

D O N ' T T R A D E Y O U R

Why are intellectual property rights important to artisans? Intellectual property rights can be asserted to prevent others from improperly using or benefiting from your work or reputation. Even if you do not want to assert your intellectual property rights against others, someday you may be faced with claims from others asserting such rights against you. In recent years, intellectual property rights have been subject to increased attention, both positive and negative. This article discusses two particular types of intellectual property rights: copyrights and trademark rights.

Copyright Basics for Artisans

Copyright law protects original, creative works that are recorded in a tangible medium, such as books, paintings, sculptures, films and crafts. There is no international law of copyright, and each country has its own laws, which may differ greatly. However, there are a number of international treaties regarding copyright that set minimum standards for member countries. The most important international treaties regarding copyright are the Universal Copyright Convention and the Berne Convention for the Protection of Literary and Artistic Works. Artisans from countries that have signed the treaties can enforce their copyrights in other signatory countries. For example, under the Berne Convention, an artisan from China may be able to enforce a Chinese copyright registration in the U.S. For more information on these treaties, please see the resources and treaties sections on pages 12 and 13 of this issue. The concepts discussed in this article are based on the law of the United States, unless indicated otherwise.

In the United States, copyright in a work arises from the act of creation. In other words, at the moment that a copyrightable work is physically created, it is automatically and immediately protected by copyright law. In general, for works created after 1978, the term of a copyright is the life of the artist plus 70 years (for works made for hire, the term is 95 years from the date of publication or 120 years from the date of creation, whichever expires first). After the term ends, the work is considered part of the “public domain.” While copyright registration is not required

in the U.S., registration of a copyright provides additional benefits and protections, including the right to sue for infringement in federal court. Copyrights may be registered in the U.S. with the United States Copyright Office at the Library of Congress.

In general, a copyright owner has the exclusive right to reproduce, distribute or perform his or her copyrighted work, and can prevent others from doing the same in an unauthorized manner, subject to certain exceptions for teaching, news reporting and commentary. A copyright owner also has the exclusive right to prepare works based on his or her copyrighted works (know as “derivative works”). For example, the owner of the copyright for a carpet design has the exclusive right to make a quilt that incorporates the copyrighted carpet design. The owner of a copyright may grant a non-exclusive license of his or her rights to another either orally or in writing. This would allow another artist to use the copyrighted craft or design in a derivative work. Assignment of copyright, however, must be in writing.

As noted above, copyright law only protects works that have been fixed in a tangible medium so that they are perceptible either directly (e.g., a design woven in a carpet) or with the aid of a machine or device (e.g., a song recording or a dance performance that has been recorded on videotape). Copyright does not protect abstract ideas. In other words, copyright law may protect the way that an idea is expressed in a work, but does *not* protect the underlying idea. For example, if an artisan creates a piece of pottery and decorates it with an original design showing two people dancing, the artisan cannot prevent other artisans from decorating pottery using the idea of a “dancing people” theme under copyright law. However, she can prevent others from copying the particular interpretation of the dancing people theme portrayed in her copyrighted work.

The copyrights in a work are separate from the work itself. Without an agreement to the contrary, copyrights are not automatically transferred when the work itself is sold or given away. This means that, for example, if an artisan creates an original work and sells it to a collector, the artisan does not automati-

cally give up the copyright in the work, and may prevent the collector from making and selling photographs of the work (which are derivative works). In this example, although the collector does not own the copyright in the work, the collector would have the right to display and sell the work. The artisan may agree to assign all (or some) of his exclusive rights in the copyrighted work, including the right to make derivative works, to the collector with a written agreement.

Use of a copyright notice is beneficial as it informs others that you claim the copyright in your work. Although United States law once required that a copyright notice be placed on all published work if the owner wished to retain the copyright, such a notice is no longer required. The copyright notice should include the symbol © (the letter C in a circle), or the word “Copyright,” or the abbreviation “Copr.,” followed by the year of first publication of the work and the name of the owner of copyright in the work. For example: ©2000 José Rivera. Use of the notice informs the public that the work is protected by copyright, and provides identifying information about the copyright owner. Use of the notice will often also provide additional benefits in a civil action against an infringer.

Trademark Basics for Artisans

A trademark is a word, symbol, combination of words and symbols (or even a smell or sound) that is placed on or associated with goods and services and is used to identify them. A trademark informs the consumer that the product comes from a particular source and guarantees that the quality of the product will be the same as that of other products sold under that trademark. For example, a trademark on the tag of a woven jacket will inform consumers that the jacket comes from the same source and will be of a similar quality as other items of clothing sold under the mark. When a symbol, picture or other design is used as a trademark, it is often referred to as a “logo.” Trademarks are also sometimes referred to colloquially as “brands.”

Trademarks are sometimes used to certify compliance with regulations set by a particular organization. In this context, they are referred to as “certification marks.” When

R I G H T S A W A Y !

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a consumer sees a certification mark on a product, the consumer should be able to assume that the product meets the standards that have been set up by the owner of the certification mark. A certification mark may be used to signal that a product is from a particular region or origin, is made from particular types of labor or materials, a certain manufacturing process, level of quality, or other characteristics. For example, use of a "fair trade" certification mark might indicate that the products for which the mark is used were made in compliance with certain labor and/or wage standards.

The owner of a trademark has the exclusive right to use the mark for the relevant goods. Thus, if an artisan uses and/or registers a trademark in connection with his or her goods in commerce, the artisan may preclude others from subsequently using the mark or a similar mark on other goods in a manner that would create a likelihood of confusion. Evaluation of likelihood of confusion includes assessment of factors such as the strength of the artisan's mark, the similarity of the marks, the similarity of the goods, the channels of trade, and the sophistication of consumers.

As with copyrights, there is no international law of trademark, and each country has its own laws that may differ greatly, although the general function of trademarks and concepts of likelihood of confusion apply in most countries. Although in general a trademark owner must establish trademark rights in the country where he or she seeks to enforce those rights (through use and/or registration), there are a number of international treaties regarding trademarks that set minimum standards for member countries. Such treaties include the Trademark Law Treaty, the Paris Convention for the Protection of International Property, the Madrid Agreement and Protocol, and the Inter-American Convention for Trademark and Commercial Protection. The European Union has also adopted the Community Trademark Act. For more information on these treaties, please refer to the resources and treaties sections on pages 12 and 13.

In some countries, such as China, a trademark owner will have rights only if he or

she registers the mark with the proper governmental authority. WIPO's website provides links to trademark offices around the world. In other countries, such as the United States and United Kingdom, rights in a trademark can arise either from registration or from use of the mark in commerce. Rights that arise from use of a trademark are called "common law" trademark rights, and are generally limited to the geographic area where they are actually used. Thus, in the U.S., if an artisan uses a mark on the East Coast of the United States, he or she may have common law trademark rights in that geographic region, but not in the rest of the country. Federal registration will usually provide for nationwide rights. In the U.S., the United States Patent and Trademark Office is responsible for trademark registration.

Although the U.S. provides for protection of common law rights, there are substantial benefits to registration. One of the benefits afforded by a federal registration is "nationwide constructive use" and a priority date as of the date of filing. This means that an artist who obtains a federal registration for his trademark will have rights in the entire United States as of the date of filing, even if he has actually only used his mark in the eastern part of the country. In addition, a registration carries with it a presumption that the registration is valid, and that the owner has the exclusive right to use the mark.

A trademark should be used in a manner that allows consumers to recognize it as a trademark. A trademark should be set off from surrounding text, for example, by use of a different font style, size or color. Although not required, use of a trademark notice can provide additional benefits in trademark litigation, and puts others on notice of your claim of trademark

rights. For registered marks, the owner may use the symbol ® (the letter R in a circle), for example, MARK®. For common law marks, the owner may use the symbol "™" for example, MARK™ goods, but may not use the ®.

In drafting agreements with other parties for the sale of their products, artisans should consider whether or not it makes sense to include provisions regarding the ownership and use of intellectual property that may be affected by the agreement. 🌐

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