

Guarding the goods

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Intellectual property rights have been subject to increased attention recently (both positive and negative), due, in part, to the sometimes awkward application of traditional legal principals to new and developing technologies. The phrase "intellectual property rights" includes a variety of types of rights - copyright, trademark, patent, trade secrets, etc. Because copyright is likely to be of greatest interest to digital imaging artists and others working in digital media, this article focuses on copyright law. It's important to note that there is no international law of copyright; each country has its own laws, which may differ greatly from one another. The concepts discussed in this article are based on the law of the United States, unless indicated otherwise.

SCOPE OF COPYRIGHT PROTECTION

Generally, copyright law protects original, creative works from being copied or distributed without the copyright owner's permission. Copyright only protects works that have been fixed in a tangible form, meaning that they must be perceptible either directly (e.g., a sculpture, photograph, or painting) or with the aid of a machine or device (e.g., a digital photograph, motion picture, or computer software). Because digital technology has changed the way certain work is made and distributed, making possible the production of identical copies, with little or no degradation, and at very low costs, digital technology poses new challenges to the copyright scheme with respect to both what is considered copyrightable work and how copyright law is enforced.

A critical distinction to be made at the onset is that copyright law protects the way that an idea is expressed in the work, but it does not protect the underlying idea. In other words, the owner of the copyright in a photograph can't prevent others from taking photographs containing the same basic elements or themes, but can prevent others from copying the original manner in which he or she created the photograph—e.g.,

the particular lighting, angle, and original combinations of subject matter used. Although the law does not set a high bar in defining "creativity" (even a modicum will do), the less control that the photographer has over these decisions and the more "automatic," or technology-driven they become, the more difficult it may be to conclude that the resulting work is sufficiently creative to warrant copyright protection.

EXCLUSIVE RIGHTS

A copyright owner has the exclusive right to reproduce, distribute, make derivative works, or perform her copyrighted work during the term of copyright, and can prevent others from reproducing, distributing, making derivative works, or performing the copyrighted work in an unauthorized manner, subject to certain exceptions for teaching, news reporting, and commentary (known as "fair use" exceptions). In general, for works created after 1978, the term of a copyright is the life of the

author 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."

The exclusive right to reproduce takes on special significance in the digital arena because courts have held that accessing copyrighted digital media on a computer (e.g., in the computer's RAM) or transferring it to another computer involves copying that infringes the right of reproduction, which is a violation of the rights of the copyright owner (there are certain limited exemptions in this area that are provided in the Copyright Act). Thus, an artist who creates a digital image by downloading a copyrighted work from the Internet, transforming it radically so that the final product bears little or no relation to the original downloaded image, may still be found guilty of copyright infringement because the work was copied, despite the radical transformation of the

PROTECTION TIPS

- When entering into agreements for production of copyrighted work, establish who will own the copyright in the work and the scope of reproduction rights. In drafting agreements with other parties for the sale of products, consider whether or not it makes sense to include specific provisions regarding the ownership and use of intellectual property that may be affected by the agreement, including copyright and trademarks.
- There are a number of practical steps that copyright owners can take to enhance protection of their copyrighted work. Copyrights may be registered in the U.S. with the United States Copyright Office at the Library of Congress (www.copyright.gov). While registration is not required in order for copyright to exist (copyright exists once the work is fixed in tangible form), registration of a copyright with the Copyright Office provides certain additional benefits and protections, including the right to sue for infringement in federal court.
- Use of a copyright notice is beneficial, as it informs others that you claim the copyright in your work. Use of the notice will often also provide additional benefits in a civil action against an infringer. The copyright notice should include the symbol © (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr.," the year of first publication of the work, and the name of the owner of copyright in the work. For example: © 2003 José Rivera. 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.
- Consider using digital watermarks to identify copyrighted works.

work (although it may be difficult for the owner of the copyrighted work to prove that his or her work was the source of the new digital image, unless he or she has used DRM technology—discussed later in this article—to identify the work).

WHAT IS FAIR USE?

As noted above, fair use is an important exception to the exclusive rights of the copyright owner. To determine whether a use is a "fair use," the following factors, set forth in section 107 of the Copyright Act, are considered: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work. Thus, for example, at one end of the spectrum, if the use is for a purely nonprofit, educational purpose, the copyrighted work is more factual than creative (e.g., a historical account of a famous event), the use is only of a small portion of the copyrighted work and does not affect the market for the copyrighted work, it will be considered fair use.

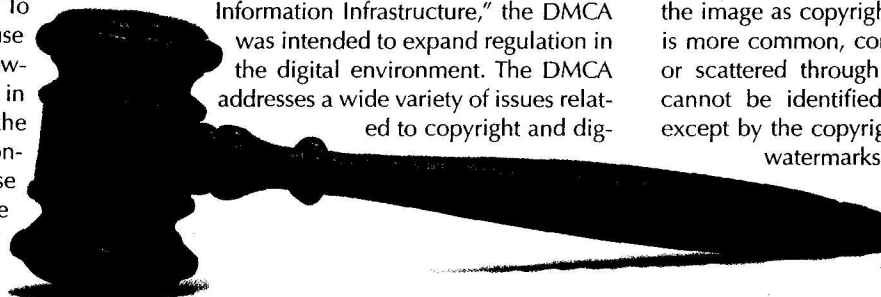
FAIR USE AND THE DMCA

The issue of fair use has taken on important significance in the context of digital works. For example, many university libraries and similar institutions maintain archives of images photographed from books and periodicals for use in scholarly research and for teaching. Recent legislation, including the Digital Millennium Copyright Act (known as the DMCA), has put the legality of such archives, particularly in those in digital format, as well as the ability of the fair use doctrine to balance the interests of copyright owners and users, in question. Accordingly, in the mid-to-late 1990s, the National Conference on Fair Use (CONFU) was convened and met to attempt to promulgate guidelines for the fair use of digital images. Although proposed

guidelines were drafted, the participants, including both content owners and users, were unable to reach a consensus, and the guidelines were not formally adopted. How these issues will be resolved is still an open question.

The DMCA, which was signed into law in 1998, was a key piece of legislation for the Clinton administration. As part of the larger goal of addressing policies relating to the "National Information Infrastructure," the DMCA was intended to expand regulation in the digital environment. The DMCA addresses a wide variety of issues relating to copyright and dig-

the first successful DRM technology and is the process of scrambling digital data so that it can't be viewed without a "key." Another effective DRM tool is digital watermark technology, which is used to detect both authenticity and unauthorized copying. Digital watermarks are data embedded within electronic images, and often include copyright information (author, rights, etc.). They can either be visible so as to mark the image as copyright protected or, as is more common, completely invisible or scattered through the file so they cannot be identified or manipulated except by the copyright owner. Digital watermarks may be set up so that they don't reproduce when the work is copied (thus



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ital media. For example, the DMCA makes it illegal to intentionally remove, alter, or falsify copyright management information, such as the copyright notice or other information that identifies the work, author, terms, and conditions of use, or to knowingly distribute works with false copyright management information. Key provisions of the DMCA proscribe circumvention of technologies used to protect copyrighted works, such as encryption, and prohibit the importation and sale of devices used to defeat encryption technology. The DMCA poses a challenge to the doctrine of fair use because, currently, the DMCA's anti-circumvention provisions mean that where copyrighted work is protected, (by encryption, for example), the DMCA effectively prevents access to that work, even for fair use.

DRM TECHNOLOGY

Dovetailing with the DMCA are efforts by copyright owners to develop enforcement mechanisms through new technologies that can be used to prevent unauthorized use of digital media known as "digital rights management," or DRM technologies. Encryption was

revealing that the copy is not authorized) or can be used to corrupt unauthorized copies. In the future, it's possible that DRM will be built into computer software and hardware so that they'll refuse to access or play unauthorized copies. (Developments in this area are apparently already underway in a DRM-enabling operating system being developed by Microsoft).

In light of the evolving technology in the area of digital media, as well as the development of new and more comprehensive DRM schemes, copyright law is a constantly evolving field. Although there are some who doubt whether copyright law is robust enough to provide the proper balance of protection and fair use in the digital environment, it appears likely that copyright law will continue to be an avenue for digital artists and professionals who seek protection for their work for some time to come. **DI**

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