



© COPYRIGHT LAW 101



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Whether you are concerned about protecting your own creative work or protecting your business from defending against accusations of copyright infringement, everyone involved in the business of creating and selling original works – and especially online retailers—should have a fundamental understanding of basic copyright laws.

Generally, there is often confusion with online retail stores about (1) what exactly is protected by copyright law, (2) how the copyrights are secured, and (3) what can be done with a copyrighted work. The area of fabric, patterns, sewing and quilts can be particularly fraught, as many of the issues are in an unsettled area of the law.

What is “Original”?

As the Supreme Court stated in the case *Feist Publications v. Rural Telephone Service*, 499 U.S. 340, 18 USPQ2d 1275 (1991) (regarding phone book copyrights), originality for copyright protection is means only:

“[T]hat the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.” To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”

What is “Tangible Form of Expression”?

Any idea you have for a quilt, pattern or article is not protected until you make it, draw it or write it. If you have an idea in your head or describe an idea to someone else, that’s not a tangible form of expression. If you write down instructions or actually draw a schematic or diagram of how something should be created, that list, schematic and diagram are protected from being copied. Note, however, that protection and your copyright does not automatically extend to whatever someone creates from your schematic or diagram or instructions.

Copyright Protects Tangible Expressions of Original Works

Copyright law protects “original works of authorship that are fixed in a tangible form of expression.”

Two concepts in the definition of copyright are particularly important for the designer and online retailer – originality and fixed.

If you copy a “wedding ring” quilt pattern, it’s not an original expression. However, if your design contains elements which are original, those original elements could be protected by copyright. If you come up with a design that interprets what a particular flower looks like, as Van Gogh did with sunflowers, it could be original. But if you copied someone else’s expression of the same flower, it most likely would not be considered “original.”

Does Your Business Own or Use Any Copyrightable Works?

Copyrighted work shows up in a variety of ways for online retailers. For example, does your business produce, create or record any of the following in a tangible form, paper or digital? If so, then you most likely have copyrightable or copyrighted works of which you need to be aware.

- Advertisements • Articles • Artwork applied to clothing, bags, other useful articles • Blogs • Books • Computer software • Collages
- Dolls, toys • Drawings • Fabric • Floor- and wall-covering designs
- Graphic art • Greeting cards • Jewelry designs • Labels • Marketing materials • Multimedia presentations • Needlework and craft kits
- Newsletters • Patterns for sewing, knitting, crochet, needlework, quilts • Photographs • Podcasts • Posters • Publications
- Reproductions • Stencils, cut-outs • Diagrams • Weaving designs, lace designs, tapestries • Websites • Video Demonstrations

If you use or own any of the above, you will need to assess whether you have adequately protected your interest in the copyright, or whether you have adequately secured the right to use the works on your website.

Not Everything is Protected by Copyright

It's important to note what is NOT protected by copyright law. Only the actual expression of an author is protected, not the underlying idea itself. Copyright protection does NOT extend to:

- Blank forms for recording rather than conveying information
- Charts • Familiar symbols • Ideas • Ideas or procedures for doing or making things • Listings of instructions • Lists or tables • Method of operation • Methods, processes • Standard calendars • Systems
- Tape measures and rulers • Technical methods • Titles, names
- Unwritten or unrecorded performances • Useful or utilitarian objects (i.e., furniture or clothing) • Variations of typographic ornamentation, lettering, or coloring

What this means for online retailers is that patterns for sewing clothing or templates for cutting out geometric shapes are not subject subject to copyright protection. Nor are the purely factual descriptions of how to assemble a pattern or project. However, the law does protect whatever originality might exist in the presentation of such information, such as designs placed on or affixed to furniture or clothes.

What Rights Does Copyright Provide?

Copyright means the owner has the exclusive right to do and authorize others to do the following to the original work: reproduce or copy; prepare derivative works; distribute copies to the public by sale, license, or lending; perform the work publicly or by means of a digital audio transmission; and display the work publicly.

However, these rights are subject to certain statutory exceptions, such as "fair use" and parody. The copyright owner may be entitled to recover certain statutory and civil damages and other remedies for infringement of these rights if the work is registered with the U.S. Copyright Office.

Further, the "first sale doctrine" may provide rights to purchasers of any pattern or fabric or other item.

Who is the Owner of the Copyright?

A work is protected from the time it is fixed in its tangible form. The owner is the person who created the work. When a person is an employee and the work is in the scope of their employment, the work is considered "work for hire" and the owner is the company.

Notice of Copyright

It is to your benefit to put a copyright notice on a work, although it's no longer required under U.S. law. The notice precludes any infringer from claiming they didn't know the work was protected. An example of the proper form is: © 2012 Author's Name

How to Secure a Copyright

Copyright in a work is secured automatically when the work is created in a fixed medium. No publication or registration or other action is required to secure copyright. However, there are definite advantages to registration, including the right to recover statutory damages for any infringement of the work.

Filing fees range from \$35 to \$65 per work, although under certain circumstances group registrations may be possible. If you wish to secure a copyright registration, visit www.copyright.gov.

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Disclaimer: This article reviews the basics of copyright law as it applies to creative works generally, some specific guidance for the online retailer, and a brief overview of the legal copyright issues which are implicated in the fabric and quilting industry.

Note, there is a great deal of room for interpretation of these laws and how they might apply to your legal situation. While I am a lawyer, I'm not your lawyer, so please don't take this as legal advice for your specific circumstances. Since this is a very fact-dependent area, and subject to interpretation, please consider this article to be educational and a guideline for when you should consult your lawyer.



Copyright Checklist – Protect and Prevent

As you review your business and your intellectual property, consider using the following checklist:

- ☐ Inventory such items in your enterprise for consideration of copyright protection or infringement.
- ☐ Be sure all contributions to your websites, brochures and catalogs (art, music, articles, illustrations) are covered and owned by you either as the author, or through a written work-for-hire agreement or transfer signed by both parties.
- ☐ Add a copyright notice to all materials where feasible (i.e., on the selvage of fabric or through a watermark on photographs).
- ☐ For any work that has value to you and your organization, that you think might possibly be subject to copyright protection, register it with the U.S. Copyright Office.
- ☐ Verify that you have the right to use any work that is not yours and that proper attribution is provided.
- ☐ Have someone keep track of your competitors online and offline, who might be infringing your copyrights.
- ☐ Protest any suspected infringement immediately and in writing.
- ☐ When it makes sense, offer infringers a license for an appropriate royalty. Or, if you suspect you are infringing on someone else's right, offer to provide attribution and pay a royalty to avoid litigation.
- ☐ If you need more specialized information, consult an attorney whose expertise is copyrights and intellectual property law.

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How Does this Apply to You?

It's generally easy to identify which aspects of a business are subject to copyright protection (original articles, photographs and illustrations) and which are not (forms, instructions). Your website and its content are definitely subject to copyright protection. If you created your own website or had it created for you as a "work for hire," then you own the "look and feel" of your site.

The content of your website may be in a different category, since you only own the copyright in any article or photograph to the extent you created it yourself, had it created for you as a "work for hire," or have permission or "license" from the author or photographer to use it. If you or your employee shot a video podcast featuring you or another employee, then you own the copyright in that video. However, even if the photograph or video is yours (or properly licensed), you might still be unwittingly infringing on someone else's copyrights. If the photograph is of someone's quilt design or other design, or the video features someone else's design, the designer may have rights in the reproduction and use of any exact image of the item.

In the realm of fabric, clothing, patterns, quilts and creation of such items, the answer is not so readily apparent and requires a thorough knowledge of copyright law and the specific facts of the case. Generally speaking, courts have found that clothing and furniture are simply utilitarian items, and therefore, are not subject to copyright protection. However, they have recognized that purely ornamental designs and carvings on furniture are subject to copyright protection,

Numerous courts have found quilt designs to be protected in various circumstances, and that the designer was entitled to control the public display in a commercial context of their designs. See, e.g., *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d. Cir. 1997) (quilt displayed as a prop in a television show subject to copyright protection and suggesting fair use would not provide a defense to infringement); *Brown v. McCormick*, 87 F. Supp.2d 467 (D. Maryland 2000) (license to display quilt in film did not extend to use in subsequent merchandising campaigns).

If your store features photographs or illustrations of other's works, or reproduces patterns and designs created by others (which you have not acquired as a "work for hire"), you would be well-advised to hire an attorney to advise you. ©



Ashley R. Dobbs is an associate attorney with Bean, Kinney & Korman, P.C. in Arlington, Virginia, practicing in the areas of intellectual property and business transactions. Ashley helps clients protect and grow their corporate brand through trademark and copyright protection, licensing and franchising agreements, and compliance with advertising laws. She can be reached at adobbs@beankinney.com or 703-525-4000.