

Rutter Guide Chapter: California Copyright Law

1. State Copyright Law Before 1978:

- a. **Original common law right:** Owner of composition had exclusive right to possess, use, transfer, or dispose of the composition until its publication. [13 WITKIN SUMMARY OF CALIFORNIA LAW *Personal Property* § 46(1) (10th ed. 2005)]
- b. **Remedies:** [WITKIN § 46(2)]
 - i. Tort action for damages for plagiarism.
 - ii. Breach of contract action to compensate for unauthorized use.
 - iii. Quasi-contract action for reasonable value of property wrongfully taken.
 - iv. Action to enjoin unauthorized use.
- c. **Repealed in 1982:** state copyright law preempted by Copyright Act and therefore repealed, but other state copyright protection for federally unprotected works expanded. [WITKIN § 47]

2. Federal Preemption: Federal Copyright Act preempts equivalent state copyright laws.

- a. **Effective Date:** January 1, 1978. [17 U.S.C. § 301(a) *et. seq.*; WITKIN § 47]
- b. **Two part test:**
 - i. The work in which rights are claimed falls within the subject matter of copyright [17 U.S.C. §§ 102, 103]; and
 - ii. The state law creates legal or equitable rights that are equivalent to any of the exclusive rights within the scope of copyright. [17 U.S.C. § 106]
- c. **Determining equivalency:** if the mere act of reproduction, performance, distribution, or display infringes a right granted by a state law, then that state law is equivalent to federal copyright law. [*See Maheu v. CBS, Inc.* (1988) 201 Cal. App. 3d 662, 673 (state law preempted because the right plaintiff claimed—the right to prevent unauthorized publication of private letters—was equivalent to the right protected under federal copyright law); *Gladstone v. Hillel* (1988) 203 Cal. App. 3d 977, 986-87 (state law not preempted because claims of fraud and conversion of jewelry design molds required additional elements); CAL. CIV. PRAC. BUSINESS LITIGATION §§ 68:7, 68:8 (2009)]
- d. **Extra element in state law:** if a state-granted right requires an additional element, the right is not equivalent and there is no preemption. [*Gladstone v. Hillel* (1988) 203 Cal. App. 3d 977, 986-87 (state law not preempted because

- e. **State copyright laws only:** Copyright Act preempts state copyright laws, but not state laws granting or conferring rights beyond the general scope of copyright. [WITKIN § 60; *In re Marriage of Worth* (1987) 195 Cal. App. 3d 768, 777-78 (Copyright Act did not preempt California community property law applied to copyrights on books written by one spouse during marriage)]
- f. **Absence of on-point federal copyright law:** if Copyright Act does not address an issue, state law may provide resolution [CAL. CIV. PRAC. BUSINESS LITIGATION § 68:7 (2009); *Foad Consulting Group, Inc. v. Azzolino*, 270 F.3d 821, 824 (9th Cir. 2001) (state law controlled in determining whether a copyright owner granted a non-exclusive license)]

3. Current Copyright Law

- a. **Ownership of “not fixed” works:** author of an original work of authorship not fixed in any tangible medium has exclusive ownership in the representation or expression thereof. [CAL. CIV. CODE § 980(a)(1); WITKIN § 47]
 - i. **Definition of “not fixed” works:** not embodied in a tangible medium of expression or whose embodiment is not sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration, either directly or with a machine or device. [CAL. CIV. CODE § 980(a)(1); WITKIN § 47(1)]
 - ii. **Ownership exception:** ownership rights do not apply against one who originally and independently created the same or similar work. [CAL. CIV. CODE § 980(a)(1); WITKIN § 47]
 - iii. **Jointly created works of authorship:** owned by the creators in equal proportion. [Cal. Civ. Code § 981(a); Witkin § 47]
 - 1. **Contrary agreement controlling:** joint creators/authors may agree to divide ownership differently. [Cal. Civ. Code § 981(a); Witkin § 47]
 - iv. **Transferring ownership:** owner of rights in original work of authorship not fixed in any tangible medium of expression may transfer ownership. [CAL. CIV. CODE § 982(a); WITKIN § 47(2)]
- b. **Ownership of sound recordings fixed before February 15, 1972:** author has exclusive ownership until February 15, 2047 against all persons [CAL. CIV. CODE § 980(a)(2); WITKIN § 47]
 - i. **Ownership exception:** ownership rights do not apply against one who originally and independently creates another sound recording that does not

- c. **Ownership of inventions or designs:** inventor or proprietor has exclusive ownership therein, and in the representation or expression thereof.
 - i. **Ownership exception:** no ownership rights apply against prior inventor. [CAL. CIV. CODE § 984]
 - ii. **Jointly created invention or design:** owned in equal proportions if the invention or design is single or in proportion to the contribution of each person if the invention or design is not single. [CAL. CIV. CODE § 981(b)(1)-(2); WITKIN § 47(1)]
 - 1. **Contrary agreement controlling:** joint creators may agree to divide ownership differently. [CAL. CIV. CODE § 981(b)(1)-(2); WITKIN § 47(1)]
 - iii. **Making invention or design public:** if the owner of any invention or design intentionally makes it public, a copy may be made public by any person. [CAL. CIV. CODE § 983; WITKIN § 47]
 - iv. **Subsequent inventorship:** if the owner of an invention or design does not make it public, another person subsequently and originally producing the same thing has the same rights as the prior inventor (exclusive against all persons except the prior inventor). [CAL. CIV. CODE § 984]
 - v. **Duration of ownership of invention or design:** continues so long as the invention or design and representations or expressions thereof remain in the inventor's possession. [CAL. CIV. CODE § 980(b); WITKIN § 47(1)]
 - vi. **Transferring ownership:** owner of any invention or design or of any representation or expression thereof may transfer proprietary interest. [CAL. CIV. CODE § 982(b); WITKIN §47]]
- d. **Ownership of private communications in writing:** belong to the person to whom they are addressed and delivered.
 - i. **Publication limitations:** private communications in writing cannot be published against the will of the writer except by authority of law. [CAL. CIV. CODE § 985]
- e. **Ownership of works of art:** artist has exclusive ownership therein.
 - i. **Definition of "work of art":** "any work of visual or graphic art of any media including, but not limited to, a painting, print, drawing, sculpture, craft, photograph or film." [CAL. CIV. CODE § 988(a)(2); WITKIN § 47(2)]

- ii. **Ownership exception:** no ownership rights apply against prior artist.
- iii. **Transferring ownership:** whenever conveyance of a right relating to work of art is made by or on behalf of the artist or owner, ownership of the physical work remains with the artist or owner unless such right of ownership is expressly transferring by conveying document. [CAL. CIV. CODE § 988(b); WITKIN § 47(2)]
 - 1. **Resolving ambiguity concerning rights conveyed:** any ambiguity is resolved in favor of reservation of the right by the artist or owner unless federal copyright law provides to the contrary. [CAL. CIV. CODE § 988(c); WITKIN § 47(2)]

4. Works of Fine Art: Special Provisions

a. Definition of “fine art”:

- i. **As used in Cal. Civ. Code § 982(c):** “any work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature), crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials), or mixed media (including a collage, assemblage, or any combination of the foregoing art media).” [CAL. CIV. CODE § 982(d)(1)]
- ii. **As used in Cal. Civ. Code § 986:** “an original painting, sculpture, or drawing, or an original work of art in glass.” [CAL. CIV. CODE § 982(c)(2)]
- iii. **As used in Cal. Civ. Code § 987:** “an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.” [CAL. CIV. CODE § 987(b)(2)]
- iv. **As used in Cal. Civ. Code § 989:** “an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, and of substantial public interest.” [CAL. CIV. CODE § 987(b)(1)]

b. Right of reproduction: artist has right of reproduction in its work of fine art that has been transferred to another on or after January 1, 1976. [CAL. CIV. CODE § 982(e); WITKIN § 48(1)]

- i. **Methods of reproduction:** prints, facsimile, casts of sculptures, greeting cards, books and magazines not primarily devoted to art, newspapers in other than art or news sections, art films, television except educational stations or programs, advertising, and more. [CAL. CIV. CODE § 982(d)(3); WITKIN § 48(4)]

- ii. **Waiver of right permitted:** waiver must be by a written contract providing for an amount in excess of 5%. [CAL. CIV. CODE § 986(a); WITKIN § 49(2)]
- iii. **Assigning right to collect royalty:** artist may assign the right to collect the royalty to another individual or entity
 - 1. **Assignment is not a waiver:** an artist's assignment of his right to collect the royalty does not constitute a waiver of the right to receive a royalty. [CAL. CIV. CODE § 986(a); WITKIN § 49(2)]
- iv. **Survival provisions:** upon the death of the artist after January 1, 1983, the artist's rights pass to his heirs, legatees, or personal representative until 20 years from the date of death. [CAL. CIV. CODE § 986(a)(7); WITKIN § 49(2)]
- v. **Auction sales:** agent selling the work for artist must withhold 5% of sale price, locate the artist, and remit payment to the artist within 90 days of the sale. [CAL. CIV. CODE § 986(a)(1)-(5); WITKIN § 49(3)-(4)]
 - 1. **Amounts withheld are protected:** any amounts of money held by the seller or agent are exempt from enforcement of a money judgment by creditors of seller or agent. [CAL. CIV. CODE § 986(a)(6); WITKIN § 49(3)]
 - 2. **Artist not located by seller:** if artist not located by seller within 90 days, seller must transfer the 5% withholding to the Arts Council, which then places the amount in a special account in the State Treasury. [CAL. CIV. CODE § 986(a)(1)-(5); WITKIN § 49(3)-(4)]
 - 3. **Collecting amounts due:** artist may file claim with the Arts Council within seven years of the date of sale to obtain amounts due. [CAL. CIV. CODE § 986(a)(1)-(5); WITKIN § 49(3)-(4)]
 - 4. **Artist not located by Arts Council:** if Arts Council is unable to locate artist and seven years have passed from date of sale, artist's right terminates and the money is transferred to the Council for acquisition of fine art. [CAL. CIV. CODE § 986(a)(1)-(5); WITKIN § 49(3)-(4)]
- vi. **Failure to pay royalty to artist:** if the seller or agent fails to pay the artist the 5% or transfer the 5% to the Arts Council, the artist may bring an action for damages within three years of the date of sale or one year after the discovery of the sale, whichever is longer.
 - 1. **Attorney's fees recoverable:** the prevailing party will be entitled to reasonable attorney's fees. [CAL. CIV. CODE § 986(a)(3)]

d. Protections against alteration or destruction of fine art: works of fine art are protected against alteration or destruction by artist or the public. [CAL. CIV. CODE §§ 987, 989]

i. Fine art must be of recognized quality to receive protection: to determine whether a work of fine art is of recognized quality, the trier of fact shall rely on opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with creation or marketing of fine art. [CAL. CIV. CODE §§ 987, 989; WITKIN § 54(4)]

ii. Artist's rights against alteration or destruction:

1. Claiming authorship: artist retains the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his work of fine art. [CAL. CIV. CODE § 987(d); WITKIN § 52(1)]

2. Existence and duration of rights: artist's rights against alteration or destruction of fine art exist in the artist, his heir, beneficiary, devisee, or personal representative until the 50th anniversary of the artists' death. [CAL. CIV. CODE § 987(g)(1); WITKIN § 52(2)]

3. Artist's other rights and remedies against alteration or destruction: the rights of the artist created by this section shall exist in addition to any other rights and duties which may now or in the future be applicable. [CAL. CIV. CODE § 987(g)(2); WITKIN § 52(3)]

4. Written and signed waiver of rights required: rights against alteration and destruction of fine art may not be waived except by a written instrument signed by the artist. [CAL. CIV. CODE § 987(g)(3); WITKIN § 52(4)]

a. Exception if removal impossible: written and signed waiver not required if a work cannot be removed. [CAL. CIV. CODE § 987(g)(3); WITKIN § 52(4)]

5. Prohibited intentional acts: no person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art. [CAL. CIV. CODE § 987(c)(1); WITKIN § 51]

6. Prohibited grossly negligent acts: no person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence. [CAL. CIV. CODE § 987(c)(2); WITKIN § 51]

a. **Gross negligence defined:** the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art. [CAL. CIV. CODE § 987(c)(2)]

7. **Building removal limitations on protections against alteration or destruction of fine art:** when removing art from buildings, the art may not qualify for protection alteration or destruction. [CAL. CIV. CODE § 987(h)]

a. **Work unable to be removed without causing substantial harm:** if a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration or destruction, then the protections against alteration or destruction of fine art do not apply.

i. **Express reservation exception:** rights to protect art may be expressly reserved by an instrument in writing signed by the owner of the building, containing a legal description of the property, and properly recorded. [CAL. CIV. CODE § 987(h)(1); WITKIN § 53]

b. **Work able to be removed without causing substantial harm:** if a work of fine art can be removed from a building without substantial harm, and the owner of the building intends to allow the fine art to suffer physical defacement, mutilation, alteration or destruction, then the protections against alteration or destruction of fine art apply.

i. **Exceptions to protections:** the owner diligently attempted without success to notify the artist, his heir, beneficiary, devisee or personal representative in writing of his intended action or provided notice but the person notified failed within 90 days either to remove the work or pay for its removal. [CAL. CIV. CODE § 987(h)(2); WITKIN § 53]

ii. **Removal from building scheduled for demolition:** if the owner of the work has been notified and elects not to remove the work, then the protections against alteration or destruction of fine art apply.

1. **Exceptions to protections:** the owner diligently attempted without success to notify in writing the artist, his heir,

beneficiary, devisee or personal representative of the impending demolition, or provided notice but the person notified failed within 90 days either to remove the work or pay for its removal.

iii. Title passes upon removal to removing party: if the work is removed by the artist, his heir, beneficiary, devisee or personal representative, then title passes to that person. [CAL. CIV. CODE § 987(h)(2); WITKIN § 53]

iii. Artist's remedies against alteration or destruction: artist may effectuate his rights by commencing an action to recover or obtain any of the following: [CAL. CIV. CODE § 987(e)(1)-(5); WITKIN § 54]

1. Injunctive relief;

2. Actual damages;

3. Punitive damages;

a. Donated: if awarded, the court shall select a charitable or educational organization(s) involved in the fine arts to receive the damages amount. [CAL. CIV. CODE § 987(e)(3); WITKIN § 54(1)]

4. Reasonable attorneys' and expert witness fees; and/or

5. Any other relief the court deems proper.

iv. Preservation of fine art enforceable by public: the public has an interest in preserving the integrity of cultural and artistic creations. [CAL. CIV. CODE § 989(a)]

1. Real property removal limitations when work able to be removed without causing substantial harm: if there is a reasonable likelihood that a work of art can be removed from real property without substantial physical harm to it, an organization may bring a legal action to determine the issue but must pay the costs of removal. [CAL. CIV. CODE § 989(b)(2); WITKIN § 55(2)].

a. Owner must provide notice if not removing art: if a real property owner can remove a work of fine art which is part of the real property without substantial harm to it, and the owner intends to allow the fine art to suffer physical harm, the owner must comply with procedures of notice to the

artist or his heir, legatee or personal representative. [CAL.
CIV. CODE § 989(e)(2); WITKIN § 55(3)]