Guide to Copyright

American Institute of Graphic Arts

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Editorial content: Tad Crawford
Design: Grant Design Collaborative, Atlanta

Fonts: Filosofia and Interstate
Copyright: © AIGA 2003

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Business and Ethics series:

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Guide to Copyright

Copyright defines the ownership of work created by a graphic designer. It is copyright that allows a designer to control whether or not a work may be copied. If the designer permits a work to be copied, it is the copyright that gives the designer the right to negotiate for fees or royalties. If the client of a designer is to be protected from the theft of designs by competitors, it is because the copyright law gives such protection. Furthermore, an understanding of copyright is necessary if the designer is to obtain for the client appropriate licenses of copyright from suppliers such as photographers, illustrators and authors.

What is copyrightable?

Work must be original and creative to be copyrightable. Here, "originality" simply means that the designer created the work and did not copy it from someone else. If, by some incredible chance, two designers independently created an identical work, each work would be original and copyrightable. "Creative," in the Copyright Office's definition, means that the work has some minimal aesthetic qualities. A child's painting, for example, could meet this standard. Although the Copyright Office has sometimes shown a limited understanding of the artistry of graphic design, especially when uncopyrightable elements are arranged to create a new design, most graphic design should be copyrightable.

Ideas, titles, names and short phrases are usually not copyrightable because they lack a sufficient amount of expression. Ideas can sometimes be protected by an idea disclosure agreement, which expressly provides compensation if the idea is used by the party to which it is submitted. Style is not copyrightable, but specific designs created as the expression of a style are copyrightable. Utilitarian objects are not copyrightable, but a utilitarian object incorporating an artistic motif, such as a lamp base in the form of a statue, can be copyrighted to protect the artistic material. Basic geometric shapes, such as squares and circles, are not copyrightable, but artistic combinations of these shapes can be copyrighted. Typeface designs are also excluded from being copyrightable (but see the discussion with respect to copyrightabilty of the software describing a font in AIGA's "Use of Fonts"). Calligraphy would appear to be copyrightable if expressed in artwork, especially insofar as the characters are embellished, but oddly, may not be copyrightable alone, if merely expressed in the form of a guide such as an alphabet. Computer programs and the images created through the use of computers are both copyrightable.

Exclusive rights.

The graphic designer, as the copyright owner, has the exclusive rights to reproduce work; license work; prepare derivative works, such as a poster copied from a design; perform work; and display work. However, the owner of a copy of the work can also display it. Anyone who violates these rights is an infringer whom the designer can sue for damages and prevent from continuing the infringement. If the designer were to have trouble proving actual damages, which include the designer's losses and the infringer's profits, the law provides for statutory damages that are awarded in the court's discretion in the amount of $750 to $30,000 for each infringement. If the designer can prove that the infringement was willful, the court, under the copyright law, can award up to $150,000 in statutory damages. Infringers can also be required to pay attorney's fees. However, to be eligible for statutory damages and attorney's fees, designs or other works must be registered with the Copyright Office prior to the commencement of the infringement. For newly published works, registration within three months of publication will be treated as having taken place on the publication date for purposes of eligibility for statutory damages and attorney's fees. It should be noted that the copyright law defines publication as the distribution of a work to the public by sale, other transfer of ownership, rental, lease or lending. Offering to distribute copies to a group of persons for further distribution or public display also constitutes publication. Exhibiting a work on the internet would also be a publication.

Fair use.

Fair use is a limited exception to the exclusive power of the designer (or client, if the designer has transferred rights to the client) to control the uses of designs. Fair use permits someone to use work without permission for a purpose that is basically not going to compete with or injure the market for the work, such as using a design in an article about the designer's career. The court's tests for whether a use is fair or infringing turns on the following factors:

- The purpose and character of the use, including whether or not it is for profit;
- The nature and character of the copyrighted work;
- The amount and substantiality of the portion used, not only in relation to the copyrighted work as a whole, but also, in some cases, in relation to the defendant's work (and this can be a qualitative as well as quantitative test);
- The effect the use will have on the market for the copyrighted work or the actual value of the copyrighted work.

Transfers and terminations.

The copyright law explicitly states that copyrights are separate from the physical design, such as a mechanical or, more recently, digital storage media. Selling the physical design would not transfer the copyright, because any copyright or any exclusive right of use of a copyright must always be transferred in a written instrument signed by the designer. Only a nonexclusive right can be transferred verbally, such as when the designer licenses a design to one client, such as a wallpaper company, but doesn't make the transfer exclusive so that it can also be licensed to another client, such as a placemat company. Both exclusive transfers of copyrights or parts of copyrights and nonexclusive licenses of copyrights can be terminated by the designer during a 5-year period starting 35 years after the date of publication or 40 years after the date of execution of the transfer, whichever period ends earlier. This right of termination is an important right, but it does not apply to works for hire or transfers made by will.

Copyright notice.

The copyright notice is Copyright, Copr. or ©; the designer's name, an abbreviation for the name or an alternate designation by which the designer is known to the public; and the year of publication. For example, notice could take the form of © Jane Designer 2003. Copyright notice is now optional, but it should not be considered unimportant. The designer has a copyright as soon as a work is created and is no longer required to place copyright notice on the design at the time of publication. However, placing the copyright notice on the work, or requiring that it appear with the work when published, has certain advantages. If notice is omitted when a design is published, an infringer may convince the court to lower the amount of damages on the grounds that the infringement was innocent, that is, the infringer wasn't warned off by a copyright notice. In addition, copyright notice informs the public as to the designer's creative authorship of the work. The best course is simply to place the copyright notice on the design before it leaves the studio and make certain that copyright notice accompanies the design when published, even if, in some cases, the copyright notice on publication may be the client's rather than the designer's.

Copyright duration.

Designers now have federal copyright as soon as a design is created—without putting a copyright notice on it or registering it with the Copyright Office. Copyrights created after January 1, 1978, as well as those already existing in works not published or registered, will last for the designer's life plus 70 years. If the designer is an employee, the copyright term will be 95 years from the date of first publication or 120 years from the year of creation, whichever expires first. In this case, however, the design will belong to the employer, since it was created as a work-for-hire.

Registering creative work.

Almost all designs can be registered, whether published or unpublished. One might ask why one should pay the application fee (currently $30) if copyright protection already exists simply by creating the design. There are several reasons: almost all designs must be registered in order to sue, except if the design is not of United States origin; registration is proof that the statements in the Certificate of Registration are true, such as that the designer is the creator of the design; and registration is necessary for the designer to be entitled to the statutory damages and attorney's fees discussed earlier with respect to infringement. Registration allows the artist to make a record of the design and have that record held by a neutral party—the Copyright Office. Since registration is so significant if a lawsuit is necessary, the deposit materials that accompany the application are especially important. It is these deposit materials that will show what the designer, in fact, created. Groups of unpublished designs can be registered for a single fee using an alternative form of deposit, such as slides or copies of the designs. This greatly reduces the expense of registration, since the designs will not have to be registered again when published.

The Copyright Office maintains a website at the url address: www.loc.gov/copyright/. Included on the site are downloadable application forms and a great deal of information about copyright, including the latest fee schedules.

The copyright forms.

Most designs would be registered on Form VA (which stands for visual arts). If a designer wants to register a work with both text and design, Form VA should be used if the design predominates and Form TX if the text predominates. Since these classifications are only for administrative purposes, rights will not be lost if an error is made in choosing the correct classification.

Form VA is a simple two-page form with step-by-step directions explaining how to fill it out. The filing fee and copies of the work being registered should be sent with the application form to the Copyright Office, Library of Congress, Washington, D.C. 20559. There is also a Short Form VA that is even simpler than Form VA and can be used when the designer is the only author, the design is not work-for-hire and the work is completely new. Registration is effective as of the date when an acceptable application, deposit and fee have *all* arrived at the Copyright Office. Although the certificate of registration will be mailed later, this will not change the effective date. If there is an error in a completed registration or if information should be amplified, Form CA for supplementary registration should be used.

Group registration.

Unpublished works may be registered as a group under a single title for a single registration fee. This will dramatically reduce the expense of registration, and no copyright notice need be placed on unpublished work. The following conditions must be met to allow for group deposit:

- The deposit materials must be assembled in an orderly form.
- The collection must have a single title identifying the work as a whole, such as "Collected Designs of Jane Designer, 2003."
- The person claiming copyright in each work forming part of the collection must be the person claiming copyright in the entire collection.
- All the works in the collection must be by the same person or, if by different people, at least one of them must have contributed copyrightable material to each work in the collection. No limit is placed on the number of works that can be included in such a collection.

It is important that a work registered when unpublished need not be registered again when published. But, if new material is added to the work or it is changed into a new medium—creating a substantially different work from that registered—it would be wise to register the work again to protect the changed version.

Work-for-hire.

Work-for-hire is a highly problematic provision of the copyright law. If a designer provides services as a work-for-hire, or if a designer hires a supplier as a work-for-hire, the party executing the work under the work-for-hire status loses all rights, including the right to terminate the rights transferred after the 35-year period provided under copyright law. The work-for-hire status can come into existence in two ways: 1) an employee creating a copyright in the course of the employment; or 2) a freelancer creating a specially ordered or commissioned work, if the work falls into one of several categories defined under copyright law and both parties sign a written contract agreeing to consider the artwork as a work-for-hire.

For a design firm this can create some problems. For example, since most design firms are businesses, this means that the partners in design firms do not own the copyrights for the work they create. Since most partners are employees of the firm, the firm owns those copyrights, just as it owns the copyrights created by any other employee. If a partner wants rights to what he or she has created, a special contract will be necessary. Also, a salaried employee may request or negotiate a written contractual agreement that allows the employee to retain some copyright ownership.

For freelancers, the categories of specially ordered or commissioned works that can be work-for-hire include: a contribution to a collective work, such as a magazine, newspaper, encyclopedia or anthology; a contribution used as part of a motion picture or other audiovisual work; and a supplementary work, which includes pictorial illustrations done to supplement a work by another author, a compilation, an instructional text, test or answer material for a test or work for use in an atlas.

Commissioned design rarely falls into a category that can be work-for-hire, as defined under the copyright law. Corporate attorneys often rely on work-for-hire because they lack complete understanding of the tradition of creative rights or experience in defining the limited rights that their employers actually need. On the other hand, some firms may use work-for-hire with the intent of reselling the design in some form.

Contractual safeguards.

Often the term "work-for-hire" is loosely used to mean a buyout or the transfer of all rights. It is important to understand that work-for-hire is defined in the copyright law, but neither "buyout" nor "all rights" has a universally agreed upon definition. To avoid ambiguity, designers should spell out the rights transferred by type of use, media of use, duration of use, geography of use and any other description that makes clear what the parties intend. Ownership of any physical objects contained in the work should also be clarified, and may have a bearing on whether sales tax has to be charged.

Unless generous compensation is given to cover all conceivable future uses, the designer should seek to transfer only limited rights to the client. The client's desire for work-for-hire or all rights is often for the purpose of preventing the client's competitors from using the design or images in the design. The client can be protected against such competitive use by a simple clause in the contract stating, "The designer agrees not to license the design or any images contained therein to competitors of the client." This might be accompanied by the client's right of approval over some or any licensing of the design and incorporated images. The designer would then have to include similar restrictions in contracts with suppliers.

Sources of copyright information.

Legal Guide for the Visual Artist (Tad Crawford) contains an extensive discussion of copyright. *Business and Legal Forms for Graphic Designers* (Eva Doman Bruck, Tad Crawford) has forms for copyright applications, copyright transfers, licensing and specifying rights either with a client or a supplier.

The Copyright Office makes available free information and application forms such as Form VA for a work in the visual arts. To obtain this information, the designer should request the Copyright Information Kit for the visual arts. The application forms and Copyright Information Kit are available from the Copyright Office, Library of Congress, Washington, D.C. 20559. Forms from the Copyright Office can also be requested by calling a telephone hotline: 202 707 9100. The public information number for the Copyright Office is 202 707 3000. Also, as mentioned earlier, the Copyright Office has a site on the internet at www.loc.gov/copyright/ that offers information about copyright and the functioning of the Copyright Office as well as downloadable forms.

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Aquent connects design professionals with their clients' project work and permanent positions in 57 cities in 12 countries. Companies work with Aquent when they need to hire pre-screened and qualified creative talent on a project, freelance or permanent basis. By working with Aquent agents with industry expertise and an exclusive Online Portfolio System, clients find the creative talent they need.

As the Official Talent Agency of AIGA, Aquent supports designers in their pursuit of professional success through generous financial support of AIGA activities, including the AIGA Design Business and Ethics series. Aquent was also the first company to offer benefits to freelancers and is a strong advocate for appropriate levels of compensation for design professionals and respect for their contribution to effective business solutions.

To locate an Aquent office near you, call 877 2AQUENT/800 622 8367 (in North America) or visit www.aquent.com.

"Guide to Copyright" is one topic in the AIGA Design Business and Ethics series, a range of publications dealing with ethical standards and practices for designers and their clients. New topics will be added to the series regularly. Additional copies can be downloaded from www.aiga.org. For more information on solving communications design problems or hiring a professional designer, visit www.aiga.org.

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