

IN-DEPTH

Art Law

APPLICATION OF COPYRIGHT TO ART



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In-Depth: Art Law (formerly The Art Law Review) is a unique global overview of this dynamic and growing area of legal expertise. With a focus on recent trends and developments in key jurisdictions worldwide, it examines a wide range of topics including art disputes; fakes, forgeries and authentication; art transactions; artist rights; trusts and foundations; and much more.

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Copyright is the primary source of legal protection for all forms of original works of art. While these protections have been ingrained in US copyright law since 1909, the explosion of generative artificial intelligence (AI), expansion of social media, growth in appropriation art and the surge in popularity and market value for pop and street art have created multiple challenges for artists, the art market and those who seek to exploit works of art.

This chapter serves as an introduction to the law of copyright in the United States as it applies to works of art, reproductions and other derivative uses.

Historical context

When enacted in 1787, the US Constitution empowered Congress '[t]o 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 . . .'. Thus was born the earliest US legal protections for copyright (authors) and patents (inventors).

Jumping ahead 236 years, the impact of copyright on art is ubiquitous. Copyright is the primary means of protecting original works of art and incentivising others to create new art. But finding this balance has consistently been challenging, especially in the modern online, digital world. The intersection of art and copyright is one of the most debated and controversial areas of intellectual property.

The 1976 US Copyright Act (the Act), which is the exclusive means of protecting and enforcing copyright under federal law, pre-empts all other laws and claims that implicate any of the exclusive rights granted to copyright owners under the Act. The first version of the Act, enacted in 1790, granted copyright protection only for 'any map, chart, book or books already printed within these United States'.^[1] In the late eighteenth century, photography of course did not exist, and there were no technological means to create and distribute reproductions of art outside of images included in printed books. That changed with the next complete revision of the Act in 1909. The 1909 Act defined copyright-protectable works as 'all the writings of an author',^[2] which expressly included works of art, models or designs for works of art, art reproductions, photographs, and prints and pictorial illustrations.

Today's version of the Act was enacted in 1976 and extends protection to all forms of 'pictorial, graphic, and sculptural works'.^[3] These broad categories, in turn, include 'two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans'.^[4]

Scope and limitations of copyright

To be protected by copyright, a work of authorship must be original; that is, it cannot be in the public domain or so lacking in originality that it does not rise to the level of protected content. In a seminal 1991 opinion, the Supreme Court held that 'originality' requires only minimal creativity, irrespective of how much physical effort and time might go into a work.^[5]

Nevertheless, common geometric shapes and familiar symbols and designs are not subject to copyright protection. The Copyright Office provides the following examples:

1. 'Gloria Grimwald paints a picture with a purple background and evenly spaced white circles . . . The registration specialist will refuse to register this claim because simple geometric symbols are not eligible for copyright protection, and the combination of the purple rectangle and the standard symmetrical arrangement of the white circles does not contain a sufficient amount of creative expression to warrant registration.'^[6]
2. 'Gemma Grayson creates a wrapping paper design that includes circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color.' This is protectable because 'it combines multiple types of geometric shapes in a variety of sizes and colors, culminating in a creative design that goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement'.^[7]

Similarly, '[c]ommon patterns, such as standard chevron, polka dot, checkerboard, or houndstooth designs' are not protectable; however, '[a] work that includes familiar symbols or designs may be registered if the registration specialist determines that the author used these elements in a creative manner and that the work as a whole is eligible for copyright protection.'^[8] For example, a sketch of the standard fleur-de-lys design used by the French monarchy would not be protected in and of itself; however, if an artist painted an original silhouette of Marie Antoinette with a backdrop featuring multiple fleur-de-lys designs, the work would be protected because it incorporates an original, artistic drawing in addition to the standard fleur-de-lys designs.

Mere colouration or variations in colouring alone are not eligible for copyright protection.^[9] If an artist adds just a few colours to a pre-existing design or creates multiple coloured versions of the same basic existing design, the work will not be protected; however, a work comprising a digital image of the *Mona Lisa* to which different hair colour, nail polish, stylised clothing and darkened skin are applied would be entitled to protection because the changes in colour and other attributes are sufficient to constitute a new work of authorship.^[10]

Merger doctrine/scènes à faire

Two other important related principles limit copyright protectability, namely, the idea or expression 'merger' doctrine and *scènes à faire*.

Copyright does not protect any idea, procedure, process, system, method of operation, concept, principle or discovery.^[11] Consistent with this premise, the merger doctrine bars copyrightability when an idea merges with the expression; that is, if an idea and the expression of the idea are so closely related that the idea and expression are one, such that there is only one way or an extremely limited number of ways to express and embody the idea in a work. For example, an infringement suit by a photographer, whose photograph captured a mother mountain lion holding a cub in her mouth perched on a cliff, against an artist who created a sculpture depicting a similar scene, was dismissed because the image of a mother mountain lion perched on a rock with a kitten in her mouth was a naturally occurring pose that was created and displayed by nature.^[12]

The related principle of *scènes à faire* (or 'scenes that must be done') applies where the expressive elements of a work are a product of the genre of the subject matter, which by its nature must include certain common elements. In a well-known case, a glass-in-glass sculpture depicting jellyfish swimming vertically was entitled only to a 'thin' copyright, which was protected only against virtually identical copying (combination of unprotected elements dictated by the glass-in-glass medium and by the jellyfish's natural physiology).^[13]

In a widely publicised decision, a federal appellate court recently held that artwork featuring a banana duct-taped to a white wall did not infringe the very weak copyright of a banana and orange duct-taped to a green wall because the idea of affixing fruit to a wall with duct tape cannot be protected by copyright.^[14]

Fixation

Copyright protection requires that a work be 'fixed' in some tangible medium of expression, so that it is more than of transitory duration (such as a sandcastle on a beach). A leading case denied copyright protection to a wildflower garden in Chicago because the court found the garden too transitory as it kept changing throughout the seasons.^[15]

Consider prominent but temporary art installations, such as those by Christo, and whether they are too transitory to warrant protection, an issue that has not been addressed directly by US courts.^[16] Christo, however, documented and preserved all of his projects with photographs and video, which thereby fixed the art itself in a tangible medium.

In a recent decision, a federal appellate court held that a moveable sculpture was a fixed medium of expression that was entitled to copyright protection, even though its pose changed.^[17]

Functionality

Copyright precludes protection for 'useful articles' unless their incorporated artistic designs can be perceived separately from their functional elements and are independently copyrightable.^[18] As an example, sculptured artistic belt buckles by the designer Barry Kieselstein-Cord were found to be separable and, therefore, protectable apart from the utilitarian belts to which they were affixed.^[19] In 2017, the Supreme Court held that two-dimensional designs (consisting of various lines, chevrons and colourful shapes) placed on cheerleader uniforms could be subject to copyright protection notwithstanding the utilitarian nature of the uniforms themselves, which are not otherwise subject to protection under the 1976 Act.^[20]

Human authorship

Works that are not created by human beings are not protected by copyright,^[21] but with the advent of sophisticated generative AI, this fundamental principal is being challenged. In 2016, Dutch computer scientists, together with Microsoft and others, created a 'new' Rembrandt portrait painting, using complex algorithms and extensive data from numerous real Rembrandt portraits and a 3D printer for texture and depth. The resulting portrait was startling in its authenticity.^[22]

An *Edmond de Belamy* AI-created portrait, programmed by the Parisian group Obvious, sold at Christie's in October 2018 for US\$432,500. To 'learn', the algorithm was fed 15,000 images of portraits from different time periods.^[23]

The Copyright Office has consistently required human authorship as a prerequisite to registration. For example, the Office cancelled the registration of *Zarya of the Dawn*, a comic book that included images created by a generative AI tool, because the images were not created by a human.^[24] The Office later allowed portions of the work to be registered that were actually created by the human applicant and protected by copyright; namely, the text and arrangement of the AI-generated art.

Another digital artist who used AI to create a complex work using over 600 distinct AI prompts, was refused registration. He then sued the Copyright Office in September 2024 for declaratory relief, claiming his human creative input was substantial and entitled to protection.^[25] That case remains pending.

In March 2025, a US appellate court upheld the Copyright Office's refusal to register a work of visual art generated solely by artificial intelligence, holding that human authorship is an essential part of a valid copyright claim.^[26]

As part of a three-part study of AI and copyright, in January 2025, the Copyright Office issued a report on copyrightability of works creative in whole or in part by AI.^[27] The Office maintained its position that '[c]opyright does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements.' But it also emphasised that '[t]he use of AI tools to assist rather than stand in for human creativity does not affect the availability of copyright protection for the output' and that '[c]opyright protects the original expression in a work created by a human author, even if the work also includes AI-generated material.' As a result, if an author submits a work for registration that consists of both AI-generated content and human generated content, the author must specify in the application the respective portions that constitute human-generated content as only those portions are registrable. The Office emphasised that making the determination '[w]hether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.'

Copyright exclusive rights/first sale doctrine and display right exceptions

The Act provides copyright owners with a bundle of 'exclusive' rights, including reproduction, preparation of derivative works, adaptation, public distribution, public performance and public display.^[28]

These exclusive rights, however, do not prevent the owner of a work of art from reselling it or transferring title under the 'first sale doctrine', which provides that anyone who lawfully owns a particular copy of a work 'is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy'.^[29] The owner of an original work of art, however, cannot grant to a gallery or auction house to which such work is consigned for sale any rights greater than the bare legal title that owner has, with no right to exercise any of the exclusive rights reserved to the copyright owner.

This also highlights the important distinction between the copyright in a work of art and legal title in the same work that is purchased or otherwise acquired. The creator of an original work who sells it does not transfer their copyright in the work absent a written agreement to do so.

Another important statutory exception to the exclusive display right permits owners of works of art, or anyone authorised by owners, to display those works publicly, 'either directly or by the projection of no more than one image at a time, to viewers present at the place where the [work] is located'.^[30] This provision is responsible for lawfully permitting all displays of copyright-protected art by galleries, auction houses and museums.

Term of copyright

The term of copyright for an individual artist who created a work on or after 1 January 1978 is the life of that author plus another 70 years. Works created prior to that date are subject to a different term under the 1909 Act, which was an initial term of 28 years and a second renewal term of 28 years, but there are certain exceptions that are beyond the scope of this chapter.

Where an artist is commissioned to create a work to be used in conjunction with other original content in another work, such as a compilation or collective work, the artist's work will be deemed a 'work made for hire', which automatically places copyright ownership in the party that commissions the work, provided a written agreement with the author specifies it is a 'work made for hire'. The copyright term for a work made for hire under the 1976 Act is 95 years from the date of first publication or 120 years from the year of creation, whichever expires first.^[31]

Registration and infringement

Under US copyright law, registration for an original work is optional, but provides significant benefits in connection with any claim for infringement:

1. First, registration is a precondition to filing a copyright infringement action in the US, unless the work is a foreign work created by a non-US author.^[32] This is required by the Berne Convention, a treaty to which the US and 178 other countries are parties.^[33]
2. Second, a work that is registered is presumed to be valid as to its ownership and copyrightability.
3. Third, the copyright owner of a work that is registered prior to commencement of an act of infringement is entitled to seek alternative economic relief in the form of statutory damages, which generally range from US\$750 to US\$30,000 per work infringed, to as high as US\$150,000 for a wilful infringement and as low as US\$250 for an innocent infringement.
4. Fourth, the copyright owner of a work that is registered before an infringement begins may, if successful in proving infringement, also seek an award of legal fees in the court's discretion.^[34]

Although a foreign work under the Berne Convention need not be registered before an infringement action can be brought, it must still be registered in a timely manner to seek statutory damages and legal fees. The absence of registration also places the initial burden of proof on a foreign copyright owner to establish ownership and validity of the copyright.

While a detailed discussion on copyright infringement is beyond the scope of this chapter, in general, to establish infringement, a copyright owner must prove that (1) their work is original and protectable by copyright (which is initially presumed if a registration has been issued), and (2) an alleged infringing work is substantially similar to the protected work, as to those elements of the protected work that are entitled to protection. Some cases also examine whether an alleged infringing work has copied the overall 'look and feel' of a protected work.^[35] In the case of artworks, substantial similarity is assessed from the perspective of a hypothetical 'ordinary observer'.^[36]

Impact of fair use on the arts

Among the more controversial issues impacting copyright and art today is the statutory defence of 'fair use', particularly as it applies to appropriation art.

Over 117 years ago, Supreme Court Justice Oliver Wendell Holmes Jr cautioned '[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits'.^[37] That caution still impacts fair use art decisions today.

Fair use is a defence to copyright infringement that was originally intended to protect certain types of uses of a copyright-protected work as 'fair'. Among the statutory uses that are generally permitted are news reporting, research, and criticism and commentary on an original work, including parody, where reproduction of the work is necessary for such purposes. Courts must consider four non-exclusive statutory factors in assessing a fair use:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.

In an important 1992 case, Jeff Koons's sculpture of a couple holding a litter of puppies was held to have deliberately infringed photographer Art Rogers's copyright in a photo depicting the same scene and was not a 'fair use' parody because Koons's sculpture was commercial and not a critique of the original, but merely a distortion of it.^[38]

Subsequent to 1994, however, most federal courts have assessed whether the challenged use is 'transformative' under the first fair use factor. Transformative use was first mentioned by the Supreme Court in a seminal 1994 fair use case involving a music parody.^[39] The Court suggested that the transformative nature of a challenged work – 'whether the new work merely "supersede[s] the objects" of the original creation . . . or instead adds

something new, with a further purpose or different character, altering the first with new expression, meaning, or message' – was a useful construct in assessing the first fair use factor, and that 'the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use'.^[40]

The impact of transformative use on appropriation art was highlighted in a subsequent case where Koons was sued for adapting part of a photograph (depicting a woman's legs, feet and shoes with ornate sandals) for use in a parodic collage that included three other sets of women's legs and disparate elements. This time Koons won a fair use decision in his favour because the copying was deemed reasonably limited to conveying the fact of the photograph in a parody and was therefore found to be transformative.^[41]

The application of transformative use has expanded greatly over the past two decades and become a litmus test for fair use, particularly in addressing appropriation art. This was exemplified in the Second Circuit's controversial 2013 fair use decision in *Cariou v. Prince*.^[42] In that case, the court found that 25 of 30 works created by the famous appropriation artist Richard Prince were entitled to a fair use defence as a matter of law because they were transformative, despite there being no commentary on the original photographs he copied. Commercialism was also relegated to a minor fair use factor because any work that is sold has a commercial element to it.

Prince altered photographer Cariou's *Yes Rasta* photographs and incorporated them into a series of paintings and collages. Five of them displayed only minimal alterations or additions, and the rest were so 'heavily obscured and altered to the point that Cariou's original [was] barely recognizable'.^[43] With respect to the latter group, the court found they were transformative and entitled to a fair use defence, but that the other five were a closer case where the court could not decide the fair use issue without further lower court proceedings. The case then settled confidentially.

Significantly, *Cariou* held that a work need not comment on the original copyrighted work to be entitled to a fair use defence. The 25 images found to be transformative, said the court, 'have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's. Our conclusion should not be taken to suggest, however, that any cosmetic changes to the photographs would necessarily constitute fair use'.^[44]

But this expansive transformative fair use trend was tempered by a highly anticipated 2023 Supreme Court decision, which affirmed the decision of a New York federal appeals court that found commercial for-profit reproductions by The Andy Warhol Foundation of certain Warhol silk screen paintings and drawings, which had used as an artist's reference a portrait of the musician Prince by the famous rock music photographer Lynn Goldsmith, did not constitute fair use because they were not transformative and negatively impacted the market for Goldsmith's works.^[45]

The *Warhol* appellate court also clarified its *Cariou* decision, which had received meaningful criticism respecting its application of transformative use. The appellate court emphasised that transformative use will not be found 'where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created', and, in such case, 'the bare assertion of a "higher or different artistic use" will not suffice . . . to render a work transformative. Rather, the secondary work itself must reasonably be perceived as embodying a distinct artistic purpose, one that

conveys a new meaning or message separate from its source material'.^[46] Consequently, 'works that simply alter or recast a single work with a new aesthetic' will not qualify as 'transformative'.^[47]

In affirming this decision, the Supreme Court held that merely adding some new expression, meaning or message to another's protected work is insufficient to constitute a transformative use under the first fair use factor, emphasising that a broader application of transformative use would potentially destroy the copyright owner's exclusive right to create derivative works. Because the Warhol Foundation had issued commercial licences for use of the Warhol images and the purpose of such use was similar to Goldsmith's use of and target markets for her photo, there was no transformative use absent additional justification, which was not present. The Court also found potential future economic harm to Goldsmith's market under the fourth fair use factor.

How the Supreme Court's decision will impact future art-related fair use cases remains to be seen, but judges are likely to continue to struggle in applying the Court's modified fair use standard to assess 'transformative' uses.

Likely under pressure resulting from the *Goldsmith* Supreme Court decision, in January 2024, famous appropriation artist Richard Prince settled two consolidated infringement cases against him for US\$900,000 on the eve of trial. In both cases, Prince had taken photographs owned by the plaintiffs for his 2015 'New Portraits' installation of large images designed to look like Instagram posts. The trial court twice rejected Prince's fair use defence, finding he had crossed the line between permitted appropriation and copyright infringement, and that 'minimal modifications' he had made to the photographers' works were not transformative because the essentially unaltered photos still dominated the overall works.^[48]

Moral rights

Historically, moral rights, which protect the integrity and attribution of artists and authors, did not exist in the United States. Currently, artists possess two limited forms of moral rights, which have been codified under the Visual Artists Rights Act (VARA) and certain provisions of the Digital Millennium Copyright Act (DMCA), both part of the Act.

VARA

The Visual Artists Rights Act (VARA), which was enacted in 1990 as part of the Act, grants to authors of 'visual art' the rights of attribution and integrity.^[49] Visual art, for purposes of VARA, includes only paintings, drawings, prints and sculptures that exist in a single copy or limited edition. VARA excludes 'works made for hire' and works of 'applied art'. A recent example of applied art that was denied protection was the design of a sixteenth-century galleon ship constructed over the body of an old bus that was displayed at the Burning Man festival. When the sculptural work was destroyed, the artists sued under VARA, but the court held that because the work was applied art affixed to a functional bus, it was not entitled to VARA protection.^[50]

VARA also prevents the use of an artist's name as the author of a work of visual art in the event of a distortion, mutilation or other modification of the work that would be prejudicial to their honour or reputation. Related to this right, VARA empowers an artist to:

1. prevent any intentional distortion, mutilation or other modification of a work that would be prejudicial to their honour or reputation, and any intentional distortion, mutilation or modification of that work is a violation of that right; and
2. prevent any destruction of a work of 'recognised stature', and any intentional or grossly negligent destruction of that work is a violation of that right.

VARA permits a property owner to remove a work of art affixed to a building without its destruction, distortion, mutilation or other modification, provided 90 days' notice is first given to the artist, who is then given the right to either remove the art or pay for its removal.

Until 2018, few courts had grappled with VARA's concept of recognised stature, and no case had applied VARA to street art. This all changed dramatically when a court awarded a group of street aerosol artists US\$6.75 million after their high-profile 5Pointz curated murals and exterior building wall art were intentionally whitewashed over and then destroyed by a developer.^[51] Based on expert witness art market testimony, the court found that most of the aerosol artworks had achieved recognised stature. The decision was upheld on appeal, and the Supreme Court declined to hear it.^[52]

Another VARA case was filed in 2021 as a class action, on behalf of similarly situated street artists, by a prominent visual artist against the New York City Police Department and the City of New York for painting over a street mural that he had created with permission of the property owner, such that it was not illegal graffiti.^[53]

In a recent decision by a federal appellate court, Vermont Law School was permitted to use barriers to conceal a controversial mural depicting scenes of American slavery and Vermont's role in the Underground Railroad during the Civil War. The plaintiff artist sued under VARA, arguing that hiding his murals hurt his reputation and should be viewed as an impermissible 'modification' of his work. The appellate court affirmed a dismissal of the claim, finding that 'merely ensconcing a work of art behind a barrier neither modifies nor destroys the work, as contemplated by VARA, and thus does not implicate VARA's protections.'^[54]

DMCA

The Digital Millennium Copyright Act (DMCA) was added to the Act in 1998 to address various issues tied to digital technology and online use of copyright-protected works. One part of the DMCA addresses the integrity and removal of 'copyright management information', which is defined to include a copyright-protected work's title, the name of its author and other identifying information about the copyright owner, including a notice of copyright.^[55] The intentional removal or alternation of this information is a DMCA violation, with statutory damages ranging from US\$2,500 to US\$25,000 per violation.

The statute has been applied in recent years to find liability where someone copies and uses without permission a photograph or other image found on the internet, and in doing so strips out all attribution credits identifying the creator of the original work. Courts have held that removal of a copyright owner's attribution credit in a gutter credit is a DMCA violation. This provides another remedy for artists and, particularly, photographers to protect their moral right of attribution.

Street art

Street artists have started suing companies that use their art for commercial marketing purposes. A high-profile case was filed in California in 2018 by a graffiti muralist (Smash 137) against General Motors for using his mural in an unauthorised photo as part of an advertisement. The mural had been painted on the outdoor level of a parking garage. The case arises under another unique portion of the Act called the Architectural Works Copyright Protection Act of 1990 (AWCPA), which provides that anyone can reproduce an image of a building that is habitable by humans and viewable from public places.^[56] The court refused to dismiss the case, finding there was a 'lack of a relevant connection between the mural and the parking garage'.^[57] The case then settled.

In 2019, four street artists demanded that Mercedes-Benz cease using images of their street art murals after Mercedes posted images of its vehicles on social media with buildings visible in the background that displayed the murals. Mercedes filed suit to declare that its conduct was protected by the AWCPA. Although the artists moved to dismiss the case, contrary to the GM case, this court found that Mercedes had a plausible claim and allowed the case to proceed.^[58] This case also settled in 2020.

A claim filed in New York by a street artist against H&M for using his street art in an advertisement was quickly resolved when H&M agreed to cease using the advert and issued an apologetic press release.^[59]

Several other similar claims have been filed by prominent street artists in recent years, but until appellate courts start ruling substantively on these issues, street art will remain a burgeoning area of copyright law impacting artists.

Generative AI

The exponential growth of generative AI art platforms, such as ChatGPT (GPT-4o) and DALL-E 3 by Open AI, Stability AI, Gemini (Google), Deep Dream Generator (Aifnet Ltd.) and Midjourney (Discord), has resulted in class actions filed by artists against various AI platforms alleging copyright infringement tied to the AI algorithms' training data sets containing artistic images crawled from the internet.^[60] It is expected that decisions in these cases will ultimately address whether infringement has even occurred and fair use defences asserted by the platforms, some of which license their AI engines for third-party uses.

Endnotes

- 1 Copyright Act of 1790, 1 Statutes At Large, 124. ^ [Back to section](#)
- 2 Section 4. ^ [Back to section](#)
- 3 17 U.S.C. § 102(a). ^ [Back to section](#)
- 4 17 U.S.C. § 101. ^ [Back to section](#)

- 5 See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). [^ Back to section](#)
- 6 [Copyright Office Compendium](#) 3rd, §906.1. [^ Back to section](#)
- 7 *id.* [^ Back to section](#)
- 8 37 C.F.R. §202.1; Compendium 3rd, §906.2 and § 313.4(J). [^ Back to section](#)
- 9 37 C.F.R. § 202.1(a). [^ Back to section](#)
- 10 See Compendium 3rd, §906.3. [^ Back to section](#)
- 11 17 U.S.C. §102(b). [^ Back to section](#)
- 12 *Dyer v. Napier*, 2006 WL 2730747 (D. Ariz. 2006). [^ Back to section](#)
- 13 *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003). [^ Back to section](#)
- 14 *Moreford v. Cattelan*, 2024 WL 3857453 (11th Cir. Aug.16, 2024; unpublished per curiam); cert denied (U.S. Sup. Ct. April 7, 2025). [^ Back to section](#)
- 15 *Kelley v. Chicago Park Dist.*, 635 F.3d 290 (7th Cir. 2011). [^ Back to section](#)
- 16 In 1985, Christo sued media companies in France after they attempted to reproduce and distribute photos of his Pont Neuffabric wrap installation. In 1986, a Parisian court ruled for Christo, finding the installation was an original work of authorship that was entitled to copyright protection under French law; Paris Court of Appeal, 13 March 1986, Gaz. Pal. JP, p. 239. [^ Back to section](#)
- 17 *Tangle, Inc. v. Aritzia, Inc.*, 2025 WL 85839 (9th Cir. Jan. 14, 2025). [^ Back to section](#)
- 18 *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017). [^ Back to section](#)
- 19 *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980). [^ Back to section](#)
- 20 *Star Athletica, LLC* (see footnote 16). [^ Back to section](#)
- 21 See Copyright Office Compendium 3rd, §306: 'Because copyright law is limited to "original intellectual conceptions of the author," the Office will refuse to register a claim if it determines that a human being did not create the work.' *Naruto v. Slater*, 888 F. 3d 418 (9th Cir. 2018) (self-portrait photograph taken by a monkey, represented by People for the Ethical Treatment of Animals as its surrogate, was not entitled to copyright protection and the monkey lacked standing to sue for infringement). [^ Back to section](#)
- 22 ' [The Next Rembrandt](#)', VML. [^ Back to section](#)

- 23 Gabe Cohn, '[AI Art at Christie's Sells for \\$432,500](#)', *The New York Times* (25 Oct 2018). ^ [Back to section](#)
- 24 [Letter from US Copyright Office](#) regarding *Zarya of the Dawn* (21 Feb 2023). ^ [Back to section](#)
- 25 Allen v. Perlmutter, No. 1:24-cv-2665 (D. Colorado) (filed Sept. 26, 2024). ^ [Back to section](#)
- 26 Thaler v. Perlmutter, 2025 WL 839178 (D.C. Cir.; March 18, 2025). ^ [Back to section](#)
- 27 <https://copyright.gov/policy/artificial-intelligence/>. ^ [Back to section](#)
- 28 17 U.S.C. §106. ^ [Back to section](#)
- 29 17 U.S.C. §109. ^ [Back to section](#)
- 30 17 U.S.C. §109(c). ^ [Back to section](#)
- 31 17 U.S.C. §302(c). ^ [Back to section](#)
- 32 Fourth Estate Public Benefit v. Wall-Street.com, LLC, 139 S. Ct. 881 (S. Ct. Mar. 4, 2019). ^ [Back to section](#)
- 33 '[WIPO-Administered Treaties: Contracting Parties > Berne Convention](#)', World Intellectual Property Organization. ^ [Back to section](#)
- 34 The United States follows the 'American rule', under which legal fees can only be awarded if authorised by statute or contract. ^ [Back to section](#)
- 35 Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010). ^ [Back to section](#)
- 36 See *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001). ^ [Back to section](#)
- 37 *Bleistein v. Donaldson Lithographing Company*, 188 U.S. 239, 251 (1903). ^ [Back to section](#)
- 38 *Rogers v. Koons*, 960 F. 2d 301 (2d Cir. 1992). ^ [Back to section](#)
- 39 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). ^ [Back to section](#)
- 40 *id.* at 579. ^ [Back to section](#)
- 41 *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006). ^ [Back to section](#)
- 42 *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013). ^ [Back to section](#)

- 43** id. at 710. [^ Back to section](#)
- 44** id. at 708. [^ Back to section](#)
- 45** *The Andy Warhol Foundation v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021). The author was counsel to the photographer, Lynn Goldsmith, in the district (trial) court proceedings. [^ Back to section](#)
- 46** id. at 41. [^ Back to section](#)
- 47** id. [^ Back to section](#)
- 48** *McNatt v. Prince, et al. and Graham v. Prince, et al.*, 2023 WL 3383029 (S.D.N.Y. May 11, 2023), consolidated decision denying defendants summary judgment on their fair use defence. Judgment was then entered on 24 January 2024 against the defendants on claims of willful infringement, awarding plaintiffs the agreed-upon settlement sums and enjoining defendants from further acts of infringement. The defendants included Laurence Gagorian, Gagorian Gallery and Blum & Poe gallery. [^ Back to section](#)
- 49** 17 U.S.C. § 106A, generally. [^ Back to section](#)
- 50** *Cheffins v. Stewart*, 825 F.3d 588 (9th Cir. 2016). [^ Back to section](#)
- 51** *Cohen v. G&M Realty*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018). [^ Back to section](#)
- 52** *Castillo v. G&M Realty*, 950 F.3d 155 (2d Cir. 2020), cert. denied 141 S. Ct. 363 (2020). [^ Back to section](#)
- 53** *McLeer v. New York City Police Department et al.*, Case No. 2:21-cv-03093 (E.D.N.Y. filed 1 June 2021). [^ Back to section](#)
- 54** *Kerson v. Vermont Law School Inc.*, 79 F.4th 257, 259 (2nd Cir. 2023). [^ Back to section](#)
- 55** 17 U.S.C. § 1202. [^ Back to section](#)
- 56** 17 U.S.C. §102(8); 37 C.F.R § 202.11. [^ Back to section](#)
- 57** *Falkner v. General Motors LLC*, 393 F. Supp. 3d 927 (C.D. Cal. 2018). [^ Back to section](#)
- 58** *Mercedes Benz, USA, LLC v. Lewis*, 2019 WL 4302769 (E.D. Mich. Sept. 11, 2019). [^ Back to section](#)
- 59** *H&M v. Jason 'Revok' Williams*, No. 1:18-cv-01490 (E.D.N.Y. filed 9 March 2018). [^ Back to section](#)
- 60** See *Andersen et al. v. Stability AI Ltd et al.*, No. 3:23-cv-00201 (N.D. Cal. filed 2023). [^ Back to section](#)



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