

The Artist in Business A Workshop



Bitsy Bidwell
Community Arts Development Manager
Washington State Arts Commission
PO Box 42675
Olympia, WA 98504-2675
360-586-2421
bitsyb@arts.wa.gov

The Biggest Step.....

First, you must decide if you want your art to also be your business. Usually, this decision is made on the basis of the tax advantages you can gain by being a business. However, keep in mind the following two truisms:

1. TRUISM: An artist's business will use only about 40% of the time to make art; about 60% of the time will be spent with business matters.
2. TRUISM: When starting a new business it is necessary to have in hand the funds for at least two year's operations before you start. This is because it takes most businesses two to three years to "work out the kinks", develop a market, and show a profit.

The questions to ask yourself include:

- What amount of time do I have to spend on my business?
- Do I want to learn the necessary business skills and practice them using 60% of my available time?
- How much is my time worth?
- Can I devote enough time and charge enough money for my art to come out with a profit?
- Do I have the necessary two years of capitol (or can I get it) to make the business successful?
- Do I have the support of the people I live with, as well as the talent, the learning ability, the persistence, and the financial basis to do it?
- What will my emotional response be if the business is not successful?

The Critical Items for being an artist in business:

1. Thinking about yourself as a business:
 - identifying why you want to be in business: finances, self-esteem, aesthetic...
 - defining business goals: how much money, time, and effort do you have and what do you expect to accomplish
 - thinking in terms of departments: manufacturing, promotion, publicity, sales, marketing, booking, research and development, bookkeeping, financial development, customer service, shipping and handling, collections, capitol development, education and training.....

2. Artistic issues: you will need to be aware of-
 - artist's statement
 - resume, profile
 - documentation – print and media
 - copyright
 - copyright registration for musical compositions and sound recordings
 - <http://www.copyright.gov/circs/circ56a.pdf>
 - warranties
 - product liability

3. Business Issues: you must check out and deal with –
 - type of artist – freelance, contracted/commissioned, member of another's company (employee), owner of your own company
 - type of business structure – sole proprietor, self-employed, partnership, limited liability corporation, etc
 - promotional materials-press kit, business cards, brochures, website,
 - licensing
 - taxes: local, state and federal
 - recordkeeping
 - contracts
 - trademarks
 - locations: real estate and utilities
 - employees
 - professional organizations – unions, etc.
 - insurance

4. Merchandise; i.e. product:
 - producing
 - planning release
 - getting distributed,
 - marketing and promotions
 - tracking and managing inventory
 - tracking outreach

5. Career Management

- others (all players will need agreements)- agents, managers, booking agents, attorneys, accountants, business advisors, personal manager, business manager, tour manager, road manager
- self-managed – doing all of the above yourself and/or with hired assistance as needed

6. Getting the 'gig':

- networking, personal contacts, newsletters
- performing in other countries – visas, customs, immigration, transport of instruments
- booking conferences, trade shows, showcases
- getting on rosters

7. Doing the 'gig':

- facility rental and issues – tickets, equipment, personnel, security, cancellation, insurance, recording permits, benefits, sound and light agreements, transportation, agreements with other musicians, agreements with facility managers/staff
- billing, advertising, promotions, merchandising, tickets

8. Money: the point of being in business -

- sales (product, services, merchandise): credit checks, collections, transactions
- royalties
- recording and other company deals - auditing
- loans
- barter
- public & other funding sources:
 - grants
 - artist-in-residence
 - Art in Public Places
- health/life/other insurance
- retirement

Resources:

WEBSITES:

Sites to check out:

4Culture, see Touring Arts

www.4culture.org

Alliance of Artists Communities

www.artistcommunities.org

Artist Equity Associates

www.artists-equity.org

Artist Trust

www.artisttrust.org

Artists Register at WESTAF

www.artistsregister.com

ArtDeadline

www.artdeadline.com

Arts, Crafts and Theater Safety

www.caseweb.com/acts

Arts Education Washington

www.artsedwashington.org

Arts International

www.artsinternational.org

Arts Lynx

www.artslynx.org (the biggest and best of links for all art forms)

ArtsNet (links to web networks about the arts)

www.artsnet.net

Arts Northwest

www.artsnw.org

artsnw@olympus.net

Arts Resource Network

www.artsresourcenetwork.org

A service of the Seattle Mayor's Office of Arts and Culture; info. for Seattle, Washington, and beyond – sample pages in packet

Artswire

www.artswire.org

Association of Performing Arts Presenters

www.artspresenters.org

California Arts Council – Performing Arts Touring and Presenting

<http://www.cac.ca.gov/?id=72>

Chamber Music America

www.chamber-music.org

Community Arts Network (for those working with communities to create art)

www.communityarts.net

Copyright Contracts for Visual Artists –A Primer

www.copyrightcontracts.com

Basic information for photographers, graphic designers and other freelance visual artists

Documentary Film Network

www.documentaryfilms.net

The Crafts Report

www.craftsreport.com

Department of Revenue (starting a new business)

www.dor.wa.gov, click on Starting a Business

Department of Insurance

www.insurance.wa.gov

(small business tips; individual health insurance)

Graphic Artists Guild

www.gag.org

Guild of Natural Science Illustrators

www.gnsi.org

Health and Safety in the Arts

www.ci.tucson.az.us/arthazards/home.html

Idaho Commission on the Arts

www.arts.idaho.gov

Independent Lens

www.pbs.org/independentlens/insideindies/resources

PBS resource list for independent film viewers and makers

International Society for Performing Arts Foundation

www.ispa.org

Larry Harris' List of the Nation's Best Arts and Craft Shows for the Professional Showperson

www.harrislist.com

Ocean State Lawyers for the Arts (OSLA)

www.artslaw.org

Free legal information/articles for artists (not free legal advice!!)

Musical America

www.musicalamerica.com

National Arts Database

www.nyfa.org

National Association of Artists Associations

www.naaao.org

National Association for Campus Activities

www.naca.org

National Performance Network

www.npnweb.org

Oregon Arts Commission

www.oregonartscommission.org

Poets and Writers, Inc.

www.pw.org

Resources for artists

www.suite101.com, then on Arts and Crafts Community

Richard Hugo House

www.hugohouse.org

“vital learning community that develops and sustains practicing writers doing essential work”

Secretary of State’s Office, Corporations Division

www.secstate.wa.gov

Small Business Administration

www.sba.gov

(small business help and articles)

The American Arts Alliance

www.americanartsalliance.org

The Artist Help Network

www.artisthelpnetwork.com

The Art Network

www.artmarketing.com

Theater Communications Group

www.tcg.org

The John F. Kennedy Center for the Performing Arts

www.kennedycenter.org

The Pauper-Internet for Artists

www.thepauper.com

Visual Artists Rights Act

A federal law protecting fine artists rights. See Ocean State Lawyers for the Arts, above, and scroll to article

Voice of Dance

www.voiceofdance.org

Washington State Arts Commission (WSAC)

www.arts.wa.gov

Western Arts Alliance

www.westarts.org

Western State Arts Federation

www.westaf.org

PerformingArtsRegister.com

<http://www.performingartsregister.com/>

Writing links and links for writers

www.internet-resources.com/writers/

BOOKING CONFERENCES:

Arts Presenters New York, NY January 9-13, 2009

Chamber Music America New York, NY January 15-18, 2009

International Society of Performing Arts New York, NY January 13-15, 2009

Folk Alliance Conference Memphis, TN February 18-22, 2009

Midwest Arts Conference St. Paul, MN September 9-12, 2009
NACA National Conference Nashville, TN February 14-18,, 2009
(also, regional conferences. See website)
Northwest Booking Conference Boise, ID October 12-15, 2009
Pacific Contact Vancouver, BC March 27-29, 2009
Performing Arts Exchange Norfolk, VA September 23-37, 2009
Western Arts Alliance Phoenix, AZ August 31-September 4, 2009
Western Fairs Association Reno, NV January 25-28, 2009
A list of Canadian Booking opportunities is at
<http://www.artstouring.com/about/links.php>

PUBLICATIONS:

Allworth Press (devoted to arts law and business)

www.allworth.com

Books by **Tad Crawford** and **Leonard D. DuBoff** at Allworth Press

www.allworth.com/Authors/Bio_TC.htm

Artisan Northwest, magazine, quarterly subscription

48906 284th Ave. SE

Enumclaw, WA 98022

www.artisannorthwest.com

Art Marketing 101, a Handbook for the Fine Artist, by Constance Smith, 2001

ArtNetwork publishers

www.artmarketing.com

Booking and Tour Management for the Performing Arts, Rena Shagan

Allworth Press, NY, 1996

ISBN: 1-880559-36-6

A Complete Guide to Internet Promotion for Musicians, Artists, and Songwriters,

John Dawes and Tim Sweeney, Tim Sweeney and Associates

Available for online ordering; also online updates

A Guide to Washington's Artist/Dealer Consignment Law with Annotated Model Contracts for the Visual Artist by Washington Volunteer Lawyers for the Arts, 1985

available from Washington State Arts Commission

Festivals Directory Northwest- a printed journal (not online), subscription

Chris Lunn

PO Box 7515

Bonney Lake WA 98390

(253) 863-6617

info@festivalsdirectory.com

How to Be Your Own Booking Agent, Jeri Goldstein, New Music Times, 1999
ISBN:096068302X

“How To Form and Maintain a Nonprofit Corporation in Washington State” King
County Bar Association, Young Lawyers Division
www.kcba.org, click Young Lawyers Division, then Publications

How To Make and Sell Your Own Recording, Diane Sward Rapaport, Prentice Hall,
1999, ISBN: 0-13-923947-2

The Musicians’ Business and Legal Guide, Mark Halloran, Esq. Prentice Hall
ISBN: 013237322X

Music Business Primer, Diane Sward Rapaport, 2002, Jerome Headlands Press
ISBN: 013034077-4

The Artist in Business by Craig Dreeszen, 1991
Arts Extension Service
Division of Continuing Education
University of Massachusetts
Goodell Building
Amherst MA 01003
(413) 545-2360

The Artist’s Marketing and Action Plan Workbook by Jonathan Talbot with
Geoffrey Howard \$16.95
Revised 5th Edition published January 2005
Talbot Arts
7 Amity Road
Warwick, NY 10990

The Business of Being an Artist, Daniel Grant, Allworth Press, NY, Third Edition
June 2000
ISBN 1-58115-056-3
Allworth Press

The Crafts Report, the Business Journal for the Crafts Industry, monthly,
subscription
The Crafts Report
PO Box 1992
Wilmington DE 19899
(302) 656-2209

The Fine Artist's Guide to Marketing and Self-Promotion, Julius Vitali,
Allworth Press, NY, 1996

The Graphic Artists Guild's Handbook of Pricing and Ethical Guidelines, 11th edition
90 John Street, Suite 403
New York, NY 10038-3202
212-791-3400

The Guild Handbook of Scientific Illustration, 2nd edition, Elaine R.S. Hodges, editor,
Wiley Publishers, May 2003
www.wiley.com/WileyCDA/WileyTitle

United States Copyright Office
www.copyright.gov

Washington Volunteer Lawyers for the Arts Copyright Basics workshop booklet,
1987 available from Washington State Arts Commission

Works Consulting
www.works-consulting.com/index.htm
Good list of resources including books, organizations, etc.

Appendix

war·ran·ty

n. pl. **war·ran·ties**

1. Official authorization, sanction, or warrant.
2. Justification or valid grounds for an act or a course of action.
3. Law.
 - a. An assurance by the seller of property that the goods or property are as represented or will be as promised.
 - b. The insured's guarantee that the facts are as stated in reference to an insurance risk or that specified conditions will be fulfilled to keep the contract effective.
 - c. A covenant by which the seller of land binds himself or herself and his or her heirs to defend the security of the estate conveyed.
 - d. A judicial writ; a warrant.
4. A guarantee given to the purchaser by a company stating that a product is reliable and free from known defects and that the seller will, without charge, repair or replace defective parts within a given time limit and under certain conditions.

[Middle English *warantie*, from Old North French, from feminine past participle of *warantir*, *to guarantee*, from *warant*, *warrant*. See *wer*-⁴ in Indo-European Roots.]

prod·ucts liability

: liability imposed on a manufacturer or seller for a defective and unreasonably dangerous product; *specifically* : strict liability for a defective product that does not require the plaintiff to have privity of contract with the seller or manufacturer called also *product liability*

NOTE: A plaintiff usually must show that a defective product was the proximate cause of injuries, was defective at the time of purchase, and was used for its intended purpose in order to establish a products liability claim.

<http://www.uspto.gov/web/offices/tac/tmfaq.htm>

Definitions

What is a trademark?

A trademark includes any word, name, symbol, or device, or any combination, used, or intended to be used, in commerce to identify and distinguish the goods of one manufacturer or seller from goods manufactured or sold by others, and to indicate the source of the goods. In short, a trademark is a brand name.

What is a service mark?

A service mark is any word, name, symbol, device, or any combination, used, or intended to be used, in commerce, to identify and distinguish the services of one provider from services provided by others, and to indicate the source of the services.

What is a certification mark?

A certification mark is any word, name, symbol, device, or any combination, used, or intended to be used, in commerce with the owner's permission by someone other than its owner, to certify regional or other geographic origin, material, mode of manufacture, quality, accuracy, or other characteristics of someone's goods or services, or that the work or labor on the goods or services was performed by members of a union or other organization.

What is a collective mark?

A collective mark is a trademark or service mark used, or intended to be used, in commerce, by the members of a cooperative, an association, or other collective group or organization, including a mark which indicates membership in a union, an association, or other organization.

Basic Questions

Do I have to register my trademark?

No, but federal registration has several advantages, including notice to the public of the registrant's claim of ownership of the mark, a legal presumption of ownership nationwide, and the exclusive right to use the mark on or in connection with the goods or services set forth in the registration.

What are the benefits of federal trademark registration?

1. Constructive notice nationwide of the trademark owner's claim.
2. Evidence of ownership of the trademark.
3. Jurisdiction of federal courts may be invoked.
4. Registration can be used as a basis for obtaining registration in foreign countries.
5. Registration may be filed with U.S. Customs Service to prevent importation of infringing foreign goods.

Do I have to be a U.S. Citizen to obtain a federal registration?

No. However, an applicant's citizenship must be set forth in the record. If an applicant is not a citizen of any country, then a statement to that effect is sufficient. If an applicant has dual citizenship, then the applicant must choose which citizenship will be printed in the Official Gazette and on the certificate of registration.

Where can I find trademark forms?

You can access forms through the Trademark Electronic Application System (TEAS), at <http://www.uspto.gov/teas/index.html>. TEAS can be used to file an application for registration of a mark, response to examining attorney's Office action, notice of change of address, amendment to allege use, statement of use, request for extension of time to file a statement of use, affidavit of continued use under 15 U.S.C. §1058, affidavit of incontestability under 15 U.S.C. §1065, combined affidavit under 15 U.S.C. §§1058 and 1065, or combined filing under 15 U.S.C. §§1058 and 1059. Additional forms may be available through the Trademark Assistance Center at 1-800-786-9199 (or 571-272-9250).

Where can I get basic trademark information?

The USPTO website at <http://www.uspto.gov/main/trademarks.htm> provides a wide variety of information about trademarks and offers electronic filing of trademark applications and other trademark documents. The Trademark Electronic Business Center contains all the information needed for the entire registration process. You can search the trademark database for conflicting marks using the Trademark Electronic Search System (TESS), at http://tess2.uspto.gov/bin/gate.exe?f=login&p_lang=english&p_d=trmk, file applications and other trademark documents online using the Trademark Electronic Application System (TEAS), at <http://www.uspto.gov/teas/index.html>, and check the status of applications and registrations through the Trademark Applications and Registrations Retrieval (TARR) database at <http://tarr.uspto.gov>. For information about applying for a trademark, click [Basic Facts About Trademarks](#). If you need answers to specific trademark questions, please contact the Trademark Assistance Center at 1-800-786-9199 (or 571-272-9250).

For patent information, please contact the Inventors Assistance Center at 1-800-786-9199. If you live in Northern Virginia, the number is (703) 308-4357.

For an index of everything about Doing Business in Washington go to: <http://access.wa.gov/business/>

Choosing the Structure of Your Business or Organization

You can find this information at: http://www.secstate.wa.gov/corps/registration_structures.aspx

You may operate your business or organization under any one of several organizational structures. Each type of structure has certain advantages and disadvantages that should be considered. You should contact an attorney, accountant, financial advisor, banker, or other business or legal advisors to determine which form is most suitable for your business or organization.

A **Sole Proprietorship** is one individual or married couple in business alone. Sole proprietorships are the most common form of business structure. This type of business is simple to form and operate, and may enjoy greater flexibility of management and fewer legal controls. However, the business owner is personally liable for all debts incurred by the business.

A **General Partnership** is composed of two or more persons (usually not a married couple) who agree to contribute money, labor, an/or skill to a business. Each partner shares the profits, losses, and management of the business, and each partner is personally and equally liable for debts of the partnership. Formal terms of the partnership are usually contained in a written partnership agreement.

A **Limited Partnership*** is composed of one or more general partners and one or more limited partners. The general partners manage the business and share full in its profits and losses. Limited partners share in the profits of the business, but their losses are limited to the extent of their investment. Limited partners are usually not involved in the day-to-day operations of the business.

A **Limited Liability Partnership*** is similar to a General Partnership except that normally a partner does not have personal liability for the negligence of another partner. This business structure is used most commonly by professionals such as accountants and lawyers.

A **Corporation*** is a more complex business structure. As a chartered legal entity, a corporation has certain rights, privileges, and liabilities beyond those of an individual. Doing business as a corporation may yield tax or financial benefits, but these can be offset by other considerations, such as increased licensing fees or decreased personal control. Corporations may be formed for profit or nonprofit purposes.

The **Limited Liability Company (LLC)*** and the Limited Liability Partnership (LLP)* are the newest forms of business structure in Washington. An LLC or LLP is formed by one or more individuals or entities through a special written agreement. The agreement details the organization of the LLC or LLP, including: provisions for management, assignability of interests, and distribution of profits or losses. Limited liability companies and limited liability partnerships are permitted to engage in any lawful, for profit business or activity other than banking or insurance.

*Registers with the Secretary of State

For further assistance with your Washington business requirements, please visit the [Doing Business in Washington Index](#).

Summary of Registration and Renewal Requirements

This is a summary of registration and renewal requirements for Corporations, Limited Partnerships, Limited Liability Partnerships and Limited Liability Companies. For specific statutes governing these entities, see [Title 23 RCW](#) and [Title 23B RCW](#) (profit corporations), [Title 24 RCW](#) (nonprofit corporations), and [Title 25 RCW](#) (partnerships & limited liability companies).

Please remember, state law holds the corporation or other business entity responsible for the timely completion of all paperwork. You can avoid delinquency notices and costly penalty fees by completing all reports by the required deadlines.

General Requirements

Domestic organizations (those formed in Washington) must file organizing documents with the Corporations Division at the Secretary of State's Office for review and approval before legal existence can begin. Two copies of the organizing documents (one with original signature) and fees should be sent directly to the Corporations Division.

Foreign organizations (those formed in a state other than Washington or in a foreign country) must submit two completed copies of an application for a Certificate of Authority to do Business in Washington. The application must be accompanied by proof of good standing issued by the state or other jurisdiction where the organization was originally formed.

A **nonprofit corporation**, such as a religious, social, charitable, or educational organization, must file two sets of Articles of Incorporation with the Corporations Division.

Limited partnerships beginning business in Washington must file a Certificate of Limited Partnership with the Corporations Division. Previous corporate and partnership certificates issued by county clerk's offices throughout the state have been transferred to the Secretary of State for centralized filing and access.

www.arts.wa.govwww.dol.wa.gov/businesses

File a Master Business Application

The Master Business Application is a simplified form used to apply for many state licenses, registrations, and permits. It is also used to apply for some city licenses.

Who should file, and when?

You must file a Master Business Application when you first start your business, or when you change or update your business. You will need to file (or re-file) if you want to:

- Get a state business license or Unified Business Identifier (UBI) number
- Get a new city or specialty license (such as a liquor license)
- Change ownership of a business
- Open or change business locations
- Register or change a trade name
- Hire employees (including minors and workers in the home)
- Change your unemployment or industrial insurance coverage

How to file

There are three ways to file the Master Business Application and supplemental forms:

File online

1. Complete the [online Master Business Application](#).
2. Pay with a MasterCard, Visa, or American Express credit or debit card (gift cards cannot be used).

Filing online isn't recommended for some businesses. See the list of [businesses that shouldn't file a Master Business Application online](#) for details.

File by mail

1. Complete the  [Master Business Application](#) and any supplemental forms that apply to your business. To find out which supplemental forms you'll need, see the [Business Licensing Guide](#).
2. Send your completed application, supplemental forms, and a check or money order payable to "Washington State Treasurer" for the  [fees](#) to:

Master License Service
Department of Licensing
PO Box 9034
Olympia, WA 98507-9034

If your business needs [specialty licenses](#), including liquor or lottery licenses, you should file your Master Business Application by mail.

File in person

Visit any [business licensing office](#).

What is the fastest way to file?

Your application will be processed more quickly if you file online. Applications filed in person take about the same amount of time to process as those filed by mail.

Small Business Resources

Overview

As a Washington State business, you have a host of federal, state, and local programs available to help you start and grow your business, including one-on-one personal business counseling, state agency customer service representatives and helplines.

Counseling Services

- [Service Core of Retired Executives \(SCORE\)](#)- SCORE is an organization of retired business executives and business owners who volunteer to advise small businesses free of charge. Make an appointment with a counselor to review your business plan, advise you in business planning, financial analysis, marketing, expansion, exporting and other business needs.
- [Small Business Development Centers](#) (SBDCs)- The SBDC counselors have certified broad-based skills and significant experience as business owners or

managers. They provide one-on-one, confidential assistance at no charge for management and technical business affairs.

Business Information Centers

SBA Business Information Centers (BICs) serve all regions of the state providing a variety of resources and one-stop small business planning and research centers.

- [Seattle Business Enterprise Center](#)
- [Spokane BIC](#)- 509-353-2800 (Serves Eastern Washington and N. Idaho)
- [Tacoma Business Asst Center & 1-Stop Capital Shop](#)- 253-680-7770
- [Southeastern Washington](#)- 509-372-7142
- [Portland District Office](#) (*serves Wahkiakum, Cowlitz, Clark & Skamania counties*)
- [Small Business Administration](#)
- [SBA Answer Desk](#) or or 1-800-UASK-SBA

Additional Resources

- [Secretary of State Corporations Division](#)- (360) 753-7115
- [Financial Institutions](#)- (360) 902-8700
- [Business-related Associations](#)
- [Washington State Information](#)- (800) 321-2808
- [National Federation of Independent Businesses \(NFIB\)](#)- (360) 786-8675

Minority & Women-owned Business Resources

- [SBA Services to Help Succeed in Business](#)
- [Minority Enterprise Development](#)
- [Office of Women's Business Ownership/Women's Business Centers](#)
- [Women's Business Center](#)
- [Northwest Minority Business Council](#)

Publications

Review of the following publications will provide you with a basic knowledge and understanding of Washington's business licensing process, tax obligations, available technical assistance as well as a wealth of information.

- [Operating a Business in Washington State](#)

- [Washington State tax publications](#)
- Guide for Small Businesses in Washington State (PDF)
- Small Business Resource Directory (download)

What Is Creative Commons?

Creative Commons is a nonprofit organization that works to increase the amount of creativity (cultural, educational, and scientific content) available in “the commons” — the body of work that is available to the public for free and legal sharing, use, repurposing, and remixing.

How Does Creative Commons Work?

Creative Commons provides free, easy-to-use legal tools that give everyone from individual “user generated content” creators to major companies and institutions a simple, standardized way to pre-clear usage rights to creative work they own the copyright to. CC licenses let people easily change their copyright terms from the default of “all rights reserved” to “some rights reserved.” Creative Commons licenses are not an alternative to copyright. They apply on top of copyright, so you can modify your copyright terms to best suit your needs. We’ve collaborated with copyright experts all around the world to ensure that our licenses work globally. Getting a Creative Commons license is easy. Visit our Web site at creativecommons.org and click “License Your Work.” Based on your answers to a few quick questions, we’ll give you a license that clearly communicates to people what you will and won’t allow them to do with your creativity. It only takes a few minutes and it’s totally free. Our Web site also contains an FAQ that answers many of the most common questions about how CC licenses work.

What Can Creative Commons Do for Me?

If you’ve created something and want people to know that you’re happy to have them share, use, and build upon your work, you should consider publishing under a Creative Commons license. CC’s legal infrastructure gives you flexibility (for example, you can choose to only pre-clear noncommercial uses) and protects the people who use your work (so that they don’t have to worry about copyright infringement, as long as they abide by the terms you have specified). If you’re an artist, student, educator, scientist, or other creator looking for content that you can freely and legally use, there is a giant pool of CC-licensed creativity available to you. There are many millions of works — from songs and videos to scientific and academic content — that you can use under the terms of our copyright licenses.

Who Uses Creative Commons Licenses?

Major media and technology companies, leading universities, top scientists, and world-renowned artists all take advantage of the Creative Commons approach to copyright. Most importantly, there are millions of “regular” people around the world who use CC licenses to help increase the depth, breadth, and quality of creativity that is available to everyone for free and legal use.

How Is Creative Commons Funded?

Financial support for Creative Commons comes from organizations including the Center for the Public Domain, the Omidyar Network, The Rockefeller Foundation, The John D. and Catherine T. MacArthur Foundation, and The William and Flora Hewlett Foundation. CC also receives contributions from members of the public — people just like you who value the open, collaborative exchange of culture and knowledge.

Where Can I Find Out More About Creative Commons?

There is much more information, including a number of helpful videos about Creative Commons, on our Web site. Please visit us at creativecommons.org to learn more about what we do and how we do it.

More Information

Please visit <http://creativecommons.org/>

Except where otherwise noted, this work is licensed under <http://creativecommons.org/licenses/by/3.0/>

Arts Alive

Art Department

A Guide to the Visual Artists Rights Act

by Cynthia Esworthy, NEA Office of General Counsel, JD Washington & Lee Law School 1997.

- *are a sculptor. On commission, you create a bronze frieze for a city park. A year later, you discover that the center of the frieze has been covered by a copy of the city seal. Can you force the city to remove the seal?*
- *You have just purchased an office building. In the central lobby there is a large, permanently fixed sculpture that you find aesthetically displeasing. Can you remove it?*
- *You are a well-known painter. You discover that a company that has purchased one of your canvasses is advertising one-inch square portions of it so that buyers can "own an original painting" by you. Can you stop them?*
- *You are an airport. You commission a giant mobile, specifically designed for the interior of your central terminal. You would like to relocate the mobile to the front exterior entrance of the terminal, which will require weatherproofing, removal of the motor and rendering the mobile stationary, and repainting it to match the color scheme. Can the artist prevent the move or modifications?*
- *You are a photographer. You discover that a limited edition triptych you created and sold has been separated into three pieces for resale. Can you require that the piece be sold as a whole?*
- *You are a county arts agency. You commission a mural for the side of a county building. You later discover that a state law requires you to build a handicapped access ramp blocking the lower part of the mural. Can you paint over the lower part of the mural?*
- *You are a printmaker. A collector has just sold one of your prints for 100 times the original cost. Are you entitled to a royalty on the sale?*

What rights does an artist have once the work is sold? Until 1990, with rare exceptions -- such as Monty Python, which won a lawsuit preventing broadcast of edited programs -- artists in the United States had virtually no power to protect their work from mutilation, misattribution, or destruction. For example, in 1966, Maryland commissioned William Smith to create nine murals highlighting the state's history, subsequently installed but altered the central panel, and then refused to remove his name from the

piece. He had no recourse. In 1980, the Bank of Tokyo commissioned and then removed Isamu Noguchi's 1,600 pound sculpture, *Shinto*, from its Manhattan lobby, sliced it into pieces, and warehoused it, without notifying the artist. He had no recourse. In 1979, the General Services Administration commissioned and then, after office workers complained about it, removed Richard Serra's *Tilted Arc*, a site-specific sculpture bisecting Manhattan's Foley Square. He had no recourse.

With the 1990 passage of the *Visual Artists Rights Act (VARA)*, protecting the moral rights of attribution and integrity, the successors of Smith, Noguchi, or Serra ---today's artists--- have a far greater ability to protect against similar threats to their work. But, as three artists who spent several years creating a massive sculptural installation learned after Helmsley-Spear purchased the building, these rights are not absolute: the Supreme Court recently ruled that VARA does not prevent the removal and destruction of their work. VARA applies only to a restricted category of visual artworks, extends only limited rights, and is subject to loopholes, exclusions, and waiver provisions that substantially erode its powers.

What are moral rights?

Property ownership does not necessarily convey absolute rights over the thing bought. Real estate ownership, for example, is restricted by zoning legislation. Preservation legislation recognizes society's interest in preserving its architectural treasures, despite private ownership. **Similarly, moral rights legislation recognizes that art ownership is not an absolute property right.**

The term **moral right** itself comes from the French *le droit moral*, an 18th century French concept referring to rights of a non-economic but spiritual or personal nature, existing independently of an artist's copyright. Such rights are based on what the court in *Carter v. Helmsley-Spear, Inc.* explained as **"a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality as well as the integrity of the work, should therefore be protected and preserved."**

Moral rights include:

- (1) disclosure or divulgation, which allows the artist to determine when a work is complete and may be displayed;**
- (2) paternity or attribution, which allows an artist to protect the identification of his name with his own work, and to disclaim it when applied to another's;**

(3) the right of withdrawal, which permits the artist to modify or withdraw a work following publication; and

(4) integrity, which allows the artist to prevent his work from being displayed in an altered, distorted, or mutilated form.

Works covered by VARA:

VARA covers only limited, fine art categories of "works of visual art": paintings, sculptures, drawings, prints, still photographs produced for exhibition. Within this group, only single copies or signed and numbered limited editions of 200 or less are actually protected. VARA does not apply to any of the following: works made for hire, posters, maps, globes or charts, technical drawings, diagrams, models, applied art, motion pictures, books and other publications, electronic publications, merchandising items or advertising, promotional, descriptive, covering, packaging material or container, nor does it cover any work not subject to general copyright protection.

Rights conferred by VARA:

Of the moral rights panoply conferred by other nations, VARA recognizes only attribution and integrity as legal causes of action. Attribution includes the rights to claim authorship of a work, to prevent attachment of an artist's name to a work which he did not create, and, where there has been a subsequent distortion, mutilation, or modification of the work ***prejudicial to the artist's honor or reputation***, the right to disclaim authorship and to prevent identification of the artist's name with the work. Congress did not define the term prejudicial to one's honor or reputation, but the House Report on VARA advised focusing on "the artistic or professional honor or reputation of the individual as embodied in the work that is protected...While no per se rule exists, modification of a work of recognized stature will generally establish harm to honor or reputation." The court in *Carter v. Helmsley-Spear*, one of the few cases filed under VARA, relied on expert testimony, focusing on "good name, public esteem, or reputation in the artistic community."

Exceptions to VARA coverage:

Congress was careful to delineate several exceptions. For example, natural modifications resulting from aging or the inherent nature or quality of the materials used do not constitute statutory modification, distortion or mutilation. Similarly, modification resulting from conservation or public presentation involving lighting and placement is not

a prohibited modification unless caused by gross negligence. So, for example, while some natural fading is unavoidable for textiles, excessive fading of especially fragile materials caused by overexposure to direct sunlight could trigger the statute. Similarly, the natural melting of an ice sculpture falls into the inherent nature exception and would not trigger the statute, but loss could be prohibited separately by contract.

The rights to claim or disclaim authorship of a work and to prevent the use of one's name on a distorted, mutilated, or modified work prejudicial to one's honor or reputation do not apply to a reproduction, depiction, portrayal, or other use of a work of visual art outside the statute's limited protected class. Nor do they constitute a mutilation.

Congress also made VARA rights subject to 113(d) of the copyright law, which addresses problems arising where the work is part of a building. For example, the right of integrity does not apply if the artist either consented to the installation of the artwork before VARA's trigger date [December 1, 1990], or both the artist and the building owner executed a written agreement on or after the trigger date, specifying that installation of the artwork may subject the work to damage by reason of removal.

If the building owner wants to remove an artwork which can be safely removed, the artist's rights apply unless (1) the building owner has made a diligent, good faith but unsuccessful attempt at notification of the artist of his removal intent, or (2) the building owner did provide notice, but the artist either failed to remove the work or to pay for its removal within 90 days after receiving notice. A "diligent, good-faith attempt" involves sending notice by registered mail to the artist at his most recent address as recorded by the Register of Copyrights. This record is part of a system, established by Congress, which permits an artist whose work is incorporated in a building to record his identity and address, with available update procedures, and similarly permits building owners to record evidence of their efforts to comply.

Another exception involves Congress' specification that the VARA rights are wholly independent of the copyright owner's exclusive rights (1) to reproduce the copyrighted work in copies; (2) to prepare derivative works based on the copyrighted work; (3) to distribute copies to the public by sale or other forms of ownership transfer, e.g., barter, or by rental, lease, or lending; and (4) to display the work publicly. While the artist retains VARA rights, these rights transfer to whoever owns the copyright in the artwork. Congress further provided that VARA rights were subject to 107 fair use limitations on exclusive rights. If the artwork is copyrighted, there are permissible fair use purposes for which the work may be reproduced, and which constitute a defense to infringement, including "criticism, comment, news reporting, teaching, scholarship, or research." In given circumstances, artistic parody may also be a defense subject to the four-factor fair

use analysis. The statute sets forth four factors which must be considered in determining whether a use is permissible: the purpose and character of the use, the nature of the copyrighted work itself, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use on the potential market for or value of the copyrighted work.

Exercise of rights, including transfer and waiver:

VARA restricts the exercise of the rights of attribution and integrity to the author or joint authors of the artwork, regardless of whether he/they hold title either to the copyright or the artwork itself. Thus while both copyright and physical ownership are property rights which may be transferred, moral rights may not be transferred.

Moral rights may, however, be waived. The waiver instrument must be very specific: the creator must consent in a written and signed instrument specifically identifying the artwork, the uses of that work, and with a clause limiting the waiver to both aspects. Where the artwork is created by more than one author, any one creator's waiver binds the group.

Duration:

For works created on or after December 1, 1990, (VARA's trigger date) VARA's moral rights are granted for the life of the author, or in the case of a joint work, until the death of the last surviving author. Works created before that date, but still owned by the author on that date, are coextensive with and expire at the same time as the copyright.

Remedies:

The legal remedies available for a violation of moral rights are the same as the civil (but not criminal) remedies available for copyright infringement: injunction, impounding, damages, profits or statutory damages, costs and reasonable attorney's fees. Statutory damages range from a \$500 minimum to a \$20,000 maximum, increasing to \$100,000 for willful infringements and decreasing to \$200 for innocent infringements.

Under VARA (unlike copyright infringement), an artist has a cause of action in a federal court even if his artwork is not registered with the Copyright Office.

Because the burden of proof on the artist diminishes and the amount of monetary damages could increase if an artwork is registered before an infringement, an artist should register his copyright as soon as possible.

It's important for artists to be aware that, while VARA establishes specific federal causes of action, additional protections are often available under state statutes.

In addition, they can negotiate even more expansive rights enforceable by contract. For example, an artist could negotiate a resale royalty and specify an intent to retain rights

of reproduction, even though additional contractual obligations are normally limited to the first sale.

Buyers and art owners should equally understand that VARA does not intrude on the standard protections available to them through contracts to purchase or commission, but in fact allows moral rights waivers. Those entering a commission arrangement can further specify that the work is for hire, which would put the work outside VARA protection, but they must meet the other criteria for that category.

FURTHER INFORMATION:

Links for the Visual Artists Rights Act can be found at

<http://www.loc.gov/copyright/title17/92chap1.html#106a> (basic provision) and

<http://www.loc.gov/copyright/title17/92chap1.html#113> (exception for artworks fixed to buildings) You can also contact the Copyright Office (<http://lcweb.loc.gov/copyright>) for

further information. If you are an artist facing VARA issues, you may want to contact an organization such as Volunteer Lawyers for the Arts or the Washington Area Lawyers for the Arts that provides legal assistance to artists. You may also want to consult organizations in your field, such as the International Sculpture Center for sculptors.

Full Copyright law can be located at:

<http://www.copyright.gov/title17/92chap1.html>