Copyright Law.
The Plain English Version

The Constitutional Framework for Copyright Law

Today’s copyright laws have their roots in English common law and in the U.S. Constitution. Our copyright statutes were put into place to encourage the development of intellectual property in the form of scientific and artistic products for the public good. Creators of original artistic or scientific works are given exclusive rights for limited times to copy and distribute their works. The Constitutional framework supports the concept that creators may control the use of and seek payment for their original creations and for their derivative works. That concept is the essence of copyright law. It’s what makes possible the whole economic structure of the art world and the publishing world and the software world.

Your Artwork is Your Property

The term “intellectual property” refers to a special kind of property that has value because it can be reproduced from an original. Intellectual property includes artwork, photography, photos that have been digitally altered using photo-manipulation software, multimedia productions, and a whole range of other types of property (such as software, for instance). Some of it is covered by copyright law; some is protected by other laws, such as trademark, trade secret, and unfair competition law, which we won’t cover here. Don’t let anyone tell you that intellectual property is any less real or any less deserving of protection than other forms of property. The law protects the rights of those who own intellectual property in a big way.

Your art becomes protected by copyright when you take it from idea or concept to something in fixed and tangible form. Some have argued that digital and digitized art passes through a period of being somewhat intangible as pure information, that is, when it is in digital form, a series of 0s and 1s. But the law disagrees; at this point, even in its digital form as 0s and 1s-on disk or CD, film or printed on paper, T-shirts, tote bags, magazine advertisements, brochures, swizzle sticks, you name it—it’s protected property. It can be licensed or sold outright by its owner.

When a manufacturer makes shoes, she learns her trade, becomes a skilled worker, makes an investment in capital equipment to produce the shoes, purchases raw materials for making the shoes, determines prices based on market conditions and the quality of her product, and sells the shoes to willing buyers. If her warehouse is broken into and shoes are stolen, she has the law to support her in prosecuting those who stole her property.

So, too, the artist learns her trade, becomes a skilled worker, makes an investment in capital equipment to make art, purchases raw materials for making the art, determines price based on market conditions and the quality of the art, and sells art to willing buyers. If her digital files are broken into and images are stolen, she has the law to support her in prosecuting those who stole her property. Do not be confused by the term intellectual property. Your artwork-once you’ve completed it—is tangible and fixed, and it’s protectable intellectual property. It is viable as an object and, potentially, marketable as such, and reproductions of it are also marketable. Whether you create paintings, computer-generated illustrations, graphic design, logos, multimedia presentations, or a home page on the Web, your art, your property, can be protected by copyright laws.

What can be Protected by Copyright?

Section 102(a) of the Copyright Act states:

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

The basic requirements that a work of art must meet to qualify for copyright protection are that:

❄ It must be original. The artwork must be an original.

❄ It must be creative. The artwork must show at least a minimum amount of creativity.

❄ It must be fixed in a tangible medium. The artwork must be fixed in one of the tangible mediums listed in the next section.

Be Careful When You Scan

It’s Almost Too Easy to Copy

With scanners, screen-capture programs, and other such tools, it is almost too easy to copy something. Yet naive scanning or copying can land you in court.

The following case hinges on a so-called naive infringement. You have to ask yourself whether or not the art director who did the scan knew that Newsday would need to get a license to use the materials.

FPG v. Newsday. Settled yet Unsettling

In an out-of-court settlement, FPG negotiated a retroactive licensing payment of $20,000-ten times the initial licensing fees—for the disputed use of a photograph by James Porto. FPG was also granted a significant portion of attorneys’ fees in its case. And, importantly, FPG is also free to discuss the case. FPG management considers this to be a major win for educational purposes. Now it may use its case to help raise the consciousness of copyright laws in the photography, advertising, publishing, and computer graphics industries.

What is unsettling about this case is the fact that the Newsday computer artist scanned James Porto’s image from a previously published photo directory, the 1989 Black Book, Photography. The
Black Book is one of the most prestigious directories in which photographers promote their work. Even though the image came from a printed page, the Newsday staffer was able to manipulate the digital file made from the scan to create a sharp, reproducible image. Obviously any distracting moiré patterns that would have resulted from such a scan were filtered out of the purloined image. Then, the computer artist further edited the image and combined it seamlessly with new elements-digitized photos and a scanned image of yet another photographer, Joe Viesti. No permission was sought in the usage of Viesti’s photo, either. The photo collage appeared on the cover of Newsday’s Long Island edition in November 1993.

That such scans were made in this case is unsettling. As an artist, one hopes that the professional designers and illustrators employed by major publishers are at least minimally aware of copyright laws. But the computer artist who made these scans claimed he was not aware that scanning and reproducing unlicensed photographs might violate the law. This flies in the face of the fact that Newsday had previously licensed 175 other photographs from FPG. Barbara Roberts, FPG’s president, said, “The idea that millions of published photographs—printed in copyrighted periodicals—may be free for the picking by anyone using a scanner, is a terribly unsettling concept to us, one we believe needed testing in the courts.”

To the distressing issue of scanning, Ms. Roberts said, “Current copyright statutes have been effective in curtailting misuse of photographic transparencies, but the law is woefully weak in dealing with the anonymous abuses that occur with digital scanners.” James Porto, in a letter to Wired magazine, said, “Curiously, I’ve noticed that proponents of free usage are people who don’t have any of their own images to draw from.” An excellent point.

In a final bit of justice, the settlement covered a significant portion of FPG’s legal bills. To this point Barbara Roberts said, “One of the biggest stumbling blocks in unauthorized-use cases is the sheer cost of litigation—without the chance for legal fees, who is going to hire a $10,000 attorney to recover $2,000 in licensing fees?”

An interesting postscript: photographer Joe Viesti also received a separate settlement of $15,500 from Newsday for the unauthorized scan of his photograph in the same disputed cover story image.

As I researched this book, I contacted several manufacturers of scanners and screen-capture software. I asked some of them if they included some sort of notice in their documentation about it being illegal to copy copyrighted materials. None of them did. A couple of them were actually quite out of joint at my question. One of them testily answered, “That’s up to the ethics of our customers and none of our business.” Oh? Oh. The Sony Betamax case agrees with the manufacturers. In that case, the U.S. Supreme Court held that the manufacturer of videotape recorders could not be held liable for infringement by the owners of the recorders. The recorder is just a neutral tool; although it makes infringement possible, infringement isn’t the only use to which it can be put. But just because something is legal doesn’t make it moral.

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In May of 2003 I took a trip to New York, NY for a conference. It was my first time there and I was totally amazed by all that there was to see. The conference headquarters was right in midtown Manhattan, so we were close to Time Square. Every night we walked down there to browse the shops and just people watch. It was so different to be there, then to be watching scenes from Time Square on TV or in movies. Everything seems to move and light up. There are billboards, signs, and people everywhere. It is a tourists dream, with many photo opportunities.

Once you get past the excitement of New York and really start to look around, it is still truly amazing. Just the architecture of the buildings made me awestruck. Shopping at a store that is a block long and nine stories tall was just too much for me. I used to think that Central Park was a small park like one I may have played at as a kid, but it is actually about 843 acres. We actually got lost in Central Park! I could have taken a picture or videotaped everything. I did take many pictures, including a great picture (to the left) of St. Patrick’s Cathedral and about twenty pictures of the Statue of Liberty.

Being in a city with so much to see makes it easy for an amateur photographer to actually take some decent pictures. You can see this by looking at the quality of the St. Patrick’s Cathedral photo to the left. This is probably the best picture I took during my whole trip. It is truly a magnificent architectural structure, inside and out.

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**St. Patrick’s Cathedral - New York, NY**