

Estate Planning For Copyrights

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In the 21st century, the term artist encompasses many different mediums from literary works and paintings to music, apps, audiovisual and architecture. And implementing an estate plan around the unique assets of modern artists requires the estate planner to consider different strategies to protect the value of the artist's creations during life and after death. Understanding the impact of copyright on estate planning the artist/client is the initial priority.

Since 1978, a copyright has come into existence with the creation of an "original work of authorship fixed in any tangible medium of expression" (17 U.S.C. §102) but the enforceability of that copyright is dependent on the registration with the US Copyright Office. Copyright ownership is separate from the ownership of the artistic work and the



sale of the artistic work will not automatically transfer the copyright, unless expressed in writing. 17 U.S.C. §204. The transfer of an interest in a copyright can be to the whole or a portion and can occur in a number of ways. 17 U.S.C. §201(d). The transfer of a copyright can be limited in use and in timeframe. The term of a copyright created on or after Jan. 1, 1978 is "life plus 70 years." 17 U.S.C. §302.

If during the representation of the artist/client, an asset is

identified that has not been registered, it is important to facilitate the registration as this is the only means by which the artist/client is protected from copyright infringement and by which she or he can collect statutory damages and attorney fees in the event of said infringement. The application is straightforward and available on the U.S. Copyright Office website. It requires the following information: title and nature of work; the full name and nationality of the artist

as well as a statement of the artist's understanding that the work was not created within the scope of an employment contract ("work made for hire" is a defined term in §101 of Article 17 of the 1976 Copyright Act); the date that the work was created and if published, the date it was first published; and finally, if the work was adapted or derived from a preexisting work, and if so, what preexisting work.

Once registered, or if the asset is already registered, the estate planner needs to work with the artist/client to ensure that all underlying agreements related to the work are organized in one place and docketed for dates and payment schedule. With timely registration, the copyright owner can be assured of collecting statutory damages and attorney fees in the event of infringement. Such was the case when the estate of Marvin Gaye sued Robin Thicke, Pharrell Williams, Clifford Harris Jr. and the distributors of "Blurred Lines, for the similarity of sound and feel to Marvin Gaye's 1977 billboard hit "Got to Give It Up." *Williams v. Bridgeport Music*, 2015 U.S. Dist. LEXIS 97262, Copy. L. Rep. (CCH) P30,791. The estate was successful in establishing that there was direct and circumstantial evidence that "Blurred Lines" was in some manner derived from Marvin Gaye's work and obtained recuperative damages. *Id.*

After registration of the asset, another aspect the estate planner must consider is how to protect the value of the asset during life and after death of the artist. Copyright is a bundle of rights granted to creators of original works enabling them to exclusively display, reproduce, perform, sell and transfer their original works¹ and derivatives² of their work. 17 U.S.C. §106. The goal behind this legal right to copy is that the creators receive a

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fair return for their work and avoid exploitation by others. And so to be successful, the estate planner must plan with the understanding that the copyright is a bundle of separable intangible rights which are conferred on the copyright owner for a limited period of time.

The protection afforded a copyright is dictated by the U.S. Constitution in Article 1, §8 Clause 8 and the duration of the copyright depends on the status of the work on Jan. 1, 1978.³ If the work was made on or after Jan. 1, 1978, then it will last the author's life plus 70 years. And, if multiple creators were involved,

then it is the term of life of the last surviving author plus 70 years. And if the work was "made for hire" during the scope of employment, then the employer or other person for whom the work was prepared has protection for the shorter of 95 years from the first publication or 120 years from creation.

A key aspect of planning around copyright is the knowledge that the transfer or assignment of a copyright by the artist/client is not necessarily irrevocable. U.S. Copyright law allows the recapture of a copyright (called a termination or recapture right). 17 U.S.C. §203. This was done because legislators understood that the value of a copyright is unknown initially and it is important to allow the creator a "do over" to ensure fair value is ultimately obtained by the artist.

There are two clauses in the Copyright Act that address termination rights, one of which applies to pre 1978 works and the other that applies to post 1978 works. 17 U.S.C. §203, §304. Both of these clauses provide that the copyright owner retains control over the copyright through the power to terminate the transfer at a future date. So an artist, or if she or he is deceased, their surviving spouse or issue, has a non-assignable non-waivable right to terminate most transfers and licenses granted by the copyright owner, during her or

his life, at a defined point in the future. 17 U.S.C. §203(a)(2). And if the copyright owner is deceased and she or he has no surviving spouse or issue then the executor or administrator assumes this right. The purpose is to give the copyright owner, his or her family or his or her estate the opportunity to market their work after the original sale of the copyright. This addresses the injustice that occurs when a copyright is assigned before fair value could be determined.

The rules of recapture are as follows: the termination of an assignment can be effectuated at any time during a five-year period beginning at the end of 35 years from the date of execution of the assignment. 17 U.S.C. §203(a)(3)-(4). If the artist is living, then it is sufficient for the artist to serve written notice of the termination on the grantee at least two years before the termination date stated in the notice and recording of said notice with the copyright office. *Id.* If the artist dies prior to the termination period, and there is a surviving spouse, then the surviving spouse owns 100 percent of the termination interest unless there are children and grandchildren. When there are children and grandchildren involved, then the spouse owns 50 percent of the termination rights and the issue shall own the other 50 percent of the

termination rights, and the issue shall each take shares based on their generational assignment. And when the termination rights are owned by more than one person, it takes the holders of more than 50 percent of the interest to exercise the termination right which means that family members need to cooperate with each other. Upon the effective date of termination, all licenses and rights associated with the copyright revert to the artist or to the persons owning the termination interest including those that did not join in signing the notice.

The statutory heirs remain unknown until the termination right comes into effect and this raises a complication. The termination rights provisions of the Copyright Act apply generally to any transfer of a copyright or any right comprised in copyright. Therefore, if an artist assigns his or her rights in the copyright of a piece of work to an individual during life, or to a limited liability company or to a revocable living trust, a statutory heir, if the artist is deceased, would be able to undo the artist's intent. However, there is a specific exception under Copyright Law, which will make all estate planners smile (or cringe if you fear probate) for transfers by Wills.

This is just a brief examination into the estate planning

intricacies surrounding copyrights. The estate planner working with the artist/client must tread a careful path because not all the normal estate planning recommendations will apply and there are many opportunities for errors. It is important to keep detailed records of the artist/client's work and understand potential hurdles that may be encountered if the copyright to certain works are transferred during life. Foremost, it is important to understand what you do not know, and to work with a team to enable the goals of your artist/client to be maximized both during life and after death.

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1. Original work is any literary work, computer program, apps, musical works, pantomime, choreography, pictorial, graphic or other audiovisual, sound recordings, architectural works created and fixed in any tangible medium of expression on or after January 1, 1978.

2. Derivative work is work based on a preexisting original work.

3. The U.S. Constitution grants Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" and it is often referred to as the "patent and copyright clause."