

## 5 Things Your Small Arts Business Should Totally Know About the Law

### Tip of the Iceberg Knowledge



1. **Business Organization.** Your arts organization has to be a 501(c)(3) nonprofit to collect tax-deductible donations. That doesn't mean you can't fundraise (Kickstarter, etc.) or receive donations, but your donors can't claim their gifts or investments as tax-deductible donations.<sup>1</sup> One alternative to setting up a 501(c)(3) is to use a fiscal agent.



2. **Artist Taxes.** One of the best ways to avoid being classified as a hobbyist for tax deductions is to keep good books. Not necessarily QuickBooks, but perhaps an Excel spreadsheet to track your income and legitimate business expenses.<sup>2</sup> You need to show your intent to make a profit.

3. **Copyright.** Copyright law only protects content fixed in a tangible medium of expression. In other words, make sure you put things on paper or use a recording device to archive your work.<sup>3</sup> Copyright arises at creation so you don't need to put a copyright notice on your work or register it with the US Copyright Office – although there are benefits from doing so.



4. **Trademark.** Using<sup>4</sup> a logo or brand in commerce automatically entitles you to common law trademark protection, but this protection is limited to your close geographical area.<sup>5</sup> Since trademark rights result from the use of a mark in commerce with specific good or services, it is important to do a search for existing trademarks to determine whether your mark could potentially conflict with a trademark already being used to identify similar goods or services. If you plan to invest a lot of money, and sell over the



<sup>1</sup> I.R.C. § 170.

<sup>2</sup> See Treas. Reg. § 1.183-2(b)(1).

<sup>3</sup> 17 U.S.C. § 102(a) (2012).

<sup>4</sup> *Trademarks FAQs*, UNITED STATES PATENT AND TRADEMARK OFFICE, [http://www.uspto.gov/faq/trademarks.jsp#\\_Toc275426712](http://www.uspto.gov/faq/trademarks.jsp#_Toc275426712) (last visited Jan. 9 2015) (“Federal registration is not required to establish rights in a trademark. Common law rights arise from actual use of a mark and may allow the common law user to successfully challenge a registration or application”).

<sup>5</sup> MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 26:2 (4th Ed. 2004) (“The territorial scope of an unregistered mark is limited to the territory in which the mark is known and recognized by those in the defined group of potential customers”).

Internet or to other states; you should consider filing for a federal trademark registration

- 5. Employee Classification.** If an employer improperly classifies an employee as an independent contractor, the position can be reclassified by the Department of Employment and Economic Development, which may result in the employer owing back taxes and unemployment withholding as well as fines. Typically, five factors are considered, including: (1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right to discharge employees.<sup>6</sup> Internships may also be reclassified as paid employment, as happened in the Fox Searchlight *Black Swan* case.<sup>7</sup>



---

<sup>6</sup> St. Croix Sensory Inc. v. Dep't of Emp't and Econ. Dev, 785 N.W.2d 796, 800 (Minn. Ct. App. 2010).

<sup>7</sup> DOE Fact Sheet #71, <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>