

Art Underfoot



Interviewing Leonard DuBoff on Copyright Law for Rug Makers: PART I

by Cathy Comins

Note: This is an account of a two-part telephone interview. It is not representative of, nor a substitute for, legal advice. If you have questions concerning copyright law, consult an attorney and/or contact a Copyright Information Specialist by calling the U.S. Copyright Office, Library of Congress, Washington, DC 20559 (202/479-0700). Anyone who answers the line will be able to assist you.

Leonard DuBoff and Art Law

Cathy Comins: Leonard, as an attorney, why are you so interested in craft artists in general and copyright law in particular?

Leonard DuBoff: Well, it's actually not copyright law, in particular, that I like; I'm interested in all forms of art and law. I had been an artist back in the early days, before I became a practicing attorney, in fact before I was blinded in 1964, and I con-



About the Author

Cathy Comins is president of Art Underfoot, Inc.TM, Handcrafted Rugs for the Floor and Walls, managing sales and publicity for more than 100 textile artists throughout America. She is also president of the Montclair (NJ) Crafters' Guild, with over 1,000 members throughout the mid-Atlantic area, and exhibition director of the juried annual Montclair Craft Show with 95 exhibitors and 3,500 attendees.

tinue to have an interest in the arts. When I started practicing law, the firm I was with always referred any case involving arts, crafts, or museums to me because they felt I could understand the people and the issues. When I left full-time practice to become an academic, I started to do some research and found that there was a vacuum. There wasn't anything in the legal field available for artists or for lawyers who were interested in working with artists. So I prepared the first art law course at any law school in the United States, taught right here at Lewis and Clark. That was followed by the first major worldwide conference on art law, also at Lewis and Clark. We also put together the first book on, and actually coined the phrase, *art law*.

C: Do you plan to have another conference?

L: We've had a couple and, yes, we probably will have more down the road. We had a continuing legal education

conference this year for lawyers and artists at Lewis and Clark; the tapes are available from our continuing legal education director at the law school.

C: I know that you have also written many books on this topic. Is there any one particular book you've written on crafts law that you would recommend?

L: A book called *The Law (in Plain English) for Craftspeople*, and its companion book, *Business and Legal Forms in Plain English for Craftspeople*, are probably the best for the craftsperson. I wrote the second book because in the first I suggest using documents, contracts, and forms, and the publisher said, "Well, now that you've made all these suggestions, why don't you give [the readers] something to use?" So he stroked my ego and I put together the second book, which has forms, explains what the terms of the forms are supposed to accomplish, and more or less how to use them.

C: How can one get a copy?

L: *The Crafts Report* distributes both books [telephone 1-800-777-7098].

C: You're also a columnist for *The Crafts Report*.

L: I write a monthly column on law and I am also the chair of the editorial advisory board.

Copyright Protection and Separability

C: Let's start with the basics about copyright. What is copyright?

L: Copyright is a right granted

by the Constitution. It was deemed so important that the founders put it in our Constitution to prevent somebody from copying the work of a creative person. That is accomplished by granting the creative person the exclusive right (depriving anyone else of the exclusive right) to reproduce that original work—to publish it, to perform it publicly where appropriate, to display it, or to make derivative works (that is, works derived from the original work).

C: How does one determine what is protectable?

L: The constitutional permission is to grant copyright to works of authorship. Authorship is basically defined as applying to writings, photographs, and items of art. If the object is utilitarian or functional, the Constitution provides that it can be protected, if at all, by the patent laws of the United States, *not* under copyright. So—the delineation for craftspeople is between aesthetic works, which are protectable under copyright, and functional works, which are not . . . and sometimes that delineation is not very clear. For example, the *Kitchelstein* court case, Second Circuit, dealt with a belt buckle created by a jeweler using geometric shapes. The question arose as to whether or not this belt buckle was a copyrightable item. The buckle could, on one hand, be viewed aesthetically protectable as a mini-metal sculpture using precious metals in geometric shapes, or it could be viewed, on the other hand,

as being a very attractive functional piece of one's belt.

C: And how did the court determine?

L: The lower court said that the belt buckle was functional and not protectable and the Appellate Court, Second Circuit, said it was protectable because it was indeed aesthetic and that the aesthetic part was separable from the functionally utilitarian part.

C: So basically, if one can conceptually separate the functionality from the aesthetic . . .

L: Right! Now, there are some cases that require physical separation and there are other cases that permit conceptual separability. That doctrine is still working its way out.

Rug Hooking, Separability, and Color

C: Leonard, this is very important to people who make traditionally hooked rugs.

L: Yes, rug making. There I can see the separability. For example, the pattern [design] that one uses would, in my mind, be protectable, as a work of art, whereas once that pattern is woven into a carpet or rug, the rug is not. The original pattern itself is a work of art but a patterned rug, completed, is functional.

C: So, are you saying that given five identical rug patterns and five different renditions of that pattern—that is, five different, individualized, aesthetic expressions of that pattern, which can and often do look very different from each other—that each one of those finished works is not, at this time, copyrightable,

whereas the original pattern is?

L: That's correct. The original pattern would be protectable, but the different works would probably not be protectable. I'm hesitating a bit for the following reason. The copyright office recently requested information on whether color should be a copyrightable feature and the conclusion reached after receiving reaction on this from numerous interested parties was that color should be a protectable feature.

C: . . . that is probably the most distinguishing feature . . .

L: . . . Okay, so color is a protectable feature. The pattern would be copyrightable by the original artist and the colors would be protectable features.

C: If one were to do a drawing, for example, and color it in, that would be protectable? That would be easier to copyright?

L: That's correct. Yes. It's probably safer for a rug maker to draw the pattern, identify the colors to be used, and register that drawing.

C: Would one identify the colors by simply listing them, or would one have to actually provide a finalized colored-in design?

L: Either one—because what you are registering is that design. Now, certainly, it would probably be more aesthetic to have the colors filled in, but I think if you list the colors, it is clearly identifiable as your own original work.

To Be Continued . . .