

Images and Reports: Your Work Product and the Law

Robert J. Incollingo, Esq.
416 Black Horse Pike
Glendora, NJ 08029
Ph: 856-234-3800
www.rjilaw.com

Abstract

Of course we see thermography first as a service business, but a fuller understanding of the field comes upon reconsideration of thermography as a product. Certainly the law has no trouble in application of property principles to the thermographer, whose reports and images are just "widgets" by another name, treated no differently than any other work product. This paper will survey the application of substantive property, tort, and contract law to the thermographer's work product. It will touch on the Shop Rule and ownership of images and reports, copyright, liability to depicted third parties and foreseeable users, as well as legal trip wires for the thermographer in this age of heightened security concerns.

Introduction - Thermography is a Manufacturing Business

It takes no deep insight into human nature to understand that a worker values his input more highly than his output. Were it otherwise, we wouldn't have unions. For the consumer, the equation is reversed. The product, rather than the process now past, is the only consideration at point of sale.

Thermographers naturally focus, if you will pardon the pun, on thermography as a service business, and would like to bill their customers accordingly. Thermographers know the personal cost of the training, experience, equipment, and work employed in making each image and report. Customers, on the other hand, care nothing about all that, and will pay for the pictures and reports only. To the customer, the rest is history and nobody pays for history.

If you will train your attention on your customer's point of view, you will see that thermography is not a service business; thermography is a manufacturing business. This paper surveys some of the laws which govern the manufacture and sale of images and reports, which are the products of thermography.

Property Rights and the Products of Thermography

Images and reports have a dual existence in the eyes of the law, being composed of both tangible personal property and intangible intellectual property. As property, images and reports have associated legal rights and obligations for their authors, sellers, buyers, owners, and users.

The Bundle of Rights

In Merry Olde England, whence our laws on property (and words like “whence”) derive, the King owned the island and pretty much everything on it. William the Conqueror, our first pioneer, declared ownership of all the real estate in England on the day he took over the place. You may not have considered it, but the “real” in real estate means “royal”.

In order to cement their hold on all that real property, the kings and queens of England handed out lesser “estates”, or ownership interests, in the land and buildings under what we now call the feudal system. Under the feudal system, you did not fully own anything which was not subject to revert to the control of the king or to someone claiming under him. This was a break from what had been the law on the Continent, where if you owned something, you owned it completely. Over time, the novel concept of not owning things absolutely soaked into the English common law, and watered the seeds of modern commerce.

The metaphor used to illustrate this fertile concept is the “bundle of rights”, commonly depicted as bound sticks, where each stick betokens an incident of ownership, and together represent all of the rights which can be had in a piece of property. This “bundle of rights” includes the right to sell, the right to pass on to your heirs, the right to harvest, the right to destroy, the right to name, the right to withhold, the right to partition, the right to give, the right to manage, the right to transport, the right to enjoy, the right to possess, the right to lend or hire out, and more. Before taking it for granted that you own something, consider if all of these rights are yours exclusively.

In the bundle of rights metaphor, an owner of one stick need not own the others. He may own one stick or more than one stick, while another person or persons may own other sticks from the same bundle. He may own his stick by himself, or own it in common with one or more others. The owner of a stick can transfer it, and if he owns more than one he can keep the rest, or transfer all that he owns. He may transfer half a stick, the future right to the stick, and on and on in every combination. He can set up a useful arrangement known as the trust, a form of ownership developed under English common law in which the beneficial rights of ownership in a piece of property are split out from the associated managerial rights.

These bundled property rights can be identified and split out in all kinds of property, including thermographic images and reports. For example, a thermographer can sell the one-time right to publish an image, and unless the right sold is exclusive by agreement, the owner can sell the right to another publisher as well. Unless the right sold is restricted by agreement, it can be assigned (transferred) by the buyer to a different publisher who has not dealt with the thermographer. This last point is known as the first-sale doctrine under the copyright law, which allows the owner of any particular lawful copy of a copyrighted work to rent, lend, donate or resell that copy without the permission of the copyright owner.

The thermographer can enforce his retained ownership rights by suing to prevent others from publishing the image, or he can destroy the original image, or he can give it to his wife for Christmas. However, if the thermographer made the image on company time, he probably isn't the real owner, and he'll be liable for conversion of company property, and in an extreme example, prosecuted for the crime of embezzlement.

Copyright of Reports and Images

Ordinarily, if a thermographer creates an "original work of authorship", such as a thermographic image or a written report, he has a copyright in the work under the United States Copyright Act (title 17, U.S. Code). The copyright allows him, as the author, to a form of protection for his intellectual expression, whether published or unpublished.

Copyright protects "original works of authorship" that are fixed in a tangible form of expression. Conceptually, it is the expression rather than the idea which is protected. There are a number of broadly construed categories of copyrightable works, including literary works such as written reports, and pictorial and graphic works such as thermographic images. Each of these are generally eligible for federal copyright protection.

Limiting the discussion to the ordinary work products of thermography, Section 106 of the 1976 Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

1. To reproduce the work in copies;
2. To prepare derivative works based upon the work;
3. To distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending; and
4. To display the copyrighted work publicly, in the case of literary works, and pictorial or graphic works, including the individual images of a motion picture, or other audiovisual work.

The owner of a copyright may convey the foregoing rights either separately or in combination.

Copyright protection takes effect the moment the work is created in fixed form. The copyright in the work of authorship immediately becomes the property of the author who created the work. Only the author or those deriving their rights through the author can rightfully claim copyright. The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary. One should be careful about agreeing to joint authorship, however, since either joint owner can place his ownership into the public interest, effectively depriving his co-owner of all value.

Works for Hire

The thermographer in our first example may not have considered it, but as an employee of the thermography company, he had the right to possess the image (within the scope of his agency), and maybe even to sell it or to lend it out to publishers, but the proceeds of such sale or loan belonged to his employer, who commissioned the work, and he had a duty within the law of agency to manage the image for his employer's benefit.

A thermographer and his employer can enter into a contract to decide the ownership of images and reports created by the employee, or they can let the general rules apply in the absence of any agreement. They may even agree to assign ownership of intellectual property prepared on the job to the employee, but such a contract must be in writing and signed by the parties. Most often, having given it some degree of thought, an employer will insist that the employee agree, typically in an employment contract, that reports and thermographic images authored by the employee during his period of employment will be wholly owned by the employer. Such agreements, however, are usually read restrictively, and a thermographic image taken "off the clock" might only be included if it related to the work of the employee or if it was derived through some trade secret obtained on the job.

Under our example, assuming the thermographic image was prepared by an employee as part of his job, the image will be treated in the eyes of the law as a "work for hire" in the absence of any signed agreement. In the case of works made for hire, the employer and not the employee is considered to be the author. The law treats the thermographer as if he did not even participate in the creation of the image, his employer owns the copyright as if he created the image alone without any help from the actual maker. Section 101 of the copyright law defines a "work made for hire" as:

1. a work prepared by an employee within the scope of his or her employment;
or
2. a work specially ordered or commissioned for use as a contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire....

So, while the author of a report or an image is usually the owner, the author's employer owns the work when it was either created by an employee within the scope of his employment, or when the work falls within one or more of the nine above-listed categories, and a predicate written contract commissioning the work was signed by the author before beginning work.

Of course, even if work does not fall within the statutory definition of a "work for hire", the thermographer's employer may still own an image or report if it was made pursuant to a contract with an assignment of copyright.

In deciding whether a particular report or image prepared in the ordinary course of business is a "work for hire", one should first determine whether the author is "legally" an employee. Whether an author is an employee or an independent contractor is generally an issue of State law, decided with reference to how and by whom equipment and resources are supplied, and hours and working conditions are dictated. The distinction is important, because if the author is an independent contractor, rather than an employee, there is no "work for hire". The independent contractor, as author of the image or report, is the owner of the copyright associated with a commissioned work. In the absence of a suitable agreement, the copyright is not transferred along with the commissioned work, but remains with the creator.

Rights on Sale

As a general principle, mere ownership of a report or an image, or any copy of it does not give the possessor the copyright. The law provides that transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright.

Transfers of copyright are normally made by contract. Returning to our bundle of rights analogy, any or all of the copyright owner's *exclusive* rights or any subdivision of those rights may be sold or otherwise transferred, but the transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed (or his authorized agent). Transfer of a right on a nonexclusive basis does not require a written agreement. Although recordation of transfers of copyright ownership in the U.S. Copyright Office is not required to make a valid transfer between the parties, it does provide certain legal advantages and may be required to validate the transfer as against third parties.

As stated above, the right to convey or to pass on property to one's heirs is an ordinary incident of ownership. A copyright may be bequeathed by will or pass as personal property by operation of the applicable laws of intestate succession.

So, for the thermographer and her reports and images, copyright is a personal property right, and it is subject to the various state laws and regulations that govern the ownership, inheritance, or transfer of personal property as well as terms of contracts or conduct of business.

Notice of Copyright

The use of a copyright notice is no longer required under U.S. law, although it is often beneficial because it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication, and it is still relevant to the copyright status of older works. However, use requirement of a copyright notice was eliminated when the United States adhered to the Berne Convention, effective March 1, 1989.

An author who takes legal action to enforce a copyright, however, may meet with a defense of “innocent infringement” in a copyright infringement suit if a proper notice of copyright does not appear on the published copy or copies to which the defendant had access. Innocent infringement occurs when the infringer did not realize that the work was protected. The use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office.

A copyright notice should contain the following three elements:

1. The symbol © (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr."; and
2. The year of first publication; and
3. The name of the owner of copyright in the work

Example: © 2005 Infraspection Institute

Copyright Duration

Thermographic images and reports prepared on or after January 1, 1978 are automatically protected from the moment of creation and through a term enduring for the author's life, plus an additional 70 years after the author's death. In the case of "a joint work prepared by two or more authors who did not work for hire", the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.

Copyright Registration

In general, copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright, and although modern copyright law provides several inducements or advantages to encourage owners to register copyrights, registration is no longer a condition of copyright protection.

Home Inspection

It remains to be shown whether the copyright laws will trump the wave of home inspector licensure laws and regulations now sweeping the country. In New Jersey, for example, laws and regulations have been passed recently which make the home inspection report the property of the customer, in sharp contrast with the Federal copyright law which may have pre-emptive effect (see, e.g., N.J.A.C. 13:40-15.19). If you are employing thermography in the context of home inspection, try not to be the test case on this issue. Finally, don't forget the record keeping requirements for home inspectors in your state, which are likely very different from the ordinary lack of regulation for thermographers, their images and reports.

Property Obligations and the Products of Thermography

Discussion of ownership rights suggests consideration of its duties. While it may be a bit of a surprise, there are duties and liabilities inherent as features of ownership of the images and reports which are the work product of thermography. First and foremost there is the duty to prevent harm. Consideration of property ownership obligations is traditionally split out into two separate issues: (1) the duty to prevent harm to the thing owned, and (2) the duty to prevent harm to others with the thing owned. As a lesser consideration, there is the liability of personal property such as reports and images to execution by legal process, but that is the topic for another day.

Duty to Prevent Harm to the Thing Owned

With respect to an owner's duty to prevent harm to the thing owned, there must be a prior determination of the existence of such a duty with respect to a particular person because, in general, the owner of the entire bundle of rights is free to destroy the thing owned, and she only assumes a duty not to harm it if someone else has a property right to it. There are limited exceptions to the general rule, where an owner has a duty to care for things owned, such as is the case in ownership of animals or of real property with historic associations, but these will not ordinarily arise in the business of thermography absent agreement to the contrary. So, unless a thermographer has entered into an agreement with a customer to maintain a copy of a report or an image, no copies need to be preserved, and can be destroyed (or if digitally maintained, erased) at will.

Duty to Prevent Harm to Others

As this duty is commonly illustrated, your right to swing your arm ends at my face. An owner's liberty to use and manage his property as he chooses is always subject to the condition that uses harmful to other members of society are forbidden. Such harmful use, as with other misconduct, gives rise to liability for intentional torts and (unintentional) negligence.

Privacy

In the context of law enforcement, we see infrared thermography (and imaging technologies in all wavebands) at the center of the privacy debate, from the 5-4 decision of the United States Supreme Court in Kyllo v. United States, 533 US 27 (2001), where the court found that the use of FLIR technology without a warrant was an unreasonable search, to the present day use of "sneak and peek" search warrants in connection with any federal crime, including misdemeanors, under the USA PATRIOT Act (officially the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act) developed in response to the September 11, 2001 attacks. One might reasonably expect that in times such as these, citizens would grow more zealous in guarding their privacy rights against encroachment by other private citizens. The tension between privacy and public security has been growing more acute of late, and for thermographers the risk of liability for invasion of privacy becomes a real concern.

Privacy is often defined as "the right to be left alone". The unauthorized creation or publication of a thermographic image, and even the viewing of a forbidden subject in real time through the camera can invade the privacy interest of its subject. California law offers an easy example not only because the state constitution was amended in 1974 to add "privacy" to the enumerated list of inalienable rights of Californians, but because there, the tort of invasion of privacy is legally split between physical invasion and constructive invasion. Constructive invasion of privacy seems to directly cover thermographic imaging, as set out in California Civil Code Section 1708(b):

"A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used."

The remedies for constructive invasion of privacy reflect strong public disapproval of the tort: a person who commits physical invasion of privacy or constructive invasion of privacy, or both, is liable for up to three times the amount of any general and special damages that are proximately caused by the violation, may also be liable for punitive damages, and if the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant must disgorge to the plaintiff any proceeds or other consideration obtained as a result of the violation.

There is real concern that advances in infrared technology, coupled with the push to develop better security screening systems, will soon allow people to see through clothing in normal lighting. Titillating pictures taken on standard camcorders fitted with

infrared "systems" can be found on the internet. Although it's awfully hard to pin this one down, there are reports that one now can purchase a mobile phone mounted night vision device (aka the "pervert filter") from a certain Japanese company. While the infrared filter technique may have nothing to do with thermography, strictly speaking, the spillover effect of such technologies has been an increase in legislative activities designed to penalize invasion of privacy. See, for example, the recently passed Massachusetts law (Chapter 395 of the Acts of 2004) that makes videotaping someone who is nude or partially nude without their knowledge or consent, a felony punishable by up to two years in prison and a \$5,000 fine assuming that person has a "reasonable expectation of privacy".

No one is here comparing thermographers to "up-skirt" microcamera voyeurs, but the point bears making that it is not a defense to a violation of the above-cited constructive invasion of privacy rule that no image, recording, or physical impression was captured or sold. The mere viewing a forbidden subject through the camera puts one in line for civil tort liability.

There are other privacy concerns associated with making infrared images, as in reports of technologies which allow tracking of the movements of customers across retail stores using the distinct infrared signature of each individual, allowing the retailer to link the data with information at the checkout counter, and to analyze the purchasing habits and meanderings of each person. As well, there are new biometric technologies that permit infrared facial scans to identify individuals despite surgery or facial hair (at least in the absence of alcohol consumption). We can reasonably expect privacy concerns to rise as the collection of data through noninvasive procedures becomes routinely employed in our workaday world.

Downstream Liability to Third Parties

Quite apart from contractual liability to customers, recent trends in the law have converged to fix liability on professionals for the reports and opinions they provide to third parties who were strangers to the transaction. Cases decided in this country and across the world have broadened the liability of accountants, attorneys, appraisers and other experts. As a result, practitioners preparing reports now owe a duty of care to third parties, where the professional knows or ought to know that her work may be relied upon by the third party, and that the third party may suffer a loss if the work has been carried out negligently. These developments promise to impact thermographers as well.

It was accepted law, formerly, that no one had the right to sue for harm resulting from detrimental reliance on information passing between third parties, if the person harmed was not an intended third-party beneficiary of the contract resulting in the report. As Justice Cardozo found in the case of Ultramares Corp v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), often cited and applied in other jurisdictions, a "public accountant is not

liable in negligence to third parties with whom he is not in privity as such a duty could result in liability to an unlimited class of foreseeable plaintiffs and public policy required a limitation of that duty". However, for the past twenty years at least, that general rule has been eroding.

Of late, one of the hottest topics in the law has been the extent to which, and the circumstances under which, members of the public can rely on expert reports obtained indirectly. There is little conceptual difference between an industrial roof survey provided by a seller to a prospective buyer and an attorney's audit report of current litigation provided to the prospective buyer of a business. Seeing the prophetic warning of Justice Cardozo turn into a troubling reality, some state legislatures are now going to lengths to protect professionals from liability to parties other than their own clients (see, e.g., Section 30.1 of the Illinois Public Accounting Act). However, these protections are tied to written disclaimers of liability (e.g., take a look at your next broker-prepared seller's real property disclosure), and tend to be profession-specific without mention of thermographers.

On the plus side, though, the courts now appear at least willing to consider (in the absence of outright fraud) that an investor notified by limiting language in a report may not recover because he is not the one intended to rely upon the information. So, for each service provided by a thermographer to a client, the thermographer should explicitly, and in writing, provide that only the client is intended to rely upon the information and analysis contained in the thermographer's report. It is strongly recommended that such expressly limiting language be set forth in both the customer agreement and in the report, in the hope that no party outside those specifically referenced will be able to recover against the author. By attaching the limiting language, the thermographer may greatly reduce the likelihood of liability to a third party, such as an investor, when the thermographer's work product is released into the stream of commerce.

Conclusion

The work products of thermography – images and reports – are, after all, a type of personal property. The creation of the report and the creation of the image entail the creation of rights which may be profitably unbundled in subtle and varied ways, while the obligations which attend that creation always bear watching. Their creation and transfer bring the thermographer beyond the world of providing a service and into the marketplace for personal property. The laws of the marketplace govern images and reports as they do other personalty, and they subject the thermographer to obligations not to violate the privacy of the subjects of his creations, and to guard against unintended duties undertaken to third parties for negligence in the preparation of his reports. The copyright laws attach to these work products from the moment of creation, and can attend them for a lifetime or longer.