



CODE OF ETHICS

## Copyright Law

### FOR BOTANICAL ARTISTS

Story by SARA ANNE HOOK

*Betsy is an outstanding botanical illustrator and teacher. She has taken care to develop her class materials, including examples from her own work that highlight her unique style and focus. Unfortunately, Betsy discovered that Jane, a former student, has been offering substantially similar work to the public through representation by an art gallery.*

We can consider this scenario as a real-world application of copyright law and offer options to help Betsy better protect her creative work. First, it is important to note the difference between copyright infringement and plagiarism, although the scenario above certainly contains both issues. Plagiarism addresses intellectual integrity, so it is important to always provide quotation marks, complete citations, and captions under images. However, these measures do not satisfy copyright law. Note that there is a difference between when Jane uses Betsy's materials for her own personal study versus presenting this work as her own beyond her studio. Copyright is a logical and elegant area of the law, but it continues to evolve, primarily to address emerging technologies in the twenty-first century. There will always be situations that challenge the court to consider the law in new ways and where Congress amends legislation in response to these challenges. However, the principles of copyright law formulated centuries ago continue to be the foundation for any legal analysis.

Scholars believe that the first pronouncement of copyright law occurred around 560 A.D. when someone made a copy of a psalter without permission. The king decreed that "To every cow its calf"—in other words, the owner of the original manuscript had the right to any subsequent copies. Some historians believe that this dispute was the impetus for the Battle of Cul Dreimhne (Battle of the Book), so apparently copyright really is worth fighting over ([https://en.wikipedia.org/wiki/Battle\\_of\\_C%C3%BAI\\_Dreimhne](https://en.wikipedia.org/wiki/Battle_of_C%C3%BAI_Dreimhne), accessed 1/15/24)! In England's Statute of Anne from 1710, we begin to see the concept of limited times for the protection of copyright rights. The Founding Fathers believed that people's rights to their intellectual property was so important to the

development of United States that they included it in the Constitution of the United States, as Article I, Section 8 [8]:

*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; (Note: authors include artists)*

The underlined words and phrases in Section 8 [8] remain the essence of copyright law in the US. Scholars assert that one of the reasons that the US emerged as an economic powerhouse, even for such a young country, was its robust protection of intellectual property.

There are four types of intellectual property law:

- Copyright law (creative work)
- Trademark law (branding)
- Patent law (inventions)
- Trade Secret law (confidential information)

Note that while copyright, trademark and patent law are primarily federal law, trade secret and related areas of law, such as contracts, licensing, and rights of publicity, are usually a matter of state law, although there may be overlap.

Copyright protection in the US is now automatic. For Betsy, protection began the moment that she created "an original work of authorship" (drawings, paintings) and when this original authorship was "fixed in a tangible medium" (paper, canvas, video, even if transient or saved in digital form). Note that under the Berne Convention of 1989, Betsy no longer needs to follow the "formalities" (registration, copyright symbol) in order for her work to have copyright protection. However, the formalities may be part of a strategy that provides greater protection for her work.

As the copyright owner, Betsy enjoys several exclusive rights to her work under US law, which will be in force until the end of her life plus 70 years when the work then reverts to the public domain, per the Copyright Term Extension Act of 1998 (<https://en.wikipedia.org/wiki/>

*Copyright\_Term\_Extension\_Act*, accessed 1/15/24). Which rights did Jane violate by her behavior?

- The right to copy
- The right to distribute
- The right to make derivative works
- The right of public display
- The right of public performance

Granting someone else one or more of these rights must be in writing, such as when Betsy gives permission to have her work published in a book or journal article.

The right to make derivative works may be difficult to understand but think of it as a modification to the original work. Typical examples are a translation of literature from one language to another or turning a novel into a screenplay or movie. Unfortunately, there is nothing in the statute that says if you change someone else's work by 10%, 20%, or more, you are no longer infringing. What the court will consider is whether Jane's work, taken directly from Betsy's work, is truly "transformative." Even the US Supreme Court relied on the concepts of transformative versus fair use in its recent decision involving Andy Warhol's alterations to photographs of Prince. As an artist, Betsy may be able to claim additional protection under the Visual Artists Rights Act (VARA) of 1990, which is based on the notion of "moral rights."

At this point, Jane might argue that her work falls under the "fair use" exception to Betsy's copyright rights. The court employs a four-factor analysis to determine whether this exception should apply. Consider whether Jane would be successful in claiming fair use:

- What was the purpose of Jane's use (commercial versus educational/nonprofit)?
- Was Betsy's original work more fact-based or creative?
- How much of Betsy's original did Jane use (ratio and "substantiality")?
- How much did Jane's use impact the market for Betsy's original work?

The good news is that Betsy can provide considerable protection for her work, including her original artwork and her class materials. First, she can place a copyright notice on all of her work, especially anything that she makes available on the Internet, in a learning management system, or via social media. It costs nothing and is easy to do, with just a © or copyright, full name and year [© Betsy R Jones, 2024]. I automatically put a copyright notice on everything, especially given the prevalence of copying in a "cut and paste world" made possible through technology. A notice reminds honest people about copyright law. If Betsy might be willing to have someone use her work, she can provide contact information and set the parameters for what is permissible through her website, on her syllabus or in the learning management system she uses. A copyright notice eliminates the "innocent infringer" defense—which increases the penalties on the infringer and means more in damages that the court can award to Betsy. She can also make it clear throughout her class sessions that students are not allowed to use or share any of her work without permission. She can include this information in her syllabus or a set of class policies that students agree to as part of their enrollment.

Second, Betsy can register her work with the US Copyright Office. It

is inexpensive and easy to do through the US Copyright Office's website (<https://www.copyright.gov/>, accessed 1/15/24). To save money, Betsy might want to register a series of related items, such as her course materials, as a collection. A record of her copyright ownership will then be in the national database, meaning that anyone who uses her work without permission has committed "willful" or "intentional" infringement, giving Betsy attractive options when requesting damages. Anything that Betsy has spent a considerable amount of time on or where the work was costly to produce (art supplies, travel expenses) is worthy of registration, especially if a career in botanical illustration is part of how Betsy supports herself.

Third, Betsy could contact the gallery that is displaying Jane's work and inform them that this is copyright infringement. The gallery's reputation is at stake if it is displaying work that infringes someone else's copyright and to sell this work could be fraudulent. Its representation agreement may have a provision for only accepting work that is original. ASBA's publishing contract includes language that "I am the sole creator of the Article; it represents my original work and I have not... based it upon the work of any other person..." and puts the burden on the author to obtain copyright permission. Even the instructions for local art exhibits contain a requirement that any submissions be original work. Finally, for a modest fee, Betsy can have a lawyer draft a simple "cease and desist" letter to Jane, warning of future legal action if her infringing activities continue. Sadly, Jane may not even realize that what she is doing is a violation of copyright law, believing that the material from a class that she paid for can be used in any way she likes. The botanical illustration community is small, so it may be prudent for Betsy and her lawyer to handle the situation with Jane firmly but collegially.

I hope that Betsy now has a framework for understanding copyright law that she can apply in her creative endeavors as well as in her teaching of botanical illustration. It is an area of law that I find endlessly fascinating, especially with the challenges presented by new technologies such as AI. Betsy should not be afraid of copyright law, but use it to her advantage. As she continues to pursue her botanical illustration activities, I challenge Betsy and all of us who are botanical artists to be vigilant about copyright issues in our work and to watch for any new legislation, amendments to current legislation and recent court cases that may impact our creative efforts in the future. ■

#### References:

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