

An Artist's Guide to the Law

Law and Legal Concepts Every Artist, Performer, Writer,
or Other Creative Person Ought to Know



Richard Amada

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Contents

Acknowledgments	vii
Introduction	ix
What Does the Artist Own?	1
The Bundle of Sticks: Property Law Basics	2
Copyright Basics	5
Attaining, Using, and Keeping a Copyright	13
Trademark Basics	17
What Is the Artist Selling?	25
A Meeting of Minds	25
Sale of the Whole vs. Sale of Specific Rights	28
Licensing	35
The Artist as an Independent Contractor	37
The Work Made for Hire Doctrine	39
The Business Form	43
What Can and Can't the Artist Use?	47
Original Material and Factual Matter	48
Public Domain Property	54
Fair Use	58
Real People	66
Fictional Characters	75
Music Rights	78
What Is the Artist Allowed and Not Allowed to Say?	87
First Amendment Protections	88
Restrictions on Free Speech	90

Defamation	95
How Does the Artist Protect Intellectual Property?	103
Copyright Notice and Registration	104
Evidence of Original Authorship	108
Unfair Competition Protections	111
Protecting the Pitch	117
Dealing with Internet Piracy	122
Digital Rights Management	127
What Contracts Does the Artist Make?	131
Collaborators	134
Visual Art or Design Purchasers	138
Literary Publishers	141
Music Publishers	147
Recording Companies	150
Agents and Managers	155
Performance Outlets	158
Film, Television, and Radio	160
What Happens to Art When the Artist No Longer Possesses It?	167
First Sale Doctrine and <i>Droit de Suite</i>	167
<i>Droit Moral</i>	169
Artist Estate Planning	172
Resources	179
Case References	183
Statutory References	185
Index	187

Introduction

“The first thing we do, let’s kill all the lawyers.”

Oh, that Billy Shakespeare! What a cut-up!

There’s actually a good deal of argument over whether the Bard’s oft quoted line from *Henry VI, Part II* was supposed to be a lawyer joke or an homage to the profession that was best equipped to stop the dastardly anarchists in the play who were illegally trying to take over the government. Like so much else that gets written down, there are various ways to interpret the words, and, since Shakespeare’s not around to ask anymore, people are likely to read into the line whatever meaning they like. Of course, your interpretation might just be tinged by whether your own personal experiences with lawyers have been good ones or bad ones. Every client likes his lawyer when the case has been won. There tends to be less fondness for the attorney when the case is lost. So, if we want to know what Shakespeare really thought of lawyers, maybe we should find out if he was ever successfully sued.

At this point I should probably mention that I happen to *be* a lawyer. That said, in the interest of full disclosure, I’ll just state for the record that I haven’t a clue what Shakespeare really thought of people in my profession. What I can say is that, despite my admiration for his wizardry with dramatic poetry, he obviously was not trained in the law. How do I know this? *Exhibit A*—Act IV, Scene 1 from *The Merchant of Venice*:

Plaintiff Shylock is denied the pound of flesh he’s entitled to under the gory terms of his loan agreement with defendant Antonio because of a supposed loophole in the contract that makes no provision for any blood being spilled while the flesh is being carved. The judge warns Shylock that, while he can take a knife to Antonio’s flesh, if he “dost shed one drop” of blood Shylock will have everything he owns confiscated as punishment for

violating the letter of the agreement. Apparently, in Shakespeare's version of jurisprudence, a contract was an excruciatingly precise thing that required absolutely explicit clauses for an exacting definition of all terms. In short, if it ain't on the page, it ain't in the agreement.

However, contract law doesn't really work that way. It's not nearly so anal retentive a field of law that it doesn't allow for certain implicit elements of a contract. Some components of an agreement are naturally implied. For example, if I contract with you to sell you a gallon of lemonade, it's implicit in that contract that the lemonade will come in a container of some sort. I can't simply dump the lemonade on your head and then claim, because a container wasn't specified in the agreement, that I've fulfilled my part of the bargain. No court would uphold that argument. If you're buying a liquid, unless you've specifically stated that you want it dumped on your head, you've a right to expect that the agreement's implied requirement is that it be delivered to you in a container.

The same would hold true for the "drop of blood" loophole. If you contract with a surgeon to perform an appendectomy, you can't later sue that surgeon because the surgical consent agreement didn't explicitly state that the surgeon was allowed to draw blood when the incision was made. It's quite obviously implied that any cutting of flesh will naturally produce bleeding. If Antonio agreed to allow Shylock to cut into his skin, he implicitly agreed to allow for bleeding to occur. Under the terms of the agreement, Shylock would not have breached the contract by causing Antonio to bleed while exacting his pound of flesh.

The more likely and stronger argument against upholding the macabre contract of Shylock and Antonio is one that Shakespeare didn't even bother to mention. Specifically, a contract won't be upheld if the exercising of its terms is against public policy. Murder was illegal in Shakespeare's day as well as today, and carving a pound of flesh out of Antonio's heart (which was Shylock's plan) would certainly have killed him. That, alone, was enough to void the contract. (Think of it this way. I couldn't sue somebody for breaching an agreement to commit armed robbery for me. What's the judge going to do?—order someone to stick up a bank in order to fulfill the contract?)

Now I don't hold those little nitpicks against the Bard. After all, the law wasn't his field. He was an artist, and most artists aren't legal scholars. However, a writer, performer, visual artist, or other creative person, who has little to no knowledge regarding the legalities and illegalities that govern these professions, is an artist who can get into a world of trouble without

even realizing it's happening—that is, until it's too late and the lawyers have to be called in to do a potentially costly cleanup of the mess. Much better to bone up on some basic principles of law that allow the artist to avoid potential legal pitfalls. That's where this book comes in.

An Artist's Guide to the Law is written especially for creative people in the arts and entertainment fields, whether professional or aspiring, who want a general overview of key aspects of the law that relate to their artistic endeavors. In the following chapters, I'll attempt to explain in plain, simple English the answers to some basic, legal questions I believe every artist ought to know—namely:

- What does the artist own?
- What is the artist selling?
- What can and can't the artist use?
- What is the artist allowed and not allowed to say?
- How does the artist protect intellectual property?
- What contracts does the artist make?
- What happens to art when the artist no longer possesses it?

It should be noted that my use of the word, “artist,” is merely a shorthand reference for all creative people in the arts and entertainment industries. I'll be using the term throughout the book, and, unless I specifically reference a particular type of artist, you may assume that I'm speaking generally about all types of artists.

Ahem...Now comes the big disclaimer. Yes, that's right. You can't talk to a lawyer without getting a legal disclaimer.

IMPORTANT. PLEASE READ THIS.

THE INFORMATION IN THIS BOOK IS NOT,
NOR IS IT INTENDED TO BE, LEGAL ADVICE.

Application of the law is extremely fact specific. For example, you're not allowed to go through a red light...unless you happen to be driving a fire engine at the time and you're racing to a three-alarm blaze. See how a small change in the facts can make a huge difference? That being the case, absolutely nothing in this book can or should be taken as legal advice for anyone's specific situation. This book is meant to be a general guide to the law as it relates to artists. Its purpose is to help you understand, plan, and

function as an artist in a world full of laws that directly affect you. If you have a particular legal issue that's specific to you, personally, there simply is no substitute for consulting a lawyer as your professional legal counsel. Although I'm a lawyer, I'm not *your* lawyer just because you're reading my book.

Additionally, everything in this book must be qualified with the understanding: first, that it is not meant to be an exhaustive treatise on any of the topics discussed within its pages, but, rather, it's a general overview of key legal concepts important to artists; and, second, that it is written from the standpoint of general American jurisprudence. That is, the legal concepts discussed within this text are those common to the law as it is interpreted in the United States of America. Other countries often have different laws and practices that cannot realistically be covered sufficiently in this book. Therefore, no attempt is being made here to analyze how a law might apply if you're operating in a non-American jurisdiction. What's more, even within the United States, laws and rulings on laws can vary by state, and they can change over time. This is why it's vitally important that, if you've got a legal problem and you're not certain how the law applies to you, you should contact an attorney for guidance.

So, now that we have that out of the way, we stand on the very brink of launching into a discussion of all the legal stuff that's the whole reason you started reading this in the first place. But, before we do, perhaps you're asking yourself a few questions, like: Who is this guy? Why is he writing this particular book on this particular topic? And what does he know about what an artist's work is all about?

The answer's simple. In addition to being a practicing attorney, I'm also an artist, myself. Among my artistic callings, I'm a writer, an actor, a musician, a composer, a director—sometimes professionally and sometimes just for the love of the art. Much of what I'll be sharing with you in this book is information that I, myself, have researched and utilized in my own artistic endeavors. I believe being an artist gives me certain insights that help me better understand what's important to other people in the arts, and I like to think that makes me a better lawyer when I'm counseling my clients who are artists. Additionally, a sheer fascination with this area of the law has led me to ask myself various questions and seek out the answers—or, at the very least, ponder the possibilities. I created an arts-and-the-law blog called *The Artful Jurist* (artfuljurist.com) specifically to allow me to ponder these

things publicly for the benefit of others who might also be musing on similar topics. The questions that have been posed to me by those who have read the blog, and by those whom I have encountered in my own artistic ventures, have helped me discern what areas of the law are of greatest interest and importance to artists. Based on that, I've written this book as an attempt to tell artists what they want to know and what they need to know.

Knowledge, it is said, is power. I believe knowing how the law works in relation to my art makes me a more powerful artist. I hope it does the same for you.

~ Rich Amada

What Does the Artist Own?

When you're talking about law for the arts and entertainment fields, more often than not you're talking about one of two areas of law: property law and contract law. The first concerns ownership rights—who owns what and what they're allowed to do with it. The second involves the transaction end of the business—the transferring of some or all of those property rights from the creator to someone else. That “someone else” we'll call “the buyer.” At the very least, we'll assume it's someone the artist hopes will help advance the artist's career through some sort of agreement involving the purchasing, exhibiting, performing, or otherwise presenting of the artist's work. While I know that artists typically prefer to focus on the aesthetic rather than the commercial part of their calling, don't discount the importance of the buyer in this whole process. Unless your plan is to keep your art solely to yourself, at some point a buyer is necessary if you desire to share your artistic vision and talents with the world at large. So, when that time comes, it can't hurt for you to know a thing or two about contract law and the rules that govern the business of art.

And, yes, yes!—we'll get to that contract stuff! I know you're just champing at the bit to ink that big deal! But, before you can sell something, you first need to know what it is you actually *own* that's available for selling. Perhaps that seems like a ridiculously simple thing that shouldn't require any explanation whatsoever. However, if you know anything at all about the law, you ought to know that the law specializes in making even some of the simplest things far more complex than you might ever have imagined. So we begin our discussion with a little basic property law.

The Bundle of Sticks: Property Law Basics

This is a concept that most if not all law students encounter when they begin their studies of property. It's the so-called *Bundle of Sticks*, a concept that's designed to provide a comprehensible example of how property law works. It goes like this:

Imagine, if you will, that someone possesses a bundle of sticks. Someone else sees it and comments...

"Hey, Leslie, that's a mighty fine bundle of sticks you've got there. I wish I had some sticks like that."

(One can only assume that this representational example comes from some distant past epoch when sticks were considered a marketable commodity much in demand. But let's try not to get hung up on the details here, shall we?)

Leslie responds...

"Well, Ron, I need the dry, brown sticks for my fire. But, if you'll let me have a few of your rocks, I'll let you take the moist, green sticks."

The deal has been struck, and Ron gleefully removes from the bundle only the green sticks, leaving the brown ones in Leslie's possession.

This is the concept of divisible property rights at its most elemental. Leslie possessed one bundle, but within that bundle were a number of individual sticks, each one severable from the rest. Leslie could just as easily have told Ron that he could have only those sticks that were less than twenty inches long, or only those sticks that were of a particular type of wood, or only those sticks that had the bark still on them. It's Leslie's bundle, and she's free to give it all away or to distribute its separate components however she likes. In this case, she chose to give Ron the green sticks because the moist, green ones don't make good firewood.

Of course, there was no mention in the agreement between them as to what's supposed to happen when Ron's newly acquired green sticks eventually dry out and turn brown. If the sticks are no longer green, does their ownership revert back to Leslie?...

"Hey, Ron, I said you could only have the green sticks."

"I only took the green ones."

"Yeah, well, those sticks are brown."

"They were green when I took 'em."

"Well, they're brown now, so fork over!"

"No way! We had a deal!"

Well, you can see where this is heading. Thanks to the imprecise nature of the transaction's terms, Ron and Leslie are about to lawyer up for a massive court battle in what undoubtedly back then would have been considered the trial of the century. See?—Didn't I tell you the law can make even simple things complicated?

But, putting aside their dispute for the moment, imagine now that something you own is represented by a bundle of sticks and that each stick represents one individual piece of the whole. You can sell or give away all of the pieces or just certain pieces, reserving the others for yourself, or you could transfer some pieces to one person and other pieces to someone else—and, if you haven't yet given away all the pieces, you could still transfer some other pieces to a third, fourth, fifth person, and so on. That's easy enough to visualize when the object is a bundle of sticks or something else where there are physically a number of separate pieces that compose the whole of the bundle. But what about property that doesn't come in a lot of little, distinct pieces? What about something that's physically only one piece?

Let's take, for example, a photograph. A photo, assuming it has been printed only once on a piece of photographic paper, is a single, tangible object you're able to hold in your hand, put in an album, or mount on the wall. If you took the photo using your own camera, it's your photo to do with as you want. If you want to give the print (or sell it) to someone else, that's your call. However, if you give the print to another person, have you given away all the "sticks" in that photo's bundle? The answer is—not necessarily. Even though the print, itself, is only a single piece, the property rights (the individual "sticks") that go with it are several pieces. For example, there's the right to publish the photo in a book. Just because you give a friend a print of your photo doesn't mean you've given that friend the right to use that photo in your friend's new book. That's a property right that doesn't automatically transfer with the physical possession of a photo print. It's a property right that must be transferred *specifically*. Otherwise, it's a stick that remains in the photographer's bundle. The same holds true for the right to put the photo on the cover of a magazine, or the right to use the photo in an advertisement. It's the same for the right to duplicate the photo and sell it on posters, T-shirts, dishware, mugs, mouse pads, computer screensavers, what have you. Like Leslie's retained brown sticks, those are all separate rights that remain the property of the photographer until such time as the photographer gives them away.

What Happens to Art When the Artist No Longer Possesses It?

At some point in every parent's life, there comes a day when that parent must wave good-bye from the front door to the offspring who are marching off to make their own way in the world. It's the natural order of things. We give them life. We nurture them. We share our wisdom. And then, just when they get to the point where they can exit the house without instantly hurting themselves, they leave us. *Go raise children!*

Art is the birth child of every artist. It is born of creativity, ingenuity, and labor. Furthermore, once it has been born, it takes on a life of its own—a life that, in many ways, is separate from that of its creator and, if given a chance, can outlive that creator. All things that we create will, if they endure, eventually belong to someone else. Gracing our world today is art that has been left to us by people who lived perhaps hundreds, if not thousands, of years ago; art the exact origins of which might not always be discernible, but the beauty, meaning, and impact of which remain as fresh as if it had been unveiled only this moment. That's the legacy of the artist—to touch even those whom the artist may never personally meet.

In this, the last chapter of this book, we'll examine some legal issues and concepts that pertain to art once it has left the artist's possession.

First Sale Doctrine and *Droit de Suite*

Early in this text, we discussed the fact that the property rights to a work of art can be subdivided into as many distinct pieces as the artist can devise. The artist is then free to license or assign each of those pieces to other people. Licensing rights is the equivalent of *leasing* them. Just like our earlier comparison to a landlord leasing an apartment to a tenant, the artist never relinquishes ownership of the rights, he only licenses their use.

Assigning rights, on the other hand, amounts to an outright transfer of property, similar to selling a house. Once the deal is closed, the seller gives up all claims of ownership to the buyer.

However, be that as it may, it's still perfectly legal for someone to sell a home while retaining certain rights to the real estate on which the house is located. An example of this would be an *easement* in which the seller retains the right to have access to a portion of the land. Let's suppose, for illustration purposes, that you're selling Gary a piece of real estate, which is located directly in front of the lot where your home is located. The only way for you to get in and out of your lot is through the piece of property that Gary's buying. Naturally, a piece of land would be worthless to you if you couldn't get in or out of it. So, to ensure the utility and value of your home, you could sell Gary the front lot while retaining an easement that allows you to cross Gary's lot for the purpose of accessing the outside roads. Your having an easement through the land doesn't take away Gary's right to use and call the entire piece of real estate his property. It just means that there's a retained right of access that you possess on that lot, and, legally, Gary can't infringe that right by forbidding your access or putting up a fence that blocks your way.

Virtually any type of property (real estate or otherwise) can be sold with the seller retaining certain rights, provided both the seller and buyer agree to the terms. That includes works of art, even where the physical substance of the art changes hands and leaves the artist's possession forever. If the artist wishes to reserve certain privileges related to the art, the artist is free to offer its sale with the caveat that those particular rights are reserved by the artist. That's generally done either by explicitly retaining the rights (e.g., "*The Artist expressly reserves the right to make duplicate copies of the art and to distribute those copies to others for sale in the open retail market.*"), or by explicitly assigning only specific rights that implicitly retain all others (e.g., "*The Artist expressly assigns to the Buyer the non-exclusive right to sell the art in the open retail market but not the right to make or distribute duplicate copies of the art.*").

Despite this, there are limits to the artist's reach in terms of controlling what happens to a piece of art once it has been sold. Under something called the *first sale doctrine*, once a piece has been legally sold to another, the artist cannot then dictate the terms of any further sales of that particular piece. To illustrate, suppose that Dawn writes mystery novels. Patrick buys one of Dawn's novels in a chain bookstore, reads it, and then takes it to a local used book shop to sell it. Dawn cannot prevent Patrick from selling the book to the used book shop, nor can she stop that shop from reselling the book on