CAROLINA ARTS
A PUBLICATION COVERING THE ARTS IN THE CAROLINAS

December Issue 2002

LEGAL Q & A - For the Arts

by Edward Fenno, Copyright Attorney

Question: I heard that Tiger Woods sued an artist for not paying Tiger royalties on a print the artist made of Tiger playing golf. Is that true? If so, when does an artist have to ask a celebrity's permission to photograph, paint or sell pictures of the celebrity?

Answer: It is true that Tiger sued. But he lost. Still, the question is important because celebrities, and all of us non-celebrities, have a "right of publicity" under the law in most states. This is a form of privacy and property right, and may be infringed upon when someone uses our name or "likeness" for their own (usually commercial) benefit without our consent. The right of publicity is said to "protect the celebrity's pecuniary interest in the commercial exploitation of his identity."

Relying upon this right of publicity, Tiger Woods' exclusive licensing agent, ETW Corp. ("ETW" is short for "Eldrick 'Tiger' Woods," Tiger's real name), sued a sports artist for making and selling limited edition prints of his painting depicting images of Tiger playing golf. Tiger's agent argued that any use of Tiger's name or likeness must be with the agent's permission. Tiger and his agent lost, however, because the artist's right to express himself under the First Amendment's freedom of speech trumped Tiger's right of publicity. But free speech won't win in every case.

The dividing line that is used most often by the courts is one of "endorsement." When an artist uses the image of the celebrity to endorse a product or the artist, the artist has usually violated the celebrity's right of publicity, despite free speech interests in the work. For example, in a recent case, clothing company Abercrombie & Fitch used the names and images of some surfers in its catalog without their permission. The surfers sued under the right of publicity, and won on the grounds that Abercrombie & Fitch was essentially using them to endorse and sell its clothing without their permission. The court found Abercrombie's catalog to be more a proposal for a commercial transaction than a work of art. Thus, the surfers' rights of publicity won out over the company's rights of free speech and expression.

Despite the general rule that "endorsement" is the dividing line, a number of courts have also permitted celebrities to recover when their literal likeness was used by the artist for commercial purposes, even outside of advertising or promotion. For example, the Supreme Court of California ruled last year that a man who created a lithograph of the "Three Stooges" and used it to make and sell silk-screened t-shirts violated the right of publicity of the actors who portrayed the "Three Stooges" under California's right of publicity statute. (It should be noted that the "right of publicity" is sometimes treated only as a right in the living, but California extended these rights to the heirs of the dead by statute.) The California Supreme Court found that "depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected under the First Amendment." The court then set forth the following test:

"When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain ... without adding significant expression ..." the [statutory] right of publicity is infringed.

The court also stated this test as:

"Whether a product containing a celebrity's likeness is so transformed that it has become primarily the artist's own expression rather than the celebrity's likeness."

Although the artist in the "Three Stooges" case argued that all portraiture involves creative decisions, and therefore no portrait portrays a mere literal likeness without some "transformation," the court disagreed and ruled against the artist. In addition, the court commented on the Tiger Woods decision (made by a federal court in Ohio), stating that "We disagree with the [Tiger Woods] court if its holding is taken to mean that any work of art, however much it trespasses on the right of publicity and however much it lacks additional creative elements, is categorically shielded from liability by the First Amendment."

In a somewhat similar case, the United States Supreme Court held that a television station's unauthorized videotaping and news broadcast of the entire 15 second act of the "human cannonball," performed at a local fair, violated the entertainer's right of publicity because it involved "the appropriation of the very activity by which the entertainer acquired his reputation in the first place." The Court added that "much of [the] economic value [of the entertainer's talents] lies in the right of exclusive control over the publicity given to his performance; if the public can see the act free on television, it will be less likely to pay to see it at the fair."

So, where does this leave artists in the Carolinas? The law concerning the right of publicity is not as well developed in the Carolinas as in many other parts of the country. Neither North nor South Carolina has a right of publicity statute; and although South Carolina courts have essentially recognized the right of publicity by prohibiting the "wrongful appropriation of personality," South Carolina courts have never had occasion to decide such a case. North Carolina courts have addressed the issue once, and held that a person has a right to prohibit the unauthorized use of his or her photograph "in connection with an advertisement or other commercial enterprise." In that case, a woman's photograph was used in an advertisement.

Due to the paucity of law on the subject in the Carolinas, local artists should be prepared to follow the decisions of other jurisdictions - including California. As a result, painters are likely in a better position than photographers or videographers - since paintings of people are more likely to be "transformative" than photographs or videotapes. In the "Three Stooges" case, for example, the California Supreme Court specifically noted that Andy Warhol's paintings of celebrities were sufficiently "transformative" to avoid the right of publicity, as are "works of parody or other distortion." On the other hand, the sale of photographs of people (other than to the newsmedia, who generally have additional First Amendment protection), or the sale of videotaped sporting events or similar performances may well require the permission of the personalities involved - even if not used for advertisement or other endorsement.

September Issue 2002

LEGAL Q & A - for the Arts

by Edward Fenno, Copyright Attorney

Question: I created a sculpture of a fully nude man and sold it a few years ago. Recently, I noticed it in someone's garden. Like a proud father, I went to look at my work, but then realized that it had been changed - the genitalia had been smoothed over to become something of a mound. Is this type of distortion of someone's work legal? Can another artist change my work?

Answer: In selected cases, and yours may be one of them, the original artist ("author") may have the right to prevent others from distorting, mutilating, misrepresenting or even destroying his (or her) work, even after both the work and any copyright in it have been sold.

Many European countries have long recognized artists' personal or "moral" rights in their works of art. Among these rights are the rights of "integrity" (the right to prevent distortion or mutilation of an author's work) and "attribution" (the right of the author to be recognized as the author). These "moral" rights (termed "droit moral" in Europe) spring from a belief that an artist in the process of creation injects his or her spirit into the work. Moral rights are intended to protect the honor and reputation of the artist.

In 1990, Congress enacted the "Visual Artists' Rights Act" (the "Act") to provide protection for artists' moral rights in selected categories of works of art in the United States. The Act is limited in scope, protecting only works of "visual art" that are created on or after June 1, 1991. The Act defines works of "visual art" to include only:

· Paintings
· Drawings
· Prints
· Sculptures that exist in a single copy (original), or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author; and
· Photographs that are produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Left out are such items as posters, maps, books, newspapers, technical drawings, models, motion pictures and other audiovisual works, data bases, and advertising or promotional materials. The intent is to protect "fine" art, rather than objects of utility or mass production.

Subject to "fair use" rights and other limitations, the Act provides the author of a work of visual art the right to:

· Prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation;
· Prevent any intentional or grossly negligent destruction of a work of recognized stature;
· Claim authorship of the work;
· Prevent the use of his or her name as the author of any work of visual art that (s)he did not create; and
· Prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work that would be prejudicial to his or her honor or reputation.

Note that modifications due to the passage of time or the inherent nature of the materials do not violate the author's rights. Nor do minor modifications from conservation efforts or public presentation. Thus, galleries and museums continue to have discretion to light, frame, hang and cover works of art.

Since moral rights are intended to protect the honor and reputation of the artist, the Act only protects the rights for the lifetime of the artist. Similarly, only the artist who creates the work has moral rights in the work under the Act, and the artist cannot sell or assign those rights. The artist may waive his or her rights, permitting a modification of his work, but the waiver must be in writing and must specify the modification proposed. Blanket waivers are not enforceable. In cases in which the work was created as a "work for hire" (i.e., the artist was an employee or under certain types of written commission agreement with the owner of the work), the Act does not protect the moral rights of the artist.

As a result of the Act's protection of moral rights, a prominent New York artist recently was permitted to maintain a law suit against a company that allegedly hired an inexperienced conservator to re-sculpt the

face on the prominent artist's broken piece. Thus, art patrons and conservators should think twice before modifying recent works of fine art without the written permission of the original artist. In addition, even if the Visual Artist' Rights Act does not protect a particular work of art, an artist who still owns a copyright in his or her work may have other ways of preventing changes to or adaptations of his or her work.

May Issue 2002

LEGAL Q & A - for the Arts

by Edward Fenno, Copyright Attorney

Question: Is it true that I have a copyright in my painting or photograph without registering it with the government? If so, why bother registering it?

Answer: It is true. Visual artists have a copyright in their works the minute the paint hits the canvas or the image is recorded on the negative. The legal terminology is that copyright protection begins when the artist's creation is "fixed in any tangible medium of expression." This "fixing' also includes such things as recording the creation on a compact disc or in a computer program.

As to why it is important to register a copyright - an artist cannot enforce the copyright in a court of law without registering it with the United States Copyright Office. Thus, if you find that someone is infringing upon your copyright (i.e., copying your artwork), you will not be able to sue to protect yourself until you have registered the copyright. Artists can still ask the infringer to stop, or send a "cease and desist" letter; but if these don't work, the artist must register the copyright before suing.

While you may register your copyright after infringement has begun, timely registration (discussed below) provides at least two very important benefits:
1. If you win the suit, the infringer may have to pay for your attorney's fees; and
2. You may be entitled to "statutory" damages.

Attorney fees are obviously very important. Full-blown lawsuits cost thousands of dollars. Artists that don't register their copyrights on time will have to pay their own attorney's fees. For artists that do register on time, infringers are much more likely to settle a suit early for fear of having to pay increased attorney's fees of the artist later in the case.

With respect to "statutory damages" - artists that have registered on time, but have trouble proving either how much they would have made off of their artwork absent the infringement ("actual damages") or the amount of the infringer's profits from the copying ("profit damages"), can turn to federal statutory law to set a compensation amount for the artist ("statutory damages"). These amounts generally range from $750 to $30,000 for all infringements of a given work of art by a particular infringer. In cases of intentional infringement, statutory damages can be increased to $150,000 per work. Thus, if someone made postcards by intentionally copying two photographs by an artist who timely registered copyrights in those photographs, the artist might be entitled to $300,000 plus attorney's fees as compensation - even if the artist is unable to prove how many postcards the infringer sold. Of course, not all awards will be this high. The court has discretion to tailor the award to what is fair under the circumstances. Still, the possibility of such an award may make settlement more likely.

As to when to register a work - timely registration for a "published" work is before the later of (a) three months after the date of first publication, or (b) the beginning of the copyright infringement at issue. "Publication" takes place when the artwork is distributed to the public or offered for sale or lease. For

unpublished works, timely registration is any registration before the beginning of the infringement. Again, you may still register your copyright after these deadlines, but you won't have a chance at attorney's fees or statutory damages if you miss the deadlines. Thus, the best idea is to register the work before offering it for sale or otherwise "publishing" it.

Registration is inexpensive and relatively easy. The application fee for registration of a work of visual art is currently only $30. Filling out the registration forms is about as difficult as filling out tax forms. Some artists do it themselves, and some have their attorney handle it. Forms and instructions are available from the United States Copyright Office's website - (www.loc.gov/copyright). Click on "Registration Procedures" under the General Information heading. Form VA is the general form for visual artists, although sometimes Short Form VA can be used instead.

The registration process tends to take about six months. If you are being infringed upon and need to get the registration more quickly, you should contact your attorney. Expedited registration is usually available, but it is significantly more expensive than timely registration - both in registration fees and attorney's fees.

March Issue 2002

LEGAL Q & A - for the Arts

by Edward Fenno, Copyright Attorney

Question: When I sell a painting that I created, do I still have the right to make replicas or posters of it? Or does the buyer now have those rights?

Answer: Assuming you were not commissioned or employed by someone else to create the painting specifically for them, you keep all of those rights. An artist working for him- (or her-) self owns the copyright in the paintings he creates. In general, the sale of a copyright must be in writing.

A copyright consists of a bundle of rights. In works of visual art (e.g., paintings, drawings, prints, sculptures), these rights including the exclusive rights to:

· reproduce the work
· adapt, transform or otherwise prepare "derivative works" from the work (e.g., make posters, prints or giclees)
· sell, lease, rent or otherwise distribute the work to the public
· display the work to the public

These exclusive rights are subject to some exceptions. For example, a newspaper can publish a photo of an artist's painting in a news story even though such publication might technically have violated the artist's rights to adapt and display the work.

Still, the basic copyright belongs to the artist. When the work of art is sold, the only rights automatically sold with it are the rights to sell or display the single original work purchased. Thus, a museum may hang (i.e., display to the public) a painting it owns without the permission of the artist. It may not, however, sell posters or postcards of the painting without permission. Such permission, also known as a "license," is required until either the museum acquires the copyright or the copyright expires. For recent paintings, copyright usually does not expire for 70 years after the death of the artist.

Note that the sale of any rights in the copyright bundle must be in writing, but an artist may license any of these rights orally. Since many buyers are unfamiliar with copyright laws, it may be wise to include with

the sale of a work of art a brief written statement setting forth what rights are retained by the artist. Otherwise, the buyer may claim that the artist or gallery "told" the buyer that no prints, postcards, etc. of the painting would ever be sold; when in fact it was the artist's intention all along to sell such adaptations.

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