Intellectual Property Guide for Artisans

This memo summarizes the basic approaches to protecting artisans' intellectual property. The term "intellectual property" is defined as property arising out of human intellect or creations of the mind. The protection of intellectual property (or "IP") is important to the works of artisans and to the ideas and creative expressions that are inherent in their crafts and visual arts. IP is found in all artisan works, including baskets, woven works, leather, metal textiles, pottery, woodwork, painting, drawing, sculpture, photography, fabric and fashion. While this memo summarizes basic IP protection, it is not meant to serve as a substitute for legal advice but rather to provide the artisan with a general knowledge.

What is Intellectual Property Law?

Intellectual property law consists, primarily, of four types: (1) copyright; (2) patents; (3) trade secrets; and (4) trademarks. The purpose of IP law is to protect creations such as inventions, literary and artistic works, designs, symbols, names and images that are "used in commerce" or in a commercial setting. The policy behind IP law is to protect an individual's rights to his or her creative expression and promote innovation by providing a limited monopoly to those who create. For artistic expression, including artisanal works, copyright law provides a primary means of IP protection; therefore, copyright protection is the main focus of this memo.

Copyright Law

The term "copyright" refers to exclusive rights given to certain types of creative works. The ownership rights to copyright interests arise automatically when a work is created. If registered with the U.S. Copyright Office or Library of Congress, the artisan may protect against the unauthorized reproductions and adaptations of their work under federal law. The protections include claim of authorship or artistry and the right to object to the unauthorized duplication, distortion, mutilation, modification or other infringing, duplication or derogatory action related to the work.

A federal statute, 17 USC § 102, extends copyright protection to the following enumerated works: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic

works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. Copyright protection protects the creative expression but does not extend to protect the idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described.

To obtain copyright protection, there are two major requirements. First, the work must be an original work of authorship. This means that the expression must be original to the author. Therefore, more than one person can obtain copyright protection in the same or substantially similar work, so long as it is their own, independent creation. Second, the work must be fixed in a tangible medium of expression, for more than a transitory period of time. This means that the work has to last for some period of time. For example, if a poem were written on a burning sheet of paper, this would likely not satisfy the requirement. Further, to obtain copyright protection, there must be some minimal creative spark, some originality to the creative expression. This presents a low bar that is relatively simple to overcome.

Copyright protection attaches at the moment an original work is fixed in a tangible medium for more than a transitory period of time. Nothing needs to be done in order to be afforded copyright protection other than meeting the statutory requirements listed above. If you created something, and that thing meets the statutory requirements, you are protected by copyright law. However, there are significant benefits, under federal law, to actually registering your work with the United States Copyright Office. Those benefits are summarized in the next section of this summary.

Benefits to Copyright Registration

What benefits result from registering for copyright protection with the U.S. Copyright Office or Library of Congress (the "Library of Congress")? As stated above, there is no requirement to register with the Library of Congress in order to receive legal copyright protection. However, there are several benefits to registration. Importantly, copyright registration is relatively inexpensive, costing only $35 to $55, depending on the whether the application is filed online or via a hard copy, with the latter being more expensive. This is fairly inexpensive for the benefits that come with filing.

One benefit of copyright registration provides public notice of your ownership. Works registered with the Library of Congress are published in the Official Gazette, which is searchable to the public. This provides the public constructive notice and may help to overcome an *innocent infringement* defense. Third, it provides notice to the world that the creator is the owner of his or her expressive work. Once registered, if another party attempts to claim his or her work as their own, this can prevent a costly dispute over actual ownership.

Additionally, registration is evidence of the validity of copyright rights. In order to take advantage of benefits of copyright registration, the work must be registered with the Library of Congress within five (5) years of publication. If a work is not registered in a timely manner, the copyright holder is at a serious disadvantage. A work that is not registered in the timely manner is limited to actual damages of someone else's use of their work, which are often difficult to prove. On the other hand, a work that is timely registered is entitled to statutory damages and attorney's fees, equaling up to $150,000 per infringement. To take advantage of these statutory damages, registration must come within three (3) months of publication or before the infringement occurs. This is why timely registration is so important.

Finally, and possibly the most important benefit of copyright registration, is that registration gives the copyright owner the ability to file an infringement lawsuit under federal copyright law, which can stop another party from using what the copyright owner created as well as awarding damages to the true copyright owner. Copyright law provides a route directly to the federal courts to resolve copyright issues; however, infringement lawsuits are not limited to federal courts. Therefore, considering the relative low cost and the resulting benefits, registration of expressive works with the United States Copyright Office is definitely worthwhile.

Copyright Duration

Once registered, how long do copyright rights last? The current term of copyright protection for published works is the life of the author, plus an additional seventy (70) years. For works of joint authorship, the term is seventy (70) years after the death of the last remaining author. For works made for hire and anonymous and pseudonymous works, the duration is ninety-five (95) years from first publication or one hundred and twenty (120) years from creation, whichever

is shorter, unless the author's identity is later identified, in which case the term goes to life of the author, plus seventy (70) years.

Once a copyright term has expired, the work is dedicated to the public domain or, in other words, is free for the public to use. Throughout the history of copyright law, the duration has been extended multiple times. Originally, the copyright protection was twenty-eight (28) years from the date of publication. Further, the term could be renewed for a second twenty-eight (28) year period before the work was dedicated to the public domain. No such renewal process is necessary for copyright protection under today's law. Thus, the current copyright duration provides the author a significant monopoly term.

Copyright Rights

Once registered, what is the extent of protection afforded to the expression? Copyright protection extends certain rights to the author of expressive works. A copyright holder is entitled to (1) reproduce the copyrighted work; (2) prepare derivative works based upon the copyrighted works; (3) distribute copies or phono-records of the copyrighted work to the public; (4) perform the copyrighted work publicly; (5) display the copyrighted work publicly; and (6) perform the copyrighted work publicly by means of digital audio transmission.

Copyright Registration Process

What does the registration process entail? As stated above, the application cost is relatively inexpensive, ranging between thirty-five dollars ($35) and fifty-five dollars ($55). Furthermore, the application is fairly simple. Part of the application process is a mandatory deposit showing the work to the Library of Congress, which compiles all copyrighted works. The format of the mandatory deposit differs for the different types of copyrightable works. To meet this requirement, two (2) best edition copies must be submitted to the Library of Congress (in some cases, only one (1) copy is required). Further, the Copyright Office has an online, digital submission for some copyrightable works.

So long as the application is filled out properly, the proper fee is paid, and the correct mandatory deposits are submitted, a copyright registration will be issued by the Library of Congress. There is no formal exam or claims process like there is under patent law. Thus, the

process moves fairly quickly in comparison to obtaining legal protection under other branches of intellectual property law.

Copyright Ownership

Once registered, who owns the copyright rights? Generally, the owner of a copyright is the individual that actually created the work. However, there are exceptions to the general rule. First, if a work is created by an employee in the course of their employment, the employer is the owner of the copyright. Another exception is in a work-for-hire situation, where an independent contractor enters into an agreement indicating the independent contractor is being commissioned for the work and that their creative expression is, as it is known under the law, a work-for-hire agreement and ownership is specified in favor of the hiring party. Additionally, if the work is created by two (2) or more artisans or authors, and there was intent to create a joint work, the authors have an equal share in the work. Of course, this would be altered if an agreement between the artisans or authors specified an alternative ratio

Public Domain

Once the term for the registration rights has ended, what does it mean for a creative work to be in the public domain? The public domain refers to creative works that are not protected against duplication or use by IP law protections. This means that these works are free for the public to use or duplicate. Further, once a work is in the public domain, no person can own or protect the work's intellectual property rights. Therefore, when intellectual property protection expires, works are considered to be in the public domain.

Transfer of Rights

May copyright rights be transferred? A copyright owner may transfer rights to a work. A full assignment occurs when a copyright owner unconditionally transfers all of their rights. An assignment can be made to anyone and for any reason. Once a full assignment has been made, the assignee then has the rights associated with the copyright. This commonly occurs where the creator assigns their rights to a publisher or equivalent to get the work to market, such as with literary works. Occasionally, it may be appropriate for the creator to grant a conditional assignment in his or her copyright rights. For example, when a creditor asks for an assignment in

order to make a loan to an artist or artisan, the assignment rights may be only transferred if the artist or artisan defaults on the loan.

Another form of transferring rights is licensing. There are two types of licenses—exclusive and non-exclusive. An exclusive license transfers all of the rights to the licensee. The licensee then holds all rights to use the creative work. A non-exclusive license transfers limited rights to use the creative work. The copyright holder does not transfer all of their rights to the licensee. Under a non-exclusive license, the licensee's rights are limited to those explicitly licensed to the licensee and the copyright owner retains rights, except those explicitly transferred. For example, a copyright owner can license two different distributors to sell their works in two different geographic locations or the owner can provide a license to duplicate his or her works to more than one company.

With licenses, the Library of Congress permits purchasers of both exclusive and non-exclusive licenses to record the transfer of copyright registration rights. This is a form of protection for purchasers, to avoid situations where the original copyright owner attempts to transfer the same rights to another party without disclosure.

Derivative Works

What is a derivative work? A derivative work is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. One of the rights afforded to a copyright owner is the right to prepare derivative works. This means that no one else can make a derivative work based off of the copyrighted work without the permission of the copyright owner.

The copyright holder has the exclusive right to make derivative works for the term of the copyright protection. A copyright holder has the sole right, unless the copyright owner grants permission by license, assignment or otherwise, to create derivative works like translating a literary work into another language or creating a sequel to literary works or movies.

Copyright Infringement

How is copyright infringement defined? Copyright infringement is the use of a work protected under copyright law without the copyright owner's permission. The unauthorized use infringes certain rights granted to the copyright holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works.

To prove infringement, the copyright owner has the burden to prove two elements. First, there must be ownership of valid copyright rights. Otherwise, the individual would not have the right to bring an infringement suit. Registration is the primary way to prove ownership of a valid copyright. Second, the plaintiff must show that there was actionable copying or use by the defendant of constituent elements of the work that are original to the copyright owner's protected creation. Infringement only applies to the original elements of the work, because it is the only original expression in the work. To prove the second element, a plaintiff must show: (1) the alleged infringer had access to the copyrighted work and (2) the alleged infringer's creation is substantially similar to the copyright-protected work.

Idea-Expression Dichotomy & Merger Doctrine

Are there situations in which creative expression cannot be afforded copyright protection? The idea-expression dichotomy sets forth that copyright law does not protect ideas, but rather is limited to the expression of the ideas. Further, the merger doctrine states that where there are only a limited number of ways to effectively express an idea, copyright protection will not be afforded. Essentially, where the idea becomes so essential to the expression that they *merge*, copyright protection will not be extended. Thus, these are two areas where copyright protection is not extended.

Useful Articles Doctrine

When does the "Useful Article Doctrine" apply? A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally part of a useful article is considered a useful article. While useful articles cannot be protected via copyright, expressive elements of a useful article can be afforded protection.

/the copyright symbol (©) to a work that does not have copyright protection, but instead belongs to the public domain. This practice exists on a massive scale because there are few legal consequences and because many people do not understand that it is, in fact, illegal to falsely claim copyright protection and that there can be penalties for doing so.

Other Forms of IP Protection

What other forms of IP law protection exist for artisans? In addition to copyright protection, there are other areas of IP law for the artisan to consider in protecting their creative works. While most creative expressions may be protected under copyright law, the work of a creator or artisan may also be protected by an element of patent law, such as a design and/or utility patent. A classic example of a work for consideration of a design patent includes the creation of furniture or other structural work of art which may incorporate unique designs and/or functional aspects.

Patent Protection

What is patent protection? Patent protection is provided under the United States Patent Act which states: "[w]hoever invents or discovers a new and useful process, machine, manufacture, or composition of matter, or any new and useful improvements thereof, may obtain a patent, subject to the conditions and requirements of this title." Thus, patent law does not protect expression like copyright law, but rather is geared toward protecting useful creations.

There are five requirements for patentability. First, the invention must be statutorily-prescribed subject matter under 35 USC § 101 (under the definition in the preceding paragraph). Next, the invention must be "novel" under 35 USC § 102. This differs from copyright, where the creation must only be original to the author, but not necessarily novel. With patent law, the creation must be novel. Next, the invention must be "useful" under 35 USC § 101. Again, this differs from copyright law, which does not extend protection to useful elements. Next, the invention must be "nonobvious" under 35 USC § 103. Finally, there must be an adequate written description under 35 USC § 112.

There are three primary patent types—utility, design, and plant. A utility patent is the type that is most often associated with patent protection. A utility patent is extended a for a new and

useful process, machine, manufacture, or composition of matter, or a new and useful improvement thereof. A plant patent is issued for a new and distinct, invented or discovered asexually reproduced plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber-propagated plant or a plant found in an uncultivated state. These two types of patents are not likely to be prevalent for artistic creations.

The third type of patent is a design patent. Design patents are issued for new, original, and ornamental design embodied in or applied to an article of manufacture. The duration for a design patent is fourteen (14) years, which is shorter than the normal patent duration of twenty (20) years. Common creations that fall under the design patent umbrella include ornamental designs of jewelry, furniture, and beverage containers.

To protect their rights under patent law, the owner of the utility, design or plant creative work or invention will want to file an application for patent protection with the United States Patent and Trademark Office.

Trade Secrets Protection

The artisan's processes, formulas or methods applied in their artistic works may be considered "trade secrets" as long as they have been held confidential and treated as trade secrets.

Trademark Law

When is trademark law applicable to protect a creator's rights? Trademark law governs the use of a word, phrase, symbol, product shape, or logo by a creator, artisan, manufacturer or merchant to identify its goods and services and to distinguish those goods and services from those made or sold by another. Trademark protection can be useful for marks, slogans, logos, and business names. Trademark protection remains in place, so long as simple requirements are met, until the mark is abandoned without intent to continued use. Provided that the owner has the prior rights to use a word, phrase, symbol, product shape or logo, his or her rights exist from the date of first use in commerce. To extend those rights under federal law and to afford the owner the protection and remedies allowed under federal law, the owner should register under U.S. Trademark law. This may be accomplished by successfully filing for trademark registration with the United States Patent and Trademark Office.

Conclusion

This memo has presented a brief overview areas of IP law in which an artisan should be aware in order to protect their creative works and ensure they do not infringe the rights of others, which would subject them to liability if sued for that infringement. This memo should not be considered legal advise specific to any artisan; however, it should serve to make artisans aware of IP law applicable to their creative work, especially if their work has significant commercial potential.

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