

# Protecting the Rights of Creatives:

## An Introduction to Common Issues Facing Content Creators

by Jason R. Thomas and Michael T. Brewer

With valuations approaching \$1 trillion in the United States,<sup>1</sup> and over \$3 billion in Nebraska,<sup>2</sup> the creative arts and the creation of artistic content are big business. The people involved in creating artistic content are generally referred to as “Creatives.” A Creative is a person whose job involves the production of original ideas or the doing of artistic work.<sup>3</sup> Many people think of Creatives as musicians, painters, authors, photographers, and filmmakers. However, Creative is a broad term that also applies to graphic artists and copywriters and can even include scientists and inventors. Who qualifies as a Creative is an extensive—and potentially endless—list.

Creatives include both professionals and amateurs. Their status should not be used to construe their level of understanding of the business and legal realities that affect their work. Whether professional or amateur, it is frequently the case that many Creatives have little to no understanding of business and legal realities, and quite often, this lack of understanding is intentional. This may sound strange to a legal professional;

however, artistry as a business is taboo for many Creatives, as there is often a stigma among Creatives about “selling out.” This stigma can be a powerful influence on Creatives. Further, there can also be an inner conflict between the spontaneity and creativity required for their art, and the perceived drudgery required to tackle administrative and business tasks. Many Creatives desire to keep their craft “pure” and shun matters which might construe their craft as a business. This approach often creates pitfalls in terms of the protection of their work.

A word of caution is advised when providing legal services to Creatives. Each individual industry, be it music, film, literary, etc., is its own world with its own unique rules (written and unwritten), jargon, and etiquette, resulting from years of business, interpersonal, and legal evolution. Each of these industries are complex with many moving and highly interde-



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pendent parts. Navigating these industries requires a thorough understanding of these various parts and how they all work together and relate to the goals of the Creative.

This article addresses a few of the more common areas of law involving Creatives and the protection of their interests. The purpose of this article is to provide a general background on how to assess Creative clients' issues. The first part of the article examines the formation of business entities and the advantages in choosing between the different entities; the second part addresses intellectual property (hereinafter "I.P."), and the third part addresses contract.

### I. The Creative and Business Entities

The creation of a business entity may seem simple; however, the questions of when and if to form such an entity can be very personal and problematic for the individual Creative. Creatives often don't want any sense of distance between themselves and their consumers, and a business entity may create that sense of distance. As previously mentioned, Creatives in different industries need different things from their business entities. A band, regardless of being local or platinum-selling, might only need something in writing that indicates how profits, losses, and band property (including I.P.) is allotted and distributed. A fine artist such as a painter, might only need their entity to act as a middleman between artist and buyer. A film production entity might require a sophisticated operating document that spells out nuanced specifics regarding investors' rights, interested parties' protections, and I.P. interests, while also addressing areas of ownership and licensing.

With this background in mind, the two most common business entities that make sense for most Creatives to consider are partnerships and limited liability companies ("L.L.C.").

A partnership is "an association of two or more persons to carry on as co-owners a business for profit."<sup>4</sup> Many creatives shun the notion of forming an entity to protect and govern their craft. Many music groups, film productions, etc. are partnerships by default to avoid formation of a legal entity for their business. These partnerships can, but do not need to be, governed by a written agreement. For Creatives with few obligations and liabilities, a written partnership agreement might be perfectly acceptable, and a partnership might be a good idea if the Creatives have minimal liabilities or accept an arrangement in which there will be shared ownership of the entity's assets. For example, many amateur music groups exist as partnerships, often with members frequently splitting profits and expenses evenly.

An L.L.C. is usually the most attractive and reasonable entity for a Creative because it best provides a level of protection for their members,<sup>5</sup> similar to the way a corporation protects its officers and shareholders. Unlike a corporation, an

L.L.C. usually requires fewer formalities and is relatively easy to organize and manage, with the main advantage being that the L.L.C. can protect the Creative's personal assets by limiting the liability to the business entity. Since many creative ventures (for example, a music group) are often based on close personal and working relationships, it is desirable that these relationships remain as unaffected as possible by anything that might affect the creative process. An L.L.C.'s ease of formation and relatively fewer formalities while protecting the Creative's personal assets provides a practical legal alternative for something more advanced than a partnership. Single-member L.L.C.s are also common and are more prevalent when the Creative works as a one person business. For example, many photographers and commercial videographers opt to form single-member L.L.C.s.

By contrast, in the film industry, almost every film is produced as its own separate L.L.C. and film L.L.C.s are very unique. Whereas a band might want their L.L.C. to be somewhat informal, a film L.L.C. is usually quite the opposite. A film L.L.C.'s goal is to protect and enforce the interests of its members, and typically most members are investors in the film. Also, film L.L.C. membership interests tend to be alienated as they are often used as investment vehicles. Legal counsel for film L.L.C.s need to be aware of security law issues related to the film project as well.

Forming a corporation is also an option for Creatives. A corporation is more applicable for businesses and individuals who are not directly tied to the creative process. Film studios (as opposed to film productions), art galleries, record labels, and similar creative businesses might all be better served as corporations than L.L.C.s. As with any business, however, the client's specific goals should inform the attorney as to whether a corporation or other entity would best serve the client.

The main takeaway here is that if a Creative approaches legal counsel with questions regarding the formation of a potential business entity, the attorney should be aware of the Creative's craft and relationships, both in creative and business terms. Some important information to gather includes determining who will manage the entity, how the entity will distribute profits and losses, as well as any potential royalties. The attorney should also determine how much of a "corporate feel" the members will tolerate. Tax considerations should also be considered in selection of the applicable entity for the Creative.

### II. The Creative and Intellectual Property

Trademarks, service marks, and copyrights are likely to be the most common intellectual property (I.P.) rights for Creatives. Patents and trade secrets, while just as important as other types of I.P. protection, will be encountered less frequently, and therefore are not in the focus of this article. Failing to properly register I.P. can lead to a Creative's loss of income, loss of reputation, and costly litigation. Since properly

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protecting I.P. is vital to the Creative, and the consequences for failing to properly do so are potentially significant, attorneys who otherwise serve Creatives in other capacities will often refer out this work to an attorney who specializes in I.P. Should a Creative approach you with this issue, a basic understanding of I.P. law, combined with understanding the Creative's goals, can assist the Creative in determining the need and structure of their I.P. rights.

Trademarks and service marks are used to indicate that a person or company provides a product (trademark) or a service (service mark), and these distinguish the marked goods of the mark holder from those of the competition. For example, in the music industry, automatically accrued royalties and other payments might be allocated according to a band's name. This applies when it comes to Performing Rights Organizations as these automatically allot and distribute royalties that are earned when a musical work is performed publicly. If more than one band is making use of the same name, then these royalties may be confused, leading to the wrong party improperly receiving royalties.

The advantage of a registered trademark is that the registered party can enforce the mark in federal court. However, if the mark is not registered, the party must try to enforce the trademark in the state where the infringement took place. If an infringement occurs, a federally registered trademark carries with it the right to sue for statutory damages and also grants the mark's owner the right to sue for compensation for lost profits, attorney fees, and other costs associated with the infringement, with courts empowered to increase the reward for damages up to 300%. State courts vary, but in many jurisdictions, the remedy for enforcing an unregistered mark might be limited to injunctive relief.

The next thing to consider is whether to register a mark. If your client has disposable income, the answer is easy: register the mark. However, in order to remain effective, a registered trademark must be enforced. This requires the owner to constantly be vigilant for infringers and must legally restrain infringing use immediately. Typically, the process begins with issuing a

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cease-and-desist letter. Frequently, the cease-and-desist letter can quickly escalate the situation to litigation. However, some Creatives simply do not have the assets to initiate litigation, even if successful attorney intervention would lead to the infringer paying attorney fees. As a result, enforcement of I.P. rights are financially prohibitive for some Creative clients.



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Another consideration for the Creative is how enforcement of a mark will be viewed by the public. We take no position on whether this is right or wrong, but a Creative's success is frequently driven by their notoriety (e.g., public perception). Therefore, even if a Creative is legally and rightfully enforcing a mark, negative spin by the infringing party or the media can cause fans and consumers to pull away from the Creative. Consider a Creative whose public persona is one that is easy-going and innocent. The public often places trust in the Creative's persona. If that persona sues anyone that interferes with a profit stream, the public perception shifts to viewing the Creative as greedy, selfish, or "corporate." When this public perception unfolds, goodwill can be tarnished, and the Creative's popularity decreases in the entertainment industry with an accompanying decline in revenue. Therefore, any attorney working with clients in this area should consider and discuss the potential consequences of steps toward enforcing I.P. rights.

Marks help protect the Creative's brand. Copyrights<sup>6</sup> are distinguished from marks as they protect the Creative's work. Copyright protection exists automatically from the moment the original work is recorded, be it written down on paper, an audio recording, a video recording, or another method. Further, copyright covers a variety of areas, including music and lyrics,<sup>7</sup> poetry, novels, screenplays, films, sculptures, paintings, choreography, comics, and even jewelry and architecture.

Like trademarks, a copyright can be federally registered, and unlike trademarks, registering a copyright is relatively simple. A copyright registrant does not need to prove that the work that is being registered is unique, novel, or anything of the sort. The U.S. Copyright Office makes no determination whether the copyright infringes on another's copyright. So long as the copyright registration paperwork is in order and the proper fees are paid, a copyright is registered. The U.S. Copyright Office's position is that any questions of the veracity of the registered work will be dealt with in court.

A registered copyright owner can sue an infringer for statutory damages, attorney fees, other damages, and seek a variety of injunctions. The key to proving copyright infringement is to show that: (1) the infringer had access to the copyright owner's work; and (2) the infringer's work is substantially similar to the copyright owner's work.<sup>8</sup> This being said, each federal circuit has its own tests in order to determine whether these two elements are met. A general practitioner would be well-advised to understand that most contracts involving a Creative's work contain choice-of-law provisions and that the result reached in one circuit may be different than the result reached in another. Due to this, if no choice-of-law provision exists, it would be wise to do some research to find the most favorable venue for your client if a lawsuit for copyright infringement needs to be filed.

As far as fair use is concerned, a survey of several Creatives' websites shows that these websites are treasure troves of awful

advice when it comes to fair use, and some sites even post advice that encourages infringing behavior. This advice can frequently be summed up in the phrase "it is easier to ask forgiveness than permission," which is tantamount to encouraging blatant copyright infringement. The ensuing result of this bad advice is usually couched in anecdotes in which the advising Creative got away with infringement. A wronged party might not litigate every instance of infringement, but that does not justify passively encouraging infringement by allowing a Creative to use another's intellectual property.

With that in mind, there are four factors that a court examines to determine if an alleged infringer's use of someone else's original work is a fair use: (1) the character and purpose of the use, (2) the nature of the original work, (3) the amount taken from the original work, and (4) the market effect to the original work.<sup>9</sup> The court will balance these four factors, with no factor being determinative, and if the court determines the alleged infringer's use was fair use, the defendant will not be liable for the infringement.<sup>10</sup> The U.S. Supreme Court has essentially added a fifth factor in whether the infringing work is a "transformative use," which basically examines whether the alleged infringer's work added something new to the original work.<sup>11</sup>

Many Creatives believe that, so long as their otherwise infringing work meets all or some of these criteria, then the Creative cannot be sued for copyright infringement. This notion is simply incorrect and misunderstood by many Creatives. Fair use is an affirmative defense for copyright infringement, and as such, can only be properly raised in a pleading that is filed by the alleged infringer after being sued. An alleged copyright infringer only gets to try to prove that their use of copyrighted material fell under Fair Use in a court of law, and a blanket statement that they are using the copyrighted works on their website does not protect a Creative from litigation should the owner choose to sue them. Rather, fair use provides them with a theory to prevail in the lawsuit upon being sued.

For the prospective Creative that could potentially be a plaintiff in a copyright infringement case, the decision to sue is strategic. Certainly, whether the defendant can claim fair use as a defense should be analyzed. Also, as previously mentioned, when a Creative might potentially be a plaintiff in an infringement case, the Creative needs to be advised of the practical potential consequences of what the lawsuit would mean to the Creative's reputation and notoriety. Finally, an attorney should understand that given the expense of copyright litigation, the ethereal nature of copyrighted works, and the fickleness of juries in such cases,<sup>12</sup> most parties are more than willing to settle a case than allow it to go to trial.

If a Creative approaches an attorney with an I.P. issue, regardless of whether legal counsel is well-versed in the intricacies of I.P. law, the attorney should relay to the Creative the drastic negative consequences of failing to protect their I.P.

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Failing to register trademarks, copyrights, and other I.P. rights drastically decreases the Creative's options if and when another party infringes on those I.P. rights. Failure to timely register I.P. rights severely diminishes the remedies available as well as the venues in which those remedies might be pursued. A Creative's livelihood is usually directly related to the work they create. Failure to adequately protect their I.P. can be disastrous to their current and future income. For example, consider the importance of name recognition for a band. A band could spend years working to build brand recognition. That recognition could be quickly lost should another group successfully register the same name and subsequently sue the original band to force them to stop using the name. This is just one example, but being aware of these potential issues when consulting a Creative is critical to their future success.

### III. The Creative and Contracts

A Creative's works may be protected through their business entity and I.P. registrations; however, these protections can easily be changed or limited by contract. Most Creatives' contracts will probably be personal service contracts (contracts that involve one person performing a service for another, rather than supplying goods, with each receiving a benefit). There are several types of personal service contracts. Examples include producer agreements, film option-purchase agreements, screenplay shopping agreements, performance agree-

ments, agency or management agreements, and publishing agreements. Personal service contracts are created by state law, and an attorney serving Creatives must be aware of choice-of-law clauses in these contracts, and their ethical and professional responsibilities and limitations when providing legal services in states where they are not licensed.

The creative industry is rooted in personal relationships, and too much formality can erode trust, or even make a Creative appear litigious. For these reasons, Creatives frequently forgo written contracts and engage in oral contracts. An oral contract is an agreement made in spoken words only or only partially in writing. Since oral contracts are not in writing, their terms are often difficult to prove, even in a court that recognizes oral contracts, and therefore they are generally disfavored. A written contract is the best way to protect a Creative's contract rights. E-mail and text messaging has become a means of conducting business. As a result, most courts have come to accept these communications as evidence of a written contract. An attorney should advise their Creative client to memorialize an oral agreement by way of texting or emailing the other party their understanding of the agreement. If the other party agrees, the written exchanges can be used to supplement the parties' oral agreement and those communications can result in a written and enforceable contract.

Once the Creative client has a contract, the next step is to examine whether it is enforceable in a court of law. Some examples of contracts that are unenforceable are contracts that are illegal, unconscionable, and if applicable, contracts that violate the statute of frauds. Perhaps the most vital service an attorney can provide a Creative is a simple contract review, followed by an explanation, in non-legalese, of what the contract means.

If a client has a contract they would like to enforce through litigation, a Creative must strategically pick their lawsuits. A Creative who gains a reputation, fairly or not, of being litigious might find themselves short on work as venues, producers, clients, etc., feel working with the Creative entails too much burden and risk. A phrase that encapsulates this reputation that has floated around the film industry for years is "difficult to work with." It is often the unofficial reason given to decline certain actors, crew, screenwriters, directors, etc. True, the phrase sometimes refers to an individual who creates unnecessary problems on a set, but it may also refer to someone who might be making legitimate complaints. Sometimes, Creatives simply must accept breaches of contract in order to stay employed in the industry they love.<sup>13</sup>

Musicians also face this problem. You will have difficulty locating a musician who has not been bilked out of money owed to them by a venue. The musician has the choice of enforcing their rights under the deal with the venue (often for small amounts that are nevertheless critical for the musician), and



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possibly becoming black-listed amongst venues, or they can accept the breach, continue playing, and hope they make their big break (while hopefully getting paid from other venues).

### Conclusion

The art and entertainment industry is a vibrant and dynamic industry that is vulnerable to swift changes in popular opinion. In addition to the areas we discussed, other significant legal questions and issues can, and do, arise, such as constitutional questions (particularly First Amendment issues); trust and estate issues (consider the legal storm that arose from the fact that Prince died without a will); tax issues; immigration law (particularly visas); securities law (film financing); employment and labor law; and laws concerning emerging technologies such as the advent of nonfungible tokens (NFTs) in the sale and protection of assets such as fine art, film, and music publishing.

For reasons mentioned previously, this article has been a broad overview of the Creative industry's legal issues and is not intended to be an exhaustive overview. It is intended to provide the general practitioner with some basic guidance and particular warnings about entering into the wide-ranging legal world of Creatives. For the Creative navigating their craft, most would do best to engage an attorney at the ground floor. We hope this article provides a basic starting point for the attorney not well-versed in entertainment law when choosing to represent the Creative business client. 

### Endnotes

- <sup>1</sup> *Facts & Figures on the Creative Economy*, NAT'L ASSEMBLY OF STATE ARTS AGENCIES (2020) [https://nasaa-arts.org/nasaa\\_research/facts-figures-on-the-creative-economy/](https://nasaa-arts.org/nasaa_research/facts-figures-on-the-creative-economy/).
- <sup>2</sup> *Creative Economy State Profiles*, NAT'L ASSEMBLY OF STATE ARTS AGENCIES, [https://nasaa-arts.org/nasaa\\_research/creative-economy-state-profiles/](https://nasaa-arts.org/nasaa_research/creative-economy-state-profiles/) (last visited Aug. 8, 2021).
- <sup>3</sup> *Creative*, *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/creative> (last visited Aug. 2, 2021).
- <sup>4</sup> NEB. REV. STAT. § 67-402(6).
- <sup>5</sup> NEB. REV. STAT. § 21-102(12) defines "member" as follows: "Member means a person that has become a member of a limited liability company."

- <sup>6</sup> A more specific definition of copyright is that it is "a form of protection provided by the laws of the United States to the authors of 'original works of authorship' that are fixed in a tangible form of expression. An original work of authorship is a work that is independently created by a human author and possesses at least some minimal degree of creativity. A work is 'fixed' when it is captured (either by or under the authority of an author) in a sufficiently permanent medium such that the work can be perceived, reproduced, or communicated for more than a short time." U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS (2021), <https://www.copyright.gov/circs/circ01.pdf>.
- <sup>7</sup> Yes, both. This is critical for musicians because both music and lyrics are subject to their own separate copyrights and, depending on a number of factors, possibly their own revenue streams.
- <sup>8</sup> Copyright Infringement of Literary Works, Including Compilations and Other Fact-Based Works, 145 AM. JUR. *Proof of Facts* 3d 1 (2021).
- <sup>9</sup> 17 U.S.C. § 107 and *Legal Information Institute, Fair Use*, [https://www.law.cornell.edu/wex/fair\\_use](https://www.law.cornell.edu/wex/fair_use) (last visited Aug. 2, 2021).
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id. citing Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
- <sup>12</sup> An example of this is the case of Pharrell Williams and Robin Thicke versus the Estate of Marvin Gaye in which a jury found that Williams' and Thicke's song "Blurred Lines" had enough of a "similar feel" to Gaye's "Got To Give It Up" to warrant infringement to the tune of \$7.3 million dollars. *Jury Finds Pharrell, Thicke Copied Marvin Gaye Hit for 'Blurred Lines'*, NBC News (Mar. 10, 2015, 4:42 PM), <https://www.nbcnews.com/pop-culture/music/jury-finds-pharrell-thicke-copied-marvin-gaye-hit-blurred-lines-n321046>. Robin Thicke and Pharrell Williams appealed the jury's verdict, which was consequently reduced to approximately \$5.3 million dollars on appeal. Ben Kesslen, *Robin Thicke, Pharrell Williams to Pay \$5 Million to Marvin Gaye Estate for 'Blurred Lines'*, NBC NEWS (Dec. 13, 2018, 2:24 PM), <https://www.nbcnews.com/pop-culture/music/robin-thicke-pharrell-williams-pay-5-million-marvin-gaye-estate-n947666>.
- <sup>13</sup> A recent example of such litigation involving celebrities is Scarlett Johansson's lawsuit against Disney for its release of *Black Widow* on the Disney+ streaming service simultaneously with its box office debut, instead of as an "exclusive theatrical release." Joe Flint and Erich Schwartzel, *Scarlett Johansson Sues Disney Over 'Black Widow' Streaming Release*, WALL ST. J. (July 29, 2021, 5:57 PM), <https://www.wsj.com/articles/scarlett-johansson-sues-disney-over-black-widow-streaming-release-11627579278>. Further, at the time of writing this article, Johansson's lawsuit has Emma Stone considering a similar lawsuit due to Disney's handling of the release of *Cruella*. Trace William Cohen, *Emma Stone Reportedly Considering Taking Action Over Disney Streaming 'Cruella' Alongside Theatrical Release*, COMPLEX (July 30, 2021), <https://www.complex.com/pop-culture/emma-stone-considering-taking-action-disney-streaming-cruella-theatrical-release>.