Copyright Law for Artists, Photographers and Designers

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I have tried to populate this book with anecdotal references from real living designers and artists, and where possible from lawyers and experts in this area. Unfortunately, there are few cases in which art copyright is contested, so few lawyers have had the opportunity to specialise in the area; moreover, many who do know a little are unwilling to share their knowledge for the common good. Thanks must therefore especially go to the following people, who took the time to help me understand some difficult areas: Dids MacDonald (ACID Anti Copying in Design), Andrew Lee (McDaniel & Co solicitors) Jonathan Lake QC and Ian C. Ballon (Greenberg Traurig, LLP).

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I have two beautiful children. If it were not for my mum, Helen, I would never get any work done at all – art, law or otherwise. So, thank you, mum.

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Copyright hopefully should never be a problem for any of us: in the normal run of business, visual creators are usually more concerned with trying to make a new work or earn a little cash or market their work online or to galleries, and keep ahead of basic things like income tax or VAT.

But the whole point of copyright law is that it is intended to help artists: it is an economic right: if you have spent time and effort creating something, copyright law is supposed to be there to ensure that if your work is re-used you will be a) consulted and b) paid. That’s it in a nutshell. That and affording you protection, under moral rights, against ‘derogatory treatments’ of your art.

To quote a law book: Copinger and Skone James on Copyright 1980, as applied in a leading case about Arts & Crafts works, Hensher

“Copyright law is… the negative right of preventing the copying of physical material … Its object is to protect the [artist] from the unlawful reproduction of his material”.

It is a ‘negative right’ – because it starts by saying the author/originator has exclusive rights (‘and therefore you do not… so don’t copy unless you ask and/or pay…’) – but it is not a negative in the sense that as a legal tool it CAN be very strong and effective.

I am not sure enough has been made of this in recent times when people seem to be more obsessed with worrying that people are out there trying to use copyright to ringfence public domain work and to try to undermine sharing (cf Wikipedia/National Portrait Gallery debate).

Copyright can be a very positive, financial tool.

There are a number of reasons why I thought this little handbook for artists, photographers and designers would be useful.

1 There are no other easily accessible illustrated sources written in plain English that are not law books for lawyers, or American. And UK law is different.
Copyright is complicated. Most people think they know something about it but it is not what you think it is. And it is ‘old’: UK copyright was first promoted by Hogarth who campaigned for a law to protect his engravings and later lithographs. The UK copyright framework is now 300 years and very creaky – the legislation is like a tiny old lady trying to drive a Hummer: it all seems a bit ill-fitted at times, especially when it comes to digital copyright and the Internet. This problem has been highlighted or a long time for the gaming and music industries. But less so for situations affecting visual creators.

Hand in hand with a bit of basic contract law, copyright can help you as an artist and help artists as a community. But you also need to know how to fight back – what was that I read in a recent chain email, quoting Maya Angelou?: ‘... you shouldn’t go through life with a catcher’s mitt on both hands; you need to be able to throw some things back’. I am currently watching with interest a new battle being played out on Twitter: an individual Etsy artist tackling alleged copyright abuses by a large stationery retailer.

There is very little real black letter law on copyright for artists because very few cases make it to court. When they do make it to court or there is a dispute that gets in the papers but is settled out of court it is usually because people have fallen out with each other – and copyright is used as a weapon in the ensuing fight cf Antiquesportfolio a case where copyright issues sprang up off the back of a contractual (‘I’m-not-paying-because-you-messed-up-o-yes-you-are...’) dispute.

Then there is the problem of access: access for artists to legal advice and access to information: I have been working as a law editor for 15 years and therefore have access to certain legal materials: but do you? UK law is currently reflected in the Copyright, Designs and Patents Act 1988: but if you go to the government website which publishes it, you see great big disclaimers saying this is actually not current law because it has not been updated. I have to use a paid-for subscription service to get the updated law. And lawyers are not good at sharing information for free. Also, art copyright specialists are pretty thin on the ground. And if you look at the orphan works proposals in the Digital Economy Bill 2009-10, the changes, potentially far-reaching – are hidden away on a clause entitled
'Designated authority for video games etc’ which you wouldn’t even know had anything in the world to do with art.

Therefore, there are very few answers to our copyright problems and questions. BUT we should know the basic rules, and get an idea of the boundaries and opportunities. Armed with this book, you may even earn a bit of extra money- from work you have already created and is just sitting there, as it were, ‘in the bank’. This is your starting point – signposting you to where to enquire further.

I have included email addresses or web addresses in picture captions – on purpose to identify the copyright owner – and wish everyone in the world would do the same to help on picture research/ rights clearance!

Disclaimer
I am an artist with a law degree who works with legal texts as a law editor and writer, I am not a lawyer and am not providing legal advice.

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Law differentiates between ‘real property’ and ‘intellectual property’. In other words, I can sell a painting but keep the copyright to it, or I can sell the copyright – for instance, so that someone can use the image on a poster – but keep the actual physical painting and sell that to someone else.

Likewise, I can buy the copyright (that is, buy a licence to use the image in a photograph I want for this book. But I may not necessarily be sent the actual image I need (this happened!), because while one person may own the copyright, another person may have custody of the actual painting or a photograph of the painting. Indeed, several people may be involved, and often are, which is why the process of picture research and licensing can be so painful.

I paint a painting. Joynte buys it from me because the colours go well with her newly decorated bedroom. The next year she repaints her room and burns my painting. She is perfectly entitled to do so. She bought it. She owns the real property. However, if she were to film the burning and then publish that film, or to half-burn it and display the half-burnt-out painting in public, she could be in breach of my copyright (see Chapter 10 and the *Churchill* portrait case).

So forget the burning.

Before I sold the painting to Joynte I asked Paul to photograph it for me. When I sold Joynte the painting, she did not ask me to sell (she did not want me to ‘assign’ or ‘license’) the copyright to her; she just wanted the painting itself – this is the usual scenario because no one thinks about copyright until it becomes an issue later. So I retained copyright, and thus can use the digital photos Paul has taken for me on my website and in books and catalogues, etc. Or can I? Strictly speaking, when Paul took the photograph he created a new copyright. So I am the original ‘author’ of the painting, but