

## 7 BUSINESS BASICS FOR CREATIVE INDIVIDUALS

Authors write, sculptors sculpt, composers compose, photographers take pictures, and filmmakers make films — they are all artists.

To live well and prosper, artists must sell what they create. Selling art successfully enough to make a living is as hard as creating it. Many artists hire professionals (agents, bookkeepers, lawyers, accountants, marketing professionals, etc.) to tend to the business aspects of their work. Other artists handle the business details themselves.

As artists build their businesses, they need to protect their art in order to profit from their creations. Whether you sell a single piece through a gallery, self-publish a book on Amazon, sell out of an e-Bay store, work with an agent, license work for mass production, or engage in any other type of commercial activity, there are basic business decisions that need to be made and ramifications that flow from those decisions that need to be understood.

Here are seven basic business considerations for creative individuals.

1. Protect your work
2. Find your niche market
3. Sign a fair agent agreement
4. Keep good records
5. Consider forming a business entity
6. Police infringement
7. Plan your legacy

### **1. PROTECT YOUR WORK | Register It.**

In order to profit from your work after creating it, you need to protect it. The strongest option available for protecting a piece of art (or a writing, or a photograph, or a video) is to register it with the Copyright Office.

## *THE PAPERWORK*

A work may be registered at any time in the life of the copyright. To register a work, an artist or an author must send to the Copyright Office:

1. the appropriate completed application form:
  - a. TX form for literary works;
  - b. VA form for visual works of art;
  - c. PA form for the performing arts;
  - d. SR form for sound recordings; and
  - e. SE form for single serials.
2. a filing fee (currently \$35 for electronic filing); and
3. deposit copies of the work.

On-line information including copies of forms for registering creative work and details about deposit copies can be found at the United States Copyright Office ([www.copyright.gov](http://www.copyright.gov)).

Considering the minimal cost of registration, there is little reason not to do it – and lots of reasons to do it.

Registration gives artists the leverage they need to stop someone from copying their work. If a work is registered before it is infringed, the owner of the copyright may be entitled to recover statutory damages of up to \$150,000 and attorneys' fees. Registration makes it easier to find an attorney willing to represent you, may allow you to avoid litigation and may reduce the the cost of litigation if a problem ever goes that far.

Although it may take several months to receive a certificate of registration, registrations are effective as of the date the materials are received by the Copyright Office, regardless of the date the registration actually issues.

Registration is not a condition of copyright protection. It is just a legal formality that makes the work a public record. However, this legal

formality is very important if an artist anticipates licensing the work or displaying work in any way which puts the piece at risk for infringement — on the web, for instance.

### *UNDERSTAND COPYRIGHT PROTECTION*

A work does not need to be registered in order to be protected by copyright. The moment a creative work is fixed in a tangible form of expression, copyright protection attaches. Registration is needed to enforce those rights in court.

### *THE LITTLE “c” IN A CIRCLE*

There is a common misconception that only works with a copyright notice — © (usually accompanied by the date and name of the creator) — are protected by copyright. This is not true. Works are protected the moment they are created and fixed in a tangible form of expression. Those are the magic words “fixed in a tangible medium.” A copyright notice is not needed. It is, however, a good idea.

The purpose of a copyright notice is to let the world know whose work it is. The notice sends a message that you expect your rights to be respected by those who see your work.

Those rights are:

- the right to reproduce your work;
- the right to distribute your work;
- the right to make derivatives or create new works based on your protected work; and
- the right to perform or display your work in public.

It is so easy to put a copyright notice on your work and the benefits are so great, that there is really no reason not to do it. Except one reason *not* to do it is that a copyright notice on the face of a piece of visual art can be ugly. But other than for aesthetic reasons, the notice should be used.

The other message implicit in using a copyright notice on your work is that you respect the copyrights of others.

## **2. FIND YOUR NICHE MARKET**

Understanding the marketability of your work is key to selling it. An artist or a writer must be able to articulate the niche market for his work.

A niche is a small, focused segment of a larger market.

If you are a visual artist, your larger market is art but you might define your niche by style, medium, or subject matter. If you are a writer, niche might be thought of as genre. Fiction is the market, but steampunk romance is your niche, for example.

It's important to define your niche so you can figure out who your target audience is, how you're going to sell your work to them, and for how much. Understanding niche marketing is the difference between amateurs and professionals.

Once you define your niche, you are also able to identify your competitors. When you know who else is selling to your target audience, you will be able to position yourself and your work to stand out from your competition. Differentiation can only happen after you know who else is operating in your niche.

Defining your niche can take time and is an evolving process as your work evolves. As you study your niche market, you will find customers, agents, licensees or publishers that are right for your work. Successful business flows from this critical understanding of your work and who it is for.

## **3. IF YOU USE AN AGENT, SIGN A FAIR AGREEMENT**

An agent is paid, in part, for who they know. It is your agent's job to find publishers, galleries, customers, or manufacturers interested in publishing, showing, buying or licensing your work.

Good agents are a valuable business asset, but they can be hard to find. Because agents can receive a significant share your profits sometimes indefinitely, you need to be certain that the agent is the right representative for your work and has your best interests in mind. Entering an agreement with an agent must not be taken lightly.

Research your potential agent before signing any agreements. You will want to know what type of work the agent specializes in, how much business they do and who they work with. Ask for referrals, the agent

should be willing to provide you with contact information for actual clients so you can see if the agent is satisfying their needs.

Many agent agreements are exclusive in nature. This means that the agent is the only agent for your work. An exclusive agreement may not suit your needs. For example, some agents only specialize in assistance in selling your primary work. If you are looking for someone to find and negotiate licensing opportunities or a book deal for your visual art, you may need a different, or second, agent.

Additionally, some agents will require that you sign an agreement for an extended period of time. This allows them sufficient opportunity to market your work, negotiate deals or licenses on your behalf, and begin bringing in royalties. If you are not interested in licensing and only need an agent to help you sell your work, you may not want to sign a long term agreement.

A shorter agreement will allow you to change agents if the relationship is not working out for whatever reason.

Standard provisions that should be included in any agent agreement are:

- the reservation of the right to reject any proposed deal, sale or licensing agreement;
- a statement that any works in possession of the agent will be promptly returned upon termination of the agreement;
- an explanation of who will bear the expense of promotional and advertising materials, travel, shipping, and other expenses;
- the agent's percentage for all of the various possible transactions such as licenses, sales, and agreements negotiated with and without the help of the agent (excluded deals); and
- a reasonable and bilateral termination provision (both you and the agent have the right to terminate the agreement) generally with a certain amount of notice.

#### **4. KEEP GOOD RECORDS**

Always remember that you are in business. All business transactions should be memorialized. There are tax implications for any transaction even if no money changes hands (if you are given a share in somebody's

project, for instance). Keeping accurate records of all sales, licenses, royalties and expenses is crucial not only for tax reporting purposes but also to measure whether you are making a financial success of your business.

### *Income*

In agreements you have with agents, publishers, galleries, or licensees, you must be able to monitor your income. All agreements should require the contracting party to provide you with regular payment and accountings. There is a difference between payment and accounting. Payment is receiving the cash. An accounting reflects how much of your work has been sold, how much money others have made from your work, and how much money you have made. Many book publishers, for instance, pay only twice a year but the contractual obligation to account for sales is annual.

If you enter into any long term agreement (6 months or more) your agreement should include a provision that allows you to inspect the books and records relating to the agreement during regular business hours upon reasonable notice. You should also require that these books and records be kept according to standard accounting principals. Ideally, any business partner you work with should offer basic reporting information but many times they do not. Put it in the contract.

### *Expenses*

Any expense reasonably related to a legitimate business purpose should be tracked and recorded so it can be deducted from your taxes. Business mileage should be logged. Keep your cash receipts.

### *Accountants*

It is a good idea to hire an accountant for your business as soon as economically practical. Many bookkeepers are highly skilled, as well, and can be less expensive. The importance of keeping your finances in order cannot be overstated.

## **5. BUSINESS ENTITY FORMATION**

There comes a time in the life of every individual who sells their work for a living to decide whether it is necessary to create and operate their venture through a business entity such as an LLC or a corporation.

At the very basic level, the single most important reason to operate through a business entity rather than as a sole proprietor is to protect your personal assets from liability. The first consideration, then, is whether you have assets that need to be protected. The second consideration is whether those assets are exposed should you become personally liable.

Once you determine that forming a business entity makes sense, the question becomes what form of entity is appropriate. The options are: a corporation, an LLC or a partnership. Partnerships do not offer protection from personal liability. In that sense, partnerships are of limited usefulness.

There are different tax implications for each form of business entity. So, depending on your financial circumstances, one entity may make more sense than another. If there is more than one owner of the entity, the question becomes a bit more complex. Some individuals choose to form LLCs as opposed to corporations for the pass-through tax treatment of the income, ease of filing and reporting requirements. Corporate income can be treated as pass-through, if certain requirements are met.

Business entity formation requirements are different in each state. Choosing the most appropriate business entity is best accomplished with the help of a professional advisor and the advice of mentors.

## **6. POLICE INFRINGEMENT**

In order to protect the rights you have painstakingly worked for by creating your work and then registering it, you must police any unauthorized use of your work. If you find that someone has reproduced your work without authorization, or that one of your licensees has used your work outside the scope of the license arrangement, that individual or licensee has infringed your copyright in violation of federal law.

The first step is to send the infringer a letter informing them of your rights and demanding that they stop the offensive activity. This letter, known as a cease and desist letter, should be drafted with care but it does not need to come from a lawyer, necessarily. There are no magic words that will make the infringer stop infringing. The essence of the message you want to send is that it is your work, it is protected, you will enforce your rights and it will end up costing the infringer money if the offensive use doesn't stop.

Invite a response, start a conversation with the offender. Dialogue is generally the best way to resolve issues of ownership and use of creative property.

If you put a deadline in your letter, be prepared to take action if the deadline passes and nothing has changed. Do not issue hollow threats.

If the infringement takes place on the internet, you can send a DMCA (Digital Millennium Copyright Act) takedown notice to the internet service provider (ISP). This can be a powerful tool that allows a copyright owner to demand an ISP remove infringing material or block access to it.

The next step is to sue for infringement. Remember that suit cannot be filed until you have registered your copyright in the work. At this point in the enforcement process, legal advice is recommended. Litigation should never be undertaken lightly, for it is an invasive, burdensome and time consuming way to spend your time that could otherwise be spent making art.

## **7. ESTATE PLANNING.**

A final word.

Because copyright endures for 70 years after the artist's death, it is an asset with inheritance value and should be treated like one.

When an artist dies, his copyrights pass to his estate. Copyright is a property right and therefore will be subject to the disposition of the estate just like other tangible property. If you have chosen to divide your property evenly between each of your children, for example, the rights in each work will be valued (just as a chair or a car would be valued) and these rights will be sold or divided among your beneficiaries. If you would rather have these rights owned by one individual, or controlled by a trust for the benefit of the beneficiaries, you must expressly arrange this. When crafting a will or trust, be sure to consider these rights as well as ownership of any physical pieces of art.

Artists create. Lawyers protect.

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