US Copyright Office
Library of Congress
Submitted Electronically

May 27, 2015

Re: Comment on Copyright Protection for Certain Visual Works (Docket No. 2015-01)

I submit the following in response to your April 24, 2015, Federal Register Notice soliciting comments regarding Copyright Protection for Certain Visual Works.

I wish to raise a matter that is related to use in the marketplace of the copyrighted visual (and textual) works my company produces. As such, this comment is applicable to question 2 defined in Section II of your notice, "What are the most significant enforcement challenges for photographers, graphic artists, and/or illustrators?"

I provide this comment on my own behalf as Managing Partner of Liesl and Co., Inc.—a New York based company that produces sewing patterns under four brands: Oliver + S, Lisette, Straight Stitch Society, and Liesl + Co. All of our sewing patterns provide extensive textual and visual instructional material that enables home sewists to construct garments and other three-dimensions, useful articles. The visual components of our product include both photographs and illustrations that are created by us.

Sections 716 and 920 of the Compendium of U.S. Copyright Office Practices, Third Edition, make it abundantly clear that sewing patterns are eligible for copyright registration and protection. No manufacturers of product in this class of goods or consumers would question the fact that sewing patterns can be copyrighted and that these copyrights can be enforced.

There is ample confusion in the marketplace, however, regarding how far copyright extends beyond the instructions, illustrations, and photographs that together comprise a sewing pattern and whether the owner of the copyright can define terms of use for the copyrighted product.

Sewing pattern manufacturers often include language on their goods stating that the pattern is sold for private, non-commercial use only.

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Many individual home sewists, however, choose to disregard these terms of sale and insist on their right to sell (for personal profit) items made from patterns labeled as being sold for private, non-commercial use only. They argue that because clothing cannot be copyrighted, the sewing pattern manufacturers have no right in a garment made from a pattern of their design and they have no right to define the terms of how their product (the sewing pattern) will be used once it is purchased.

Currently in the United States there is no guidance or applicable case law that can be used to address or enforce appropriate usage in this situation.

Recently the Intellectual Property Office of the United Kingdom published a copyright notice specially addressing copyright issues and questions associated with knitting and sewing patterns. (See the attached document, "Copyright Notice Number 4/2015.") In this notice, the UK Intellectual Property Office affirmed that sewing pattern manufacturers may define terms and conditions that limit the use of items made from their patterns and that individuals who do not adhere to those terms and conditions may be found in breach of contract law.

This guidance has been useful to the home sewing industry in the UK and has clarified, at least in that country, a vexing issue. I would appreciate it if your study would provide similar clarification regarding this matter for the United States.

Respectfully submitted,

Todd Gibson

Todd Gibson
Managing Partner

Intellectual Property Office

Copyright Notice: knitting and sewing patterns

Copyright Notice Number: 4/2015

Updated: January 2015

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What is a Copyright Notice?

Copyright Notices are published by the Intellectual Property Office to help explain specific areas of copyright law in the UK.

This Notice is not meant as a substitute for legal advice on individual cases, but it can help readers understand some of the issues involved. It is not a conclusive view of the law – only a decision of the court can provide that.

Knitting and sewing patterns

About this Copyright Notice

This Copyright Notice responds to issues commonly raised by individuals and small businesses relating to knitting and sewing, such as whether or not it is permissible to:

- copy the written instructions (a pattern);
- share or sell those instructions;

Intellectual Property Office is an operating name of the Patent Office

- sell an item they have made from a pattern, whether in a shop or online; or
- copy from a physical item (such as a dress or jumper).

Some of the information in this Notice will be relevant to comparable activities, such as cross-stitch and embroidery.

What is copyright?

Copyright gives its owner a number of exclusive rights, including the right to control how or whether a copyright work is copied – either the whole of the work, or a 'substantial' part of it. Copying includes any reproduction, whether by hand, photocopying, scanning into a computer, etc. Likewise, as a general rule, anyone who wishes to publish (for example on the internet) or adapt a copyright work would need to secure permission from the copyright owner. However, as explained below, there are circumstances where it is not necessary to obtain permission from the copyright owner, for example where permission is implied or where a particular exception under UK copyright law applies.

What about unregistered designs?

Copyright Notices focus on copyright issues, but it is worth noting too the role of designs law in this context. Two-dimensional works (written instructions, diagrams, drawings etc) are typically protected by copyright, whereas designs law generally protects works in three dimensions.

The UK unregistered design right protects only the shape and configuration of an article. It does not therefore protect 2D items (such as a sewing pattern) and surface decoration. UK and EU registered designs do allow for the protection of patterns in respect of dress making and embroidery and surface patterns. They can be protected for up to 25 years subject to payment of renewal fees. With EU unregistered design rights, patterns may be protected, but only for 3 years. Information on the various forms of design protection is available at https://www.gov.uk/design-right or through contacting the Intellectual Property Office.

How does copyright protect knitting or sewing patterns?

A knitting pattern is essentially a set of instructions on how to make something, commonly a garment of clothing. That document will almost certainly be protected under UK copyright law as a 'literary work'. It does not matter that a pattern may be made up largely of numerals rather than words. A knitting pattern may be accompanied by charts, illustrations or photographs and those features would likely be protected by copyright as 'artistic works.'

A sewing pattern may also be protected as a literary work in that it will likely contain written instructions, but UK courts have also considered a sewing pattern (which typically includes cut out templates, illustrations or photographs) to be an artistic work.

It is important to note that copyright protects the way in which an idea is expressed – for example in a particular drawing or piece of writing. Copyright does not protect information, ideas, styles or methods, such as a particular type of stitch or ribbing, or the idea of a polo neck.

Fashion, by its nature, commonly borrows influences and aspects of others' designs. This subjective element may often make it difficult to determine, in the context of documents detailing how to make clothes, whether there has been substantial copying amounting to copyright infringement. If in doubt, it may be wise to ask the copyright owner for permission or seek legal advice, or both.

What about copyright in a made article?

It is possible that a finished item may itself be protected in UK law as an artistic work in its own right, if it amounts to a 'work of artistic craftsmanship'. The courts have generally accepted that an item (such as a knitted jumper) may be a work of craftsmanship, but have adopted various approaches to assessing whether that craftsmanship is sufficiently 'artistic' to give rise to copyright protection. For example, courts have considered aspects such as aesthetic appeal and the intention of the creator. This means that items of clothing, for example, will commonly fail to satisfy the criteria for copyright protection as artistic works.

Copying an item: Where an item succeeds in meeting the threshold for a 'work of artistic craftsmanship', then drawing or taking a photograph of it could potentially infringe copyright in that three dimensional artistic work. However, in line with common sense, copyright law allows people to include a copyright work in a photograph or film, provided the inclusion of such works is merely incidental and they are not the main focus of the resulting image or film. This would allow, for example, taking a photograph of someone who happened to be wearing an item of clothing that qualified as a work of artistic craftsmanship.

Producing a (two-dimensional) pattern on the basis of 'reverse engineering' a three-dimensional artistic work or copying from a photograph or drawing of such a work is likely to infringe copyright.

Will making an item from a pattern infringe copyright?

It is true that as a general rule a copyright owner has the right to control whether or not a literary or artistic work is reproduced 'in any material form'. It is even the case that UK law explicitly provides that it is possible to infringe copyright in a two-dimensional artistic work by making a three-dimensional item based on it.

However, because knitting and sewing patterns are essentially 'design documents,' they are treated differently under copyright law, so that in fact it will generally only be an infringement of copyright if the pattern is for making an item that is itself an artistic work. The reason why copyright law treats 'design documents' differently is to encourage the use of design law protection (rather than copyright) to control making copies of physical articles to a design.

It may be the case that a knitting or sewing pattern includes an image or representation that has copyright protection as an artistic work. Take, for example, a knitting pattern for a jumper bearing the face of Homer Simpson. Even though the jumper itself may not be a work of artistic craftsmanship, to recreate, in knitted form, the image of Homer's face (or of course any other decorative image, abstract shape etc. that amounts to an artistic work contained in the knitting or sewing pattern) may infringe copyright.

It is important to note, however, that in most cases if you have lawfully acquired a pattern (for example, bought it, received it as a gift or lawfully accessed it online) you will have either an express or implied permission to make the item, as long as the creator of the pattern had permission to use any copyright works within it. Consequently it will not generally infringe copyright to make the item according to the pattern. That, after all, is the very purpose of a pattern. (See more on whether permission is always required below.)

Can I sell an article that I have made from a pattern?

As explained above, from the point of view of copyright law, it is broadly the case that unless the made work that emerges from the pattern is itself a work of artistic craftsmanship (or unless the work bears an artistic work, along the lines of the Homer Simpson example) then making the article will not be an infringement of copyright. It follows therefore that neither will it be an infringement of copyright to distribute (including sell) such an article.

However, it will often be the case that the designer / author of the pattern will have included terms and conditions with the pattern, limiting what use may be made of a finished article. Those terms commonly specify that the pattern is licensed / sold on the basis that it is only for personal or non-commercial uses. This means that you may give as a gift, or yourself use, an item that you have made from a pattern, but if you sell an item you may be in breach of contract law. It is worth noting that other legal issues may arise if the design includes elements that are protected under trade mark law as in the 'Simpsons' example provided earlier.

Is permission always required to copy a pattern?

There are various circumstances in which permission will not be needed:

- **Where copyright has expired:** Copyright in literary and artistic works lasts for the life of the creator plus 70 years from the end of the calendar year of their death. After that time, a work will be 'in the public domain' and may be freely copied, published, adapted and so on without permission (whether for commercial purposes or otherwise).
- **Where the law expressly permits a particular act:** There are exceptions to copyright (also known as "permitted acts"), where the law permits certain uses of copyright works without permission from the copyright owner. The exceptions are limited to specific purposes such as for private study, for educational purposes or non-commercial research.

For example, some knitters like to photocopy or scan a pattern they have bought, enabling them keep a 'clean copy' while using the pattern day-to-day, folding it, carrying it with them, adding notes to it and so on. The law would permit this sort of personal copying for private use. However, it is important to note that you would not be able to pass on or sell any copy of the pattern you make (nor retain a copy should you pass on or sell the original). Patterns that have been downloaded are of course equally protected by copyright and will similarly prevent you from sharing patterns that you have acquired in electronic form (for example, by emailing them on to someone else).

More information on the copyright exceptions is available at:

https://www.gov.uk/government/publications/changes-to-copyright-law

- **Licence / express permission:** As explained above, when patterns are purchased they usually come with a licence (permission) to create the work set out in the pattern. However, that licence may set out restrictions such as not allowing the sale of the finished product or not allowing multiple copies to be made for sale.
- **Implied licence:** Where permission to copy a pattern is not expressly given, either by the copyright owner or by a copyright exception, it is possible that permission may be implied. However, such permission will only be implied in circumstances where it can be said that there was a reasonable expectation that the copyright material would be used in a particular way.

For example, an implied licence may arise where a pattern has been lawfully shared on a website dedicated to promoting knitting as a pastime. If the copyright owner has published their pattern in this way, then in the absence of express provision to the contrary, it may be implied that they are giving people permission to make the item from their pattern for their own use. Whether permission is also implied to sell a finished item will depend on the circumstances.

If in doubt, you should check for any stated copyright conditions. These may specify what the copyright owner is giving permission for people to do with their work - this may be very limited or it may give more extensive permission. It should be noted that it would not be possible to argue that you have an implied licence where the material was illegally made available in the first place (for example on the internet).

What if I make changes to a pattern that I have found or bought?

You will still be infringing if you copy part of a copyright work that is considered 'substantial'. What is 'substantial' copying in any given circumstances will depend on the facts, but it is not simply a question of the amount copied, but of the importance of what is copied. Simply by changing a pattern in some way will not mean that you avoid infringing someone else's copyright. However, assuming you have lawful use of a pattern then customising it only for your own personal use is unikely to be problematic.

Am I free to copy a pattern if it does not include a © copyright symbol?

Just because there is no name or © copyright symbol displayed does not mean that copyright has expired or that the pattern is free from copyright! It is always sensible to check.

Very often a pattern will be accompanied by a © symbol, along with the name of the copyright holder and the year from which copyright runs. However, none of these is required to be present for copyright to exist. Copyright is an automatic right that arises as soon as a work is fixed in some form. For example, copyright protection may apply to patterns as soon as they are written down or printed in a book or leaflet, or appear as web pages on the Internet, or as a PDF to be downloaded.

How do I go about seeking permission to copy a pattern?

Anyone who wishes to reproduce a pattern (or use it in a way that is restricted by copyright law) will need to know who owns the copyright in order to seek permission as appropriate.

As a general rule, the creator or 'author' of a work will be the first owner of copyright in that work. However, if a work was created as part of the creator's job, it will generally be the employer who owns copyright. It is also possible for more than one person to own copyright in related material. For example, where the written instructions are accompanied by illustrations or photographs, there may be separate owners of copyright in those literary and artistic works. Permission would be needed from each.

A creator may license the work directly themselves. Licensing is giving permission to make particular use of a work, often in return for payment and/or on certain conditions. It will often be the case that the original creator will have transferred ('assigned') the copyright to another person. Or they may have granted power to another person or organisation to license the work on their behalf.

A sensible first step would be to track down and contact the publisher or anyone identified on the work. If a © symbol is provided it will often be accompanied by text stipulating permitted uses. For example: "XYZ Knit Ltd 2015. All rights reserved. Individual, non-commercial use only. Sale, any other commercial use and any reproduction, publication or distribution prohibited."

What if I don't know who owns the copyright or I can't trace the copyright owner?

Copyright does not disappear simply because the owner cannot be found. In a work where the copyright owner is not known or cannot be located, permission to copy the work cannot be obtained. These are known as orphan works and recent changes to the law means that you will in some circumstances be able to buy licences to use these works.

For further information on orphan works, please see https://www.gov.uk/apply-for-a-licence-to-use-an-orphan-work.

Enforcement

The rapid growth of the Internet has meant that more and more knitting and sewing patterns are made available across the globe at the click of a button. There is no single international copyright law; each country has its own laws on copyright. However, most countries have agreed to abide by one or more international treaties that guarantee minimum standards of copyright protection and provide for reciprocal protection. This means that a person who has produced a knitting or sewing pattern in the UK, for example, may enforce their copyright in the United States, and vice versa.

When someone infringes copyright, there are various courses of action which could be taken by the individual or organisation that owns the copyright.

- A copyright owner may take legal action against the alleged infringer. This could lead to a user having to pay legal costs for both sides and potentially financial compensation for copyright infringement.
- Alternatively, a person who has copied the copyright material may be asked to purchase a licence, and a commercial arrangement may be reached after which no further action is taken.
- Deliberate infringement of copyright on a commercial scale may also lead to a criminal prosecution.

For further information about Copyright Notices, email copyrightnotices@ipo.gov.uk.

To ask for a Copyright Notice on another topic please complete the online form.

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