

Copyright 101: What the law means to artists.

Q: What is copyright?

A: Copyright is the protection given to the owner of a creative work against unauthorized use by others. To be eligible for copyright protection, a work must be 1) original (not a copy of something else), and 2) fixed in a tangible medium. Copyright is not a single thing, but rather a group of rights, perhaps best visualized by a bunch of sticks in the author's hand. (I use the term *author* here, but the meaning extends to the creator of any work, including an artist.) The "bunch" of rights includes the right to:

- reproduce the copyrighted work in copies or phonorecords;
 - prepare derivative works based upon the copyrighted work;
 - distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
 - perform the copyrighted work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes, motion pictures and other audiovisual works;
 - display the copyrighted work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes, pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work; and
 - perform the copyrighted work publicly by means of a digital audio transmission, in the case of sound recordings.
- The most important items for artists from that list are the rights to reproduce, display publicly and make



Illustration by Susan LeVan

derivative works. In terms of the latter, copyright law defines *derivative work* as 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. A work consisting of editorial revisions, annotations, elaborations or other modifications that, as a whole, represent an original work of authorship, is considered a derivative work.

An example of an issue involving derivative work would be if an artist

painted a watercolor on paper and then created items such as postcards, limited edition prints, mouse pads, books or screensavers. One needs a license from the copyright owner to create a derivative work, and if a license isn't received, it's a violation of the artist's copyright—an infringement.

Q: How does one get copyright protection?

A: Ideas aren't protected by copyright law. Just because I think of a beautiful scene in my mind, that doesn't give me the right to exclude others from

expressing the same idea. The expression of that idea, whether it's in a photograph, watercolor or book, can be protected. Copyright protection is automatic upon fixation into a tangible form. This means that once the artist's brush leaves the surface, copyright protection attaches.


Q: How long does copyright protection last?

A: Over the years, there have been many changes to the copyright laws in a general trend to extend copyright protection. Today, copyright protection lasts for the life of the author plus 70 years. Other circumstances allow protection from 95 to 120 years, such as if an employee creates a work within the scope of his or her employment (think of an artist who works for a newspaper as an employee—

not an independent contractor). If a work was created before 1978, the following rules apply:

- Published before 1923: in public domain (no longer protected by copyright; can be used without permission).
- Published between 1923 and 1963 and copyright was renewed: can be used 95 years from first publication without permission.
- Published between 1923 and 1963 and copyright was not renewed: in public domain.
- Published between 1964 and 1977: can be used 95 years from first publication without permission.
- Made before 1978 and published before December 31, 2002: copyright protected until at least December 31, 2047.
- Made before 1978 and not published before December 31, 2002: in public domain.

Q: What is “notice” in copyright law?

A: Copyright notice has three components: “Copyright,” “Copyr.” or “©;” the copyright owner’s name; and the year (except for items such as greeting cards). Notice need not be on the front of the work, so long as it’s in a location one would normally look. While it isn’t required, notice does eliminate a possible “innocent infringement” defense and allow for increased damages, as the infringement would be considered deliberate. 

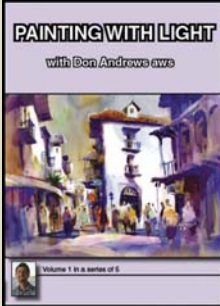
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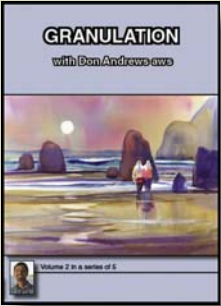
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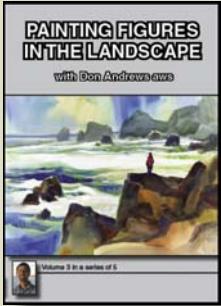
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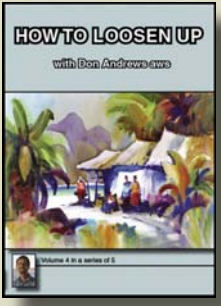
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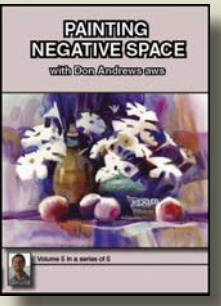


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What's Yours is Yours



Learn the legalities of publication and registration, and what they have to do with copyright protection.

Q: I'm a painter, so what does publication mean to me?

A: Publication in copyright law has to do with public distribution of copies of a work. If someone were to offer copies of his or her work to the public for sale or lease, that would be considered the moment of "publication" for copyright purposes (examples of this are limited-edition prints, postcards, open-edition prints, reproductions and images appearing in a book). But a public display isn't necessarily publication. An example of this would be a piece of art hanging in a gallery or museum. If the original work is in a show, even though it's available to the public, it wouldn't be considered published because copies of it aren't available for sale. Conversely, if prints of the artwork are available for purchase, or if an image appears on an invitation for an opening reception, it would be considered published.

Whether a work is published matters for purposes of registration (see below) and is important if the publication occurred before March 1, 1989. If you published before that date without a copyright notice, you lost all rights to your copyright.

Q: What is registration and why is it important?

A: Although there's no requirement for registration for copyright protection, artists should consider

registering their work. Registration provides a number of advantages. First, and most important, one cannot file a lawsuit for copyright infringement without a registration. Second, a valid registration provides a presumption that the copyright owner is the rightful owner and shifts the burden to the other party to disprove that the copyright owner is entitled to compensation. Third, if a work is registered either before the infringing activity takes place, or within three months of publication, the plaintiff is entitled to attorneys' fees and statutory damages. Statutory damages are essentially a civil penalty, defined to be as little as \$750, to as much as \$150,000 per infringement. Courts can award damages anywhere within that range, but the higher amounts are generally reserved for willful conduct.

Here's an example of how registration works: If an infringer willfully makes unauthorized prints of an original work that isn't registered and makes a profit of \$1,000, then that's all that can be recovered by the artist. And the artist's legal fees would far exceed that amount. If the work

A Word to the Wise

Make sure you always have contracts in writing, especially when dealing with galleries. This isn't to imply that anyone is "trying to pull a fast one," but memories do tend to fade over time, and reducing an understanding to writing will save time, expense and animosity later. If there is litigation, a written agreement provides a stronger basis for your case.

was registered prior to the infringement, the infringer might have to pay the artist's attorneys' fees and possibly up to \$150,000.

The current fee for registering a published work or an unpublished collection is \$45. Information and forms are available at the U.S. Copyright Office's website (www.copyright.gov).

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