

WHOSE © IS IT, ANYWAY?

An Introduction to Copyright Law
As it Relates to Design, Advertising
And Communications

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It comes up regularly in our practice. “I paid a photographer to shoot these pictures last year, but now he wants me to pay again when I reprint the brochure.” “We paid for this illustration. We should be able to use it when and where we want. It’s ours.” “What do you mean I have to ‘buy-out’ the copyrights? I just bought the photographs, didn’t I?”

Welcome to the puzzling and sometimes contentious realm of copyright law. It’s an area in which every marketing director, public relations director, company owner and manager should be at least modestly conversant. In my experience working with dozens of such clients over the past decade and a half, however, it seems that very few are. Yet copyright law is one of those areas that it’s easy to “get your fingers in a wringer,” to sanitize an old country expression. As with trademarks and model releases, infringements can be not only unpleasant, but downright painful.

In recent years the courts have interpreted copyright laws ever more strictly, giving clients less leeway and creators more power and authority over their work.

Here’s an overview of what it’s healthy to know about the law. (Disclaimer: I’m no copyright lawyer. But I’ve worked with a few of them and read enough to develop a working knowledge. Anybody involved in communications should do the same.)

First, A Couple of Definitions

Copyright is a section of the law that deals with “intellectual property”—property created by the mind. Unlike “real” property, it is based solely on ideas and the expression of ideas. In communications, intellectual property can consist of photos, illustrations (drawn by hand or with computers), videos, CDs, packaging, brochures, mockups, prototypes—any original creation.

Ideas cannot be copyrighted—only their tangible expression. (Remember Apple’s famous lawsuit against Microsoft regarding the Windows graphical user interface? Apple lost. The idea of a GUI could not be protected; only its actual expression could.) The legal definition of a copyrightable work is an original creative work fixed in a tangible medium. Importantly, the moment the work is created, the author owns a copyright in it. Registration is not required, nor is the little “circle-c.”

A copyright is actually comprised of five separate rights; each has value. These are the right to reproduce the work, the right to make derivative works from it, the right to display the work, the right to distribute the work and in performing arts, the right to perform the work.

It used to be assumed—and frequently still is—that a client owns all artwork, mechanicals, photos, illustrations, etc. comprising a finished work.

This was never true of course, and is less true today than ever. In recent years, the courts have decided the only thing the client owns is the final product—25,000 annual reports for example, or the two-color newspaper ad that ran three times in a local paper. The rights of authorship—copyrights—have been interpreted to apply not only to photographers and illustrators, but to designers, design firms, ad agencies and the like as well. (By the way, copyrights and trademarks are two very different things. More on trademarks in another white paper.)

Now For a Couple of Horror Stories

As you can imagine, the laws outlined above can bring clients, communications firms and creative artists into quite contentious circumstances. To illustrate, let me share just a few copyright conflicts witnessed firsthand.

- A major national energy company had created a highly effective safety education program for use with elementary schoolers. The work was built heavily on hip, funky illustrations. The program was working so well the company decided it would license it to other power companies—but was nearly precluded because the illustrator wanted re-use fees even larger than the original commission. (The artist was well within the law of course, and had every right to profit further from his copyright. The most contentious issue became the pricing.)
- We commissioned photos for a retailer's catalog, which we subsequently used for nearly five years in annual editions. (Contrary to popular opinion, some fashions do not go out of style!). In annual licensing fees, total use fees ultimately exceeded the original commission by a significant margin. Once again, our photographer was well within his rights.
- In another instance under extreme deadline duress, we were prevented from making copies from slides labeled with a photographer's copyright notice. We had to track him down and get a written release before the operator would run the copies. Even copy shops have become spooky about copyright violations; they know they can be held liable for infringements too. There have been other, more violent copyright encounters reported in the trade press. Suffice it to say that this is real law we're dealing with.

Other Hazards on the Course

Certainly there are financial implications to dealing with copyright, hinted at above and addressed more below. But there are significant other liabilities that can arise when copyright law is not understood. Consider the following scenarios:

- Model releases on a client's letterhead release that client to use photos for any promotional purpose. Retaining the copyrights, the photographer subsequently sells some of those photos to another client. The releases do not cover that use.
- Photos are commissioned and shot for your company. They subsequently appear in another company's work. Because the photographer retains rights, this is perfectly legal.
- The photographer subsequently sells all rights in an image shot for you to another party. You are precluded from using your "own" photograph.
- Photos shot for your company subsequently appear in a "royalty-free" collection downloadable from the Internet.

A Win-Win Solution

It may appear that I'm banging on photographers and illustrators as if they're greedy opportunists. This is not my intent at all. In fact, in our negotiations on behalf of clients, we seek to fairly represent the interests of both clients and suppliers. It's for this reason that we've developed what we believe is the most equitable arrangement for all concerned.

In our experience, the best solution to the copyright confusion is quite simple: acquire the copyright when you acquire the work.

With an understanding of the law and of the creator's rights, you would naturally expect to pay something extra for the copyright. In no instance in recent memory, however, has a client said to me, "Oh yeah, we should pay extra for that."

With the most rights-savvy and higher quality suppliers, you're going to encounter this. On the other hand, there are plenty of photographers and illustrators who as a matter of course assign all rights on payment. We have also encountered those who will not part with their copyright at any reasonable cost. In that instance, it's your right to determine whether you'll commission them. We have gone both ways on that one.

But, acquiring all rights is the only way to conclusively protect yourself from:

- seeing your image reproduced in other works
- being precluded from unlimited, exclusive worldwide use
- paying recurring licensing charges.

What does it cost to acquire all rights? It varies greatly with the individual supplier. We have seen quotes ranging from two to three times the cost of the original shoot to 50% of the shoot to a simple per-image buyout. Likewise with illustrations. Rights fees are typically negotiable, but once again it depends on the supplier.

To acquire all rights, be sure you have specified this in your purchase order, and request that the author likewise indicate it on the final invoice with language such as "all rights transferred to buyer with full payment of this invoice."

For nearly 10 years, we've counseled our clients to use this approach. In recent weeks alone, I had two requests for CDs of photographs that were one and four years old. In neither instance did we have to have any conversation about copyrights. In both cases our clients had followed our advice to pay a little more and acquire all the rights when the images were created.

Some useful links for more on copyright law:

The Copyright Web Site. <http://www.benedict.com>. Maintained by attorney P.J. Benedict O'Mahoney. Special focus on the Internet and copyright, with many additional links.

Copyright in Visual Arts. <http://www.fplc.edu/TFIELD/CopyVis.htm>. A very nice overview of copyright implications for communicators.

U.S. Copyright Office. <http://lcweb.loc.gov/copyright/>. Information ranging from general provisions to specific concerns.

Electronic Frontier Foundation. http://www EFF.org/pub/intellectual_property/. Mountains of information and articles here, but you're going to dig a bit to find it all.