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Protecting an Artist's Legacy with Estate and Intellectual Property Succession Planning

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Copyright Law Intersects with Texas Probate Law

I. INTRODUCTION

This article provides a general overview of the following topics: 1) creation, ownership, and rights in a copyrightable work; 2) copyright transfers; 3) copyright terms and renewals; 4) copyright grant termination; 5) characterization of a copyright in a community property state; and 6) Texas probate processes.

II. COPYRIGHT CREATION, RIGHTS, REGISTRATION, AND INITIAL OWNERSHIP

A. The Copyright Acts

Copyright arises automatically when an original work is created. A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work. *See* 17 U.S.C. § 101.

“Fixing” an idea in a tangible form could include any of the following circumstances: lyrics written on a napkin; lyrics typed into a word processor and saved as a document; the digital recording of a singer and her guitar on a computer hard drive or portable recorder; the physical drawing of a cartoon character; original creation of computer code progression; or processing a simple photograph. *See id.*

The United States has two different bodies of copyright law that cover how long a work is protected by copyright before the work falls into the public domain.

Works created and published prior to January 1, 1978, or created and registered prior to January 1, 1978, are subject to the 1909 Copyright Act and revisions. Works created after January 1, 1978, or created prior to January 1, 1978, and neither published nor registered prior to January 1, 1978, are subject to the 1976 Copyright and revisions. *See* 17 U.S.C. §§ 302-305.

Under the 1909 Act there is a two-term system of protection. The original term was 28 years from registration or publication and the renewal term was 28 years. If there had not been revisions to the 1909 Act, all works would have become public domain 56 years after registration or publication. Works existing in their first term of copyright under the 1909 Act on January 1, 1978, shall last for the initial 28 years and then shall be renewed for 67 years. Works in their renewal term on January 1, 1978, shall be protected by copyright for 95 years from publication. 17 U.S.C. § 304.

Under current revisions to the 1976 Act, works created on or after January 1, 1978, are protected for the life of the author plus 70 years. Works created, but not published or registered prior to January 1, 1978, are protected for life of the author plus 70 years, but shall not expire before December 31, 2001. The duration of copyright for “works made for hire” is 95 years from publication or 120 years from creation, whichever is shorter. *See* 17 U.S.C. § 302.

We often discuss the U.S. copyright law in a vacuum without grasping just how many works are controlled by the Copyright Act. Total copyright registrations issued from 1790 through 2022 are 40,116,623. *See* U.S. Copyright Office, Fiscal 2022 Annual Report, p. 25. The total number of registrations issued from 1927 through 1977 is 12,124,409. *Id.* The Copyright Office processed 484,253 claims for

registration in fiscal year 2022 including 236 Renewal Copyright Registrations. *Id.* Based on these numbers, the importance of understanding the intricacies of both the 1909 Act and 1976 Act becomes evident.

B. Rights

As the holder of exclusive rights, the copyright owner may grant permission to some and prevent others from doing the following five items:

To **reproduce** the copyrighted work in copies or phonorecords;

To prepare **derivative works** based upon the copyrighted work;

To **distribute copies** or phonorecords of the copyright work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

To **perform** the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;

To **display** the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphical, or sculptural works, including the individual images of a motion picture or other audiovisual work; and

In the case of sound recording, to **perform** the copyrighted work publicly by means of a digital audio transmission. *See* 17 U.S.C. § 106. These exclusive rights are subject to Fair Use, Educational Use, and other limitations and exceptions identified in 17 U.S.C. §§107–122.

C. Registration

Registration of a copyright in the copyright office is not a condition of securing copyright protection.

Registration of the copyright is necessary prior to the filing of an infringement lawsuit in federal court. *Fourth Estate Public Corp v. Wall-Street. com, LLC*, 139 S. Ct. 881, 586 U.S., 203 L. Ed. 2d 147 (2019).

To bring an action at the Copyright Claims Board for infringement or declaration of non-infringement, you must have either a registration for the work or a pending and complete application for registration. You must have submitted the copyright application information as well as a deposit copy of the work to the U.S. Copyright Office and the required Copyright Office fee. This is different from federal court, where the Copyright Office must have made a decision on your copyright application before you may bring an infringement claim. *See* U.S. COPYRIGHT OFFICE COPYRIGHT CLAIMS BOARD HANDBOOK – STARTING AN INFRINGEMENT CLAIM, Chapter 3A.

If registration is made prior to infringement of the work, attorney’s fees are available in addition to selecting between pursuing statutory or actual damages in an action for infringement. If registration is made within five years of publication; the information provided on the registration is accepted by the court as true. *See* 17 U.S.C. §§501-509.

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