

PEARLS OF LAW

SANDRA OKE

sandra.oke@norfolk-partners.com



Art and Intellectual Property Law

ily James, a budding landscape artist, enjoys depicting breath-taking landscapes in a variety of locations. She is known for combining landscape art with digital photograph which makes her work very unique. Her latest project involves her painting Kairaku-en in Mito,

one of Japan's well-known gardens. To do this effectively, she uses a post-card by a well-known Japanese Artist. The painting begins to make waves in international art circles. Suddenly, she is contacted by the lawyers of the Japanese artist who designed the original post card for copyright infringement. On the other-hand John Lawrence is world famous for his realistic portraits, his paintings include the famous and the ordinary people in society. Although, he is exhibited in some galleries in Lagos. He has not really been able to break into the Art market. While he was watching TV the other day, he stumbled across a reality series in which one of his painting was briefly shown for fifteen minutes. He is upset because the producers of the programme did not seek his permission before showing his painting. Immediately, he contacted his lawyers and instituted an action against the producers for infringing his copyright. Several intellectual property law issues arise when using a third party's art work these will be discussed below.

What is Art?

Art has been described as an expression or application of human skill and imagination in a visual form. Over centuries art has been appreciated for being a form of documentation of history and culture. Emperors and kings travelled vast distances to obtain priceless pieces of treasured art work. On the downside some groups have taken pride in destroying and stealing art from various countries.

Unlike other artists who jealously guard their intellectual property rights, visual artists do not seem to pay any attention to theirs. Only last year popular musician Paul Play Dairo sued a major Telecommunications company for using his song in a popular television singing competition for two consecutive years without paying him. Also a Nigerian Actor Rotimi Popoola threatened to sue another telecommunications company for using images from his work for an outdoor advertisement and a SIM pack. What visual artists do not realise is that they create IP assets during the creative process. Some designs can even be protected as patents. The benefits of protecting Intellectual property rights include i) it allows the artist exercise exclusive ownership of the artistic work ii) the artist gains great economic benefits from exploiting intellectual property rights through sale and licensing agreements iii) the artist might also enjoy resale rights

Legal Protection for Artistic Works

From the scenarios narrated above it is clear that visual artists need to protect their intellectual property rights under the Copyright Act, Sec 1 of the Copyrights Act protects Artistic Works. Sec 2 goes on further to state that for an artistic work to be granted protection under the Act sufficient effort must have been expended on making the work to give it an original character and the work has to be fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device. Section 5 of the Act grants the copyright owner the exclusive right to do or authorise the doing of any of the following acts, that is-

(i) reproduce the work in any material



form,
(ii) publish the work.
(iii) include the work in any cinematograph film,
(iv) make an adaptation of the work,

Approaches to dealing with Intellectual Property Law Issues

Regarding, Lily James' copy of the Japanese post card. It is important to decide whether her actions fall under the category of fair use. Fair use has been described as the copying of copyrighted material for a limited or transformative purpose including to comment on, criticise or parody. Commenting on an artist's work for educational purposes or for the benefit of the public is generally allowed under copyright law. A parody on the other-hand involves imitating a well-known work in a comic way. Clearly Lily James' actions do not fall under the category of fair use.

We must then consider under what

circumstances one artist may copy the work of another artist. The most important question is whether the Japanese post card is protected by copyright law? If it is then Lily James is guilty of copyright infringement. However, works over 70 years old are not copyrighted and are in the public domain. Going forward when using another person's artistic work as a reference it is necessary to obtain their consent and acknowledge them.

Regarding the second scenario involving the use of a painting in a movie, generally if the artwork is shown very briefly, used for news or criticism, or very old it might not be necessary to obtain permission for using it. To elucidate, if the artwork is shown for six seconds this constitutes insubstantial use, for example in the 1995 movie Seven ten copyrighted photographs were shown without the owner's permission. They were described as appearing out of focus and displayed only for a short time. The court dismissed the photographer's copyright

infringement claim, the court held that the use of the photographs was too minor to merit an action. In the court's ruling it was stated that "Because the photographs appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable, we find the use of those photographs to be de minimis." However if the artwork is focused on during the movie or it forms an essential part of the story then the artist will have to be paid for its use even if the painting was bought, the owner's permission will be required to use it in a movie.

Conclusion

Visual artists need to develop a viable strategy to protect their Intellectual property rights. First of all they should determine what form of protection is available for their works and apply for the appropriate protection under the Act. It goes without saying that the services of a lawyer will be required for this very important process.