the rights owned by licensor
- Elements of the Deal
  - Subject Matter of License
  - Scope of Rights granted

- Licensee Obligations
- Licensor approvals
- Sublicensing
- Royalties
- Audits and reporting
- Termination of the deal

STANDARD TRADEMARK/COPYRIGHT LICENSE AGREEMENT PROVISIONS

- The Property
  - Identify the work which is being licensed
  - For example, a book, film, painting, trademark
- Licensed Use
  - Identify the manner in which the licensed work will be used
  - For example, as merchandise, adapted for film, video games
- Grant of Rights
  - Describe the specific rights granted and whether the license is exclusive or non-exclusive
    - **Exclusive:** licensor may not license to anyone else
    - **Non-exclusive**: licensor may license to other parties in addition to licensee
- Reservation of Rights
  - Identify rights to the work not granted to the licensee and retained by the licensor
- Territory
  - Identify the geographic territory or trade channels in which the licensee is permitted to operate
  - For example, country, mail order, online, particular stores
- Term
  - Can limit the duration of the license and provide for whether it is renewable, non-renewable, or automatically renewable
- Production Obligation
  - Identify number of units or styles per year
- Guaranteed Minimums and Advances
  - Provide for the minimum amount that license revenues must reach
- Payment
  - Identify schedule, manner, and location of payment
  - For example, lump sum, periodic, royalty
- Royalties
  - Identify percentage royalty and define income percentage is based on, which products royalties accrue on, when royalties begin to accrue, and schedule for disbursement
  - For example, 7% of net sales
- Delivery Schedule
  - Provide for times of delivery of samples and finished products to licensor or distributor
- Quality Standards and Controls
  - Identify applicable specifications, laws, regulations
  - Designate time and approvals for procedures
  - Stipulate production and approval of sample designs, prototypes

- Advertising and Promotions
    - Stipulate manner and channels of advertising efforts required of licensee
    - For example, number of print ads, in-store promotional displays, broadcasting ads
- Accounting and Record-Keeping
    - Provide for periodic statements to be made to licensor
    - Permits Licensor to audit Licensee
- Trademark/Copyright Ownership acknowledgment
    - Licensee acknowledges Licensor's ownership and irreparable harm if agreement is breached
- Trademark/Copyright Registration
    - Restricts licensee's ability to register
- Warranties/Indemnities
    - Licensor warrants that he is the rightful owner of property
    - Licensee warrants non-infringement
    - Provides for circumstances in which one party must pay other party's legal costs
    - For example, Licensor covers costs when licensee is sued by third party claiming true ownership of property
- Work for Hire and Assignment of Rights
    - Provides for any rights incurred by Licensee regarding the property to be assigned to Licensor
- Infringement by Third Parties
    - Stipulates which party will be responsible for seeking protection for IP rights
    - For example, Licensor will be responsible for contacting infringers and demanding cease and desist
- Insurance
    - Requires Licensee to obtain product liability insurance where necessary
    - For example, property is being used in conjunction with product that could cause damage
- Sublicensing/Assignment
    - Either allows or restricts ability of Licensee to transfer rights to other parties
- Termination
    - Stipulates circumstances under which termination is automatic or where either party may terminate the agreement
    - Provides for post-termination obligations such as sell-off, destruction of molds, etc.
- Arbitration
    - May require arbitration in the event of dispute over agreement

BUSINESS ENTITIES FOR ARTISTS

Why do artists need to know about types of business entities?

- When an artist decides to enter the market in some way--sell their work, open a gallery, or form a business for any other reason, they need to decide what *kind* of business to create.
    - Each kind of business operates slightly differently and gives the artist different types and amounts of protection.
    - Consult with an attorney for legal and tax advice before setting up a business entity!

"Personal liability"

- A liability is basically a debt.
- Money owed, ongoing payments, rent, compensation, etc.
- *Personal* liability means that when your business has debts, creditors can come after your personal assets that have nothing to do with the business, such as your house or car.
- Corporations and LLCs are business entities designed to protect you from *personal* liability for the debts of your business.

Sole Proprietorships

- One person owns the business; this is the default business type.
- It is formed when the artist makes their first sale or gets their first business expense.
- There is **no legal separation** between the artist and the business, so the artist has *personal* liability for all business debts and obligations.
- This is the most common way that artists operate
- If you do not have concerns about liability, or you believe that insurance can cover any liability, a sole proprietorship or partnership is probably sufficient as a business entity.

Partnerships

- A partnership is not very different from a sole proprietorship; only difference is there are two people instead of one.
    - Although formation is automatic when two people share profits from a venture, a **partnership agreement is recommended**.
    - A partnership agreement is a document that outlines how the partnership will operate, signed by all partners, which is filed with the government
- Limited partnerships and Limited Liability Partnerships
    - LPs divide partners into general partners, who manage the business and are personally liable for the partnership's assets, and limited partners, who invest their capital but do not participate in management and are not personally liable for partnership debts.
    - LLPs generally only available to professional organizations like law firms and accounting firms, so not generally applicable to arts organizations.

Corporations

- What it is: A complete entity completely separate from the individuals, which basically separates the business from the personal. The corporation has its own rights, privileges, and liabilities.
    - A corporation separates ownership and control
    - The corporation is owned by shareholders, but controlled by directors and officers.
- When an artist would want to incorporate:
    - To protect personal assets from liability for the business's debts
- Two Types:
    - Closely-held corporation: This is the type most relevant to an individual artist
        - Operates more like a partnership; the same people are the shareholders, directors, and officers
        - Unlike a partnership, the shareholders receive limited liability.
    - Publicly-held corporation: These are the huge entities worth billions and traded on Wall Street.
- Be careful! Even if the artist is the only shareholder, *still must treat the corporation separately*.

LLCs

- What it is: An entity that is in between a corporation and a partnership.
- Provides the liability protection of a corporation
    - This protects artists against debts incurred by the business.
    - Can also protect the artist against potential copyright violation by the business

OBSCENITY

Obscenity is a *type* of speech that is not protected by the first amendment.

- *Chaplinsky v. New Hampshire* - U.S. Supreme Court stated that obscenity is undeserving of First Amendment protection because it plays "no essential party of any exposition of ideas [and is] of such slight social value...that any benefit...derived from it is clearly outweighed by the social interest in order and morality."
- What qualifies as obscene speech?
    - Modern rule of obscenity comes from *Miller v. California* (1973)
        - The *Miller* test:
            - Would an average person applying contemporary community standards find that the work, taken as a whole, appeals to the prurient interest?
            - Does the work depict, in a patently offensive way, proscribed sexual conduct?
            - Does the work, taken as a whole, lack serious political, scientific, literary, or artistic value?
        - Whether something is obscene or not is decided by a jury.
        - The work is looked at as a whole, not at individual parts..

Intersection of Art and Obscenity

- Generally, visual arts garner less First Amendment protection than verbal speech. In addition, modern day litigation has focused on visual obscenity rather than textual obscenity.
- The biggest issue that artists face regarding the modern-day *Miller* test is that the third prong requires judges to make a determination as to whether something seriously lacks artistic value.
- Current First Amendment jurisprudence and standards regarding obscenity use preconceived notions of judges and the jury to perceive art, making such opinions very relevant to an obscenity analysis.
- Examples:
    - Special-effects artist charged with corrupting morals through the distribution, possession and production of obscene materials - these included photos and videos of murders, tortures, etc. involving young female victims. He stated that his work should be valued based on artistic merit rather than its sexual nature. Found not guilty.
    - South Park showing an episode describing sex between an older man and a teenage boy. Viewed to be socially acceptable explicit content.
    - Sculpture of teenage girl taking a photo of herself meant to point out the dangers of digital technology and sexting petitioned to be removed from museum where young visitors have access to it. This case, located in Kansas, demonstrates how contemporary community standards can have an effect on what is considered obscene art or not.

RIGHT TO PRIVACY

What is the right to privacy?

- A right granted implicitly by the Constitution as seen in the:
    - Fourth Amendment (the right against unreasonable search and seizures)
    - First Amendment (the right to freely assemble)
    - Fourteenth Amendment is read as a substantive due process right to privacy
- The right to privacy is explicitly listed as an inalienable right in the California Constitution.

Types of Violations

- Intrusion: An invasion upon the solitude or seclusion of another in a way that is highly offensive to the average person.
- Appropriation (Right of Publicity): The unauthorized use of someone's name or picture for a commercial advantage
    - This includes both public and private figures.
- Public Disclosure: Widespread dissemination of confidential information about a person that would be highly offensive to an average person.
    - These facts must be truly private in all spheres of that person's life.
- False Light: Widespread dissemination of a major falsehood about a person that would be highly offensive to an average person.

Defenses

- Newsworthiness
- Consent

RIGHT OF PUBLICITY

What is the right of publicity?

- A property right that gives an individual the right to control and profit from the commercial value of their identity.
- It protects unauthorized commercial exploitation of that person's name, likeness, and other aspects of their identity.
- It is a right recognized by the state of California.

What exactly is protected?

- An individuals name, voice, signature, photograph, or likeness

The Law in California

- This was expanded in a case brought by Vanna White when a commercial featured a robot who turned letters on a Wheel of Fortune-like game. This was found to be a violation of her publicity rights even though the robot did not look like Vanna White.
    - Expanded the right of publicity in California to *any* representation that conjures up the likeness of an individual.
- New York: No right of publicity, but the use of the image or likeness of another *in advertising and trade purposes* may be a violation of right of privacy.

Examples of things that have been found to be a violation of the right of publicity:

- Portable toilets called "Here's Johnny" violated Johnny Carson's publicity rights.
- Ford's use of a singer in a commercial that sounded like Bette Midler violated her publicity rights.

Inheritability of publicity rights in California

- Even if the person whose image or likeness is used has passed away, the image or likeness still may be protected.
- If the name or likeness had commercial value at the time of their death, then the right is inheritable like any other property.
- The right is then owned by the individual's heirs, who have the power to recover.
- This ownership of publicity rights is applicable for 70 years after the death of the deceased personality.

Defenses: When you can use someone's likeness anyway

- Fair Use
    - To determine whether the use of another's likeness is "fair use" and therefore not actionable, a court will look at:
        - Nature of the copyrighted work
        - Amount and substantiality used
        - Purpose and character of the use
        - Effect on the market

DEFAMATION

What is defamation?

- Defamation is the publication of a statement of fact that is false, not privileged, has a natural tendency to injure OR which causes special damage, and the defendant was at least negligent in the publication of the false fact.
- "Publication" means that the fact is given to a third person. It does not have to be disclosure to the public at large.
- When the fact is regarding a public concern or public figure, that figure must be the one to prove that the statement is false. The defendant does not have to prove that the statement is true.

Libel or slander

- Libel
    - Any form of defamation that is written down or embodied in some permanent format (including artwork).
    - When the defamation qualifies as libel, the plaintiff does not need to show damages of any kind.
- Slander is any other kind of defamation
    - There is also no need to show damages if the defamation concerns particular topics (for example, claiming the plaintiff is guilty of a crime)

Matters of public concern:

- When the fact is regarding a public concern or public figure, that figure must be the one to prove that the statement is false. The defendant does not have to prove that the statement is true
- Any plaintiff must also prove that the artist made the statement in other than good faith
    - If they are a public figure, the artist must have known the statement was false but made it anyway or was reckless in investigating the truth of the statement.
    - If they are not a public figure, the artist must have been negligent, which is a lower standard.

- Public figures include
    - Public officials
    - Someone who has achieved pervasive fame and notoriety or works toward the resolution of public issues

Defenses: When an artist cannot be held liable for defamation:

- Consent: The consent of the subject is a defense to a defamation claim
- Truth: If the statement made was true, this is an absolute defense to a defamation lawsuit.
- Fair Report Privilege: If the defendant reasonably relied upon an official report of some kind for their information, they may not be liable for defamation.

California Anti-SLAPP statutes:

- A SLAPP suit is a "Strategic Lawsuit Against Public Participation"
    - Typically, lawsuits brought by large private interests to discourage common citizens from exercising their political or legal rights, such as their right to freedom of speech.
- Someone who is named as the defendant in such a suit can file an "anti-SLAPP" motion under Cal. CCP 425.16.
    - This is a preliminary proceeding that happens before the main lawsuit can be litigated.
    - The plaintiff in the SLAPP suit will be required to show that they have a probability of prevailing.
    - If the plaintiff cannot show they will probably prevail, the motion is granted, then the SLAPP suit will not go forward
- An important tool for artists who are sued for purposes of intimidation into silence.

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