

# WHOSE ART IS IT ANYWAY?

BY MARIESSA TERRELL, ESQ.

On Wednesday, I received an urgent call from Walter, the editor and owner of an upstart publishing house. Walter was in the process of finalizing an online fashion magazine that featured clever writing, stunning photography and original illustrations. It seems that on Tuesday, just before Walter was about to launch his first edition, one of his freelance illustrators contacted him, requesting that he sign a new agreement. The agreement provided that the copyright for the original illustration would belong to the illustrator and not Walter, the Editor/Owner.

The Agreement further provided that if Walter wanted exclusive rights to the illustration, he would have to pay additional funds totaling four times the amount originally agreed upon. Walter was astonished. He assumed that when he paid for and received the illustration several weeks ago, that he became the owner of the artwork with the exclusive right to use the art in his publication. Unfortunately, Walter was misinformed.

Under copyright law the “person who translates an idea into a fixed tangible expression entitled to copyright protection,” owns the copyright. When the freelance illustrator drew the illustration for Walter, she became the owner of the copyright in the illustration. As the copyright owner, the illustrator--not Walter--had the exclusive right to “copy, sell, distribute [or] display...” the artwork. In other words, the illustrator could sell the illustration to Walter and to anyone else. The illustrator could copy the illustration as many times as she wanted. And, the illustrator could display the

artwork in another publication, gallery or on-line media.

If Walter intended to use the illustration exclusively, Walter should have entered into a “work made for hire” contract with the illustrator. A “work made for hire” contract basically makes the commissioning party, Walter, the copyright holder.

If there is no signed written agreement or an assignment in writing, then the work isn’t made for hire and the copyright remains with the illustrator (photographer, writer, art director, composer, production company or even advertising agency).

With a looming deadline and a limited budget, Walter has few options. At this point, he can proceed with using the illustration he has already purchased (even though he does not have exclusive rights to it). Or, he can pay additional funds (in this instance, four times the amount he originally paid) and purchase the copyright in the illustration.

We can learn a lot about copyrights from Walter. Specifically, in most cases, an artist/illustrator owns the copyright in her art unless there is a contract to the contrary!

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Mariessa Terrell is President of the Board of Directors of the Washington Area Lawyers for the Arts ([www.waladc.org](http://www.waladc.org)). She is an intellectual property attorney, brander and founder of SBC Law Group with over 10 years experience providing intellectual property law services to fashion designers, defense contractors, non profits and start ups. Mariessa endeavors to make the trademark registration process simple and affordable by helping clients select marks that will be afforded the most protection, conducting comprehensive searches of potential trademarks and filing trademark applications with the US Patent and Trademark Office. Prior to starting her own firm, Mariessa worked as Trademark Examining Attorney with the United States Patent and Trademark Office and helped to register thousands of fashion brands including, Revlon, L’oreal, Estee Lauder, Balenciaga, Chanel, Dooney and Burke, Avon and countless others.

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