Artwork, Ambiguity and Antagonism: Determining Who Owns the Rights to Artistic Works

Burgeoning artists and galleries have a symbiotic relationship. Young artists offer investment potential to galleries. Promoters have the business acumen and connections that unknown artists need to develop a market for their work. But who owns the intellectual rights to the artwork if that partnership dissolves? It's a complicated question that very few art industry professionals know the answer to—and not having an answer can lead to lost revenue and expensive legal fees.

Partnerships between artists and galleries are similar to ones found in many other industries, yet in the art world, partners often have very little knowledge of the intellectual property principles that are critical to creating fair operating agreements. These kinds of partnerships tend to be ambiguous, with artists and promoters often initially agreeing to split profits 50/50 without thinking of the long-term outcomes. Copyright is an intricate issue that doesn't present itself immediately to people unfamiliar with its importance. However, the dissolution of a partnership between an artist and a gallery will often result in litigation if they do not have an agreement that address intellectual property rights.

Commonly, an artist and a promoter will create a Limited Liability Company at the outset of their relationship, and profits will flow to the LLC. The artist may eventually want to move to another gallery, or perhaps the promoter and artist realize they are not a good fit for each other, and one or both parties want the LLC to be dissolved. The original works created during the partnership have already been sold and the profits divided, but the question lies in the copyright interest of the images themselves. Original works are often reprinted and monetized through prints, etchings and lithographs. Hundreds of reproductions can be made in a variety of forms, offering the potential to double or triple profits made from the sale of the original work. Someone must own the copyright to the images in order to create and profit off of these derivative works—but who?

Artists can make the argument that the images they create belong to them, but that is not always the case. The outcome of the copyright will depend on how the deal was structured at the beginning of the relationship. Typically, any work created during the term of a partnership, and therefore all copyright interest, belongs to the LLC. In this situation, the artist would have to buy the rights from the LLC in order to create reproductions of their own work. This can be a contentious issue, since the copyright of derivative works is particularly valuable; the cost of reproduction may be a little as the price of paper and ink, yet the sale price can be comparable to the original work. The value of prints and etchings can also grow as the reputation of the artist grows.

This scenario is not as uncommon as one would think. Recently, I represented an LLC that sued an artist because of this very issue. Although the partners created an initial operating agreement before doing business together, the agreement did not expand on intellectual property rights. The artist and promoter each claimed they owned the rights to the work, and they were left with no choice but to proceed to litigation.

Lawsuits can be easily avoided by drafting an agreement that meets both artists' and promoters' needs before they begin working together. Galleries and artists, particularly small or unknown entities, often begin doing business together without nailing down details ahead of time. Working without a solid agreement leaves both partners exposed to litigation, with no guarantee that they will receive the rights and profits that rightfully belong to them. Art copyrights are tremendously valuable and litigation is virtually guaranteed when there is any kind of split between the parties.

Artists may not realize the importance of understanding who owns the copyrights to their work, and small galleries often don't want to spend thousands of dollars hiring an attorney to draft an agreement suited to their specific needs. The sticker shock of realizing that it can cost upwards of $5,000 to prepare an operating agreement causes many galleries to use generic LLC documents or forego a written agreement entirely. However, generic documents will not account for the specific issues of copyright that affect the art industry. A general LLC agreement will not touch on how the copyright of a painting will be transferred after a partnership ends. Your average LLC agreement will not include a conveyance of an interest in lithographs and reproductions, nor will it include the fact that when an LLC is dissolved, all rights are either divided between the parties or have to be auctioned off, or they revert back to the artist. Artistic partnerships leave room for unique scenarios that will not be covered by a typical LLC agreement.

With an insufficient or nonexistent operating agreement, promoters are particularly vulnerable when a partnership ends. While artists can continue to produce and sell work regardless of their representation, promoters suddenly lose a source of revenue, which cannot be regained until another successful artist partners with them. Artists have the upper hand in dissolutions because they know their market; they no longer have to share their profits; and they ultimately have the power to create the tangible goods that their customers want to buy. Promoters do not have that ability. Galleries spend can spend years building relationships and investing in the career of an artist, only to be left with virtually nothing.

Because of their dependence on the work of the artist, promoters may be tempted to use operating agreements that are shifted in their favor. Strict agreements may better protect promoters, but it also may not be fair to require that artists give up the intellectual property rights of every work they create to the LLC. Artists generate significant revenues for promoters and galleries, but they are not indentured servants and they should have some degree of control over the images they create. Artistic partnerships are nuanced, and there is no standard from gallery to gallery. It is possible to create fair operating agreements that protect both the artist and the promoter and reduce the threat of litigation.

Operating agreements need to be established early, ideally before the partners begin doing business. If art industry professionals want to secure their rights, there is no getting around hiring an attorney who is familiar with art law and copyright as it applies to fine art. It is more costly up front, but a fair operating agreement that clearly outlines the rights of each party can save thousands of dollars and hours of litigation in the long run. The attorneys best suited to handle art intellectual property issues are able to sit down with the artist and the promoter and understand their desired outcomes, both during the partnership and if or when it ends. Rights must be determined for original and reproduced works, which will protect the parties throughout their partnership and beyond.

In the greater context of intellectual property, fine art is somewhat unique. Copyright violations have not fundamentally changed the art world in the same way they have changed the music, film and television industries. Art copyright issues are more limited in scope and typically only involve a handful of parties rather than millions of consumers, which make them somewhat easier to control. That's not to say that copyright infringement of artistic works is not as important; often, millions of dollars are at stake.

It is yet to be seen how digital innovation will impact intellectual property in the art word. Other artistic fields have been significantly affected by digital technology, but in the fine arts, rare and tangible assets are still the most valuable. High-quality physical reproductions can fetch huge sums, but digital

reproductions are virtually worthless. Ultimately, people want to own the real thing, and part of what makes art so valuable is its rarity. However, we are beginning to see how that may change among the world's preeminent art collectors. For example, Bill Gates' house has digital walls that can display different art depending on the taste of his guests, using pins programmed with their preferences. It may be the home of the future, but it is still bound by copyright law: Gates must license every copyrighted image in order to display it. This is not an issue for most collectors and certainly not for the general public right now, but it may become a growing issue in the coming years. Artist who primarily work with digital media may also bring about some legal questions when it comes to copyrighting their work.

Artists and galleries have the potential to create long-lasting, mutually beneficial partnerships that generate significant revenues. The key is understanding the intellectual property rights of each party and honoring them. Copyright law can present unique and difficult challenges when applied to the fine art industry, but a fair and legally vigorous operating agreement can make all of the difference when it comes to protecting the livelihood of artists and promoters.