

COPYRIGHT FAQ'S

The Warrior Queen's Guide to Contracts

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General Copyright Questions

What is copyright?

Copyright is a "bundle of rights", infinitely divisible, where each separate right of reproduction (or usage) can be transferred individually or collectively by the copyright owner to another individual or entity.

The rights of copyright include:

- a. the right to reproduce or copy a physical object for intended dissemination to the public.
- b. the right to distribute the reproductions made from the original.
- c. the right to publicly perform (such as a copyrighted piece of music or choreography)
- d. the right to display works.

What is the purpose of copyright?

According to the US Constitution, Article 1, Section 8, the purpose of copyright is "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries".

What is copyrightable?

Any original expression of an idea fixed in a tangible form is copyrightable. Ideas themselves are not copyrightable, unless they are put into a fixed and tangible form.

Are rights of copyright separate from ownership of the original artwork?

Yes, they are. Here's what the statute itself has to say:

Section 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

What that means is, when you sell or license your rights of copyright and deliver a "material object" to your client (i.e., original artwork, a transparency of the artwork, or a scan or digital file on a disk), that material object is not part of the sale. Ownership of the "material object" remains with the artist, unless there is an agreement in place between you and your client that transfers ownership of the material object to your client or a third party.

Conversely, if you sell an original artwork, no rights of copyright are transferred to the purchaser of the material object (the artwork), unless there is an agreement specifically granting those rights of copyright-- which may be subdivided in any way that makes sense to you and the artwork's purchaser. Also, if you sell a copy of an original (i.e., fine art prints of one of your artworks), you are only selling the physical copy -- no rights of copyright are transferred along with the material object (in this instance, the fine art print).

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Who can own a copyright?

Any individual or entity (such as a corporation) can own a copyright.

How does a person get a copyright in something that they have created?

You automatically own the copyright of anything original that you have ever created in a fixed form. If you have painted a picture, written a poem, song, or story, composed music, created the choreography for a dance--you already own the copyright to that creation.

How does a person lose a copyright in something that they have created?

It used to be the case-- prior to the Copyright Act of 1976-- that you could lose the copyright in your creation if you did not attach proper copyright notice to the creation in question. Since 1978 (when the new law went into effect), the only way you can lose copyright in your creations is if you sign it away in writing. Still, it's always best to have proper copyright notice attached to your work as your best defense against infringement. Better still, REGISTER your copyrights with the Copyright Office of the Library of Congress,

What is proper copyright notice?

Proper notice should read like so:

Copyright, Copr., or © (YOUR NAME HERE)(the year date of the creation of the work).

So---for a painting I create this year, proper notice would read

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How long does copyright last?

The term of copyright lasts for the creator's life, plus 70 years. In the case of works created anonymously, under a pseudonym, or as a "work-for-hire", the term is 95 years from the date of first publication, or 120 years from the date of creation, whichever term is shorter. After that time, the copyrighted work goes into the public domain, where anyone can use it freely.

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Granting your Rights of Copyright

When you say that "Copyright is a 'bundle of rights', infinitely divisible," what exactly does that mean?

The heart of any contract that any artist signs in the course of their work consists of two things:

- * the grant of rights the artist is giving to the client
- * the consideration (or money) that the artist receives from the client in exchange for that grant of rights.

The key to getting the most out of every piece of artwork you create is to craft your grants of rights as narrowly as you can, and to get as much consideration for each of those grants as you can get.

For instance, would you knowingly grant a magazine publisher the right to use your artwork on coffee mugs and tea cozies? If you sign an agreement that grants the publisher "all rights" or "the right to sublicense the work to third parties", without specifying that you are to be paid extra for those uses, or reserving those rights to yourself-- the publisher may be able to make whatever they like out of your work.

What are the ways to craft a grant of rights, so that the artist can maximize the use and profitability of their images?

There are as many ways to craft a grant of rights as there are ways to use artwork. Here are some of the criteria you can use:

Exclusivity vs. Non-exclusivity:

When you grant an exclusive right to a client, that means no one else can use the artwork the exact same way, under the limitations of the grant. A non-exclusive grant may be used by many different clients in exactly the same way. Exclusive grants of rights will cost the client more (because the artist is restricted in their selling of that image to other parties for the same use). Exclusive grants must, by law, be made in writing; non-exclusive grants need not be (but should be for your and your clients' protection).

NOTE: A non-exclusive grant of rights that isn't limited in any way (by time, geography, media, market, etc.) can damage your ability to make exclusive grants of rights in the artwork.

Category of use:

Specify what kind of license you are granting-- advertising use; editorial; publishing; corporate; TV; electronic; use on wholesale/retail goods; etc. You can usually tell the

category of use that your work falls into by what your client's main business is. If you're in doubt, ask!

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Medium of Use:

Specify the media or item(s) in or on which the work will appear; billboards, brochures, magazines, newspapers, hardcover trade book, mass-market paperback, business-to-business communications, television commercials, on-screen use for a movie or TV show, web usage, greeting cards, giftwrap, apparel, housewares, mouse pads, coffee mugs, doormats, house flags, decorative switchplates, etc., etc., etc. The more specific you are in delineating the media of use, the narrower your grant of rights; that means there are more uses to which you can put your work.

Geographic Area, or Territory of Use:

This can be as specific as you make it. If you're working with a magazine or newspaper that only distributes within your city, limit their use to your city alone. If you're creating a greeting card for a company that only sells cards in North America, grant them North American rights only, and keep the other 6 continents for yourself.

"World Rights" and "Rights Throughout The Universe Now Known Or Heretofore To Be Discovered" should only be granted to companies who can actually utilize them-- and they should pay you accordingly!

Time Period, or Term of Use:

Again, the shorter the term of use, the more times you can sell the artwork. The only caveat I would make here is for artwork that is meant to be used on items that are for retail (like greeting cards, housewares, etc.). A longer term-- within reason-- might be more beneficial to the artist, if the item sells well and the artist is earning royalties on each unit sold. It can take a couple of selling seasons for an item to take off at retail, so it can benefit the artist to grant an initial term of at least 2 selling seasons, or as long as several years.

In general, the longer the term that you are locking yourself into, the higher your compensation (either flat fee or advance-against-royalty) should be. Avoid signing contracts that use words like "in perpetuity"-- current law will permit you to terminate that grant of rights & revert it back to yourself after 35 years, but it requires the artist to actively pursue prescribed remedies with the Copyright Office in order to do so.

The Number and /or Order of Uses:

You can specify how many times a piece is to be used; one-time use, or several times (specify how many uses, OR the period of time over which the piece can be used by the client-- i.e., 6 ad insertions within a 6 month period).

You can also specify if you are granting the client the FIRST right (or second, or subsequent) to use the artwork in a particular way.

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NOTE: Keep in mind, that if you specify that a client has the FIRST right to use the artwork and you do not limit the time within which that right must be exercised by the client, you can find yourself unable to re-use your artwork at all, if the original client never publishes. It's best to write into your grant of rights an automatic reversion to you of the first right to publish if the client doesn't exercise their right within a specific period of time-- 60 days, one year, 3 years-- whatever makes sense to you and to your client.

Here are some examples of grants of rights, and what they mean:

First North American Serial Rights -- the exclusive right to first publish in North America in a magazine or newspaper. ("Serial" refers to any publication that is published on a regular, numbered basis, i.e., in a series. If you look at a magazine or newspaper masthead, you will see that each issue has a unique Volume & Issue number.)

All Greeting Card, Notecard, Stationery, Giftwrap, and Giftbag Rights throughout the World for a Five Year term, commencing on January 1st, 2001-- The artwork can be used on any of the items specified, by this client exclusively, anywhere in the world from January 1st, 2001 until December 31st, 2005. All these rights revert back to the artist on January 1st, 2006, unless there is a provision for automatic renewal of the term.

Non-exclusive One-time Use On-Screen for Cable & Broadcast Transmission of Episode 341 of Television Program Entitled "Friends"-- Non-exclusive means that you can craft another, separate grant of rights so that your art can appear on "Frasier", too. One-time means that the network must come back to you when they re-broadcast or syndicate the program in which your art appears, or cut it from the program; cable & broadcast covers the client's ability to transmit the program with your artwork though both forms of transmission, but not through satellite transmission; television only means no print, electronic, or other use; specifying the episode of "Friends" limits the client's use to episode alone, on that program alone.

All Rights In All Media Now Known Or Heretofore To Be Invented, In Perpetuity-- You know what this means-- you have no more rights to grant. Bad as it is, it's still better than a work-for-hire!

In conclusion-- the more specific you are with your grant of rights, the more rights you have left to grant; the more rights you can grant, the more potential your work has to earn you more money.

It is possible to have your cake and eat it, too, when you divvy up the copyright cake in a knowledgeable way.

What is "work-for-hire"?

A "work-for-hire" is a work in which the creator of the work has contractually signed away his/her rights, and thus no longer enjoys any of the rights of authorship, including copyright.

There are two ways in which an original creative work can become a "work-for-hire".

- a. An employee creating a copyrightable work within the scope of his/her employment is creating a work made for hire, in which his/her employer will be the author of record (unless the employee has a contract which specifically states otherwise).
- b. An independent contractor creating a specially commissioned copyrightable work in one of ten specific categories (as specified in the Copyright Act of 1976), where the artist has signed a written contract specifying that the work being created is a "work for hire" or "a work made for hire."

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What kinds of work can be "works-for-hire"?

Work that you create for yourself (i.e., that wasn't specially commissioned by a client) CANNOT be a work-for-hire.

There are 10 categories of work that can be specially commissioned as works-for hire. If the work in question doesn't fit any of the categories, then it can't be a work-for-hire. If you have any doubt, check with the Copyright Office, or talk to someone knowledgeable about copyright.

The work must fall within one of these categories:

- * 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
- * A translation
- * A compilation, which is a work formed by collecting and assembling pre-existing materials or data

- * An instructional text
- * A test
- * Answer material for a test
- * An atlas
- * A supplementary work, defined as a work used to supplement a work by another author for such purposes as illustrating, explaining, or assisting generally in the use of the author's work. Examples of supplementary works are forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, appendixes, and indexes.
- * Sound recordings

What are the disadvantages to the artist of "work for hire" contracts?

When an artist signs a work-for-hire contract, the artist is renouncing all authorship rights that s/he once enjoyed as the creator of an original work of art. By signing a work-for-hire contract, you are saying that the other party is the author of the work; that they own the copyright; that they can use it, change it, make other works out of it, do whatever they want with your creation, because you are no longer the creator. In signing a work-for-hire contract, you become an employee for copyright purposes only; it doesn't mean that you are entitled to any employees' benefits from the commissioning party; you're still going to have to pay ALL the income taxes (and self-employment tax) on the money you earned; AND you may not even retain the right to display the work in your portfolio. (Remember, you're not the author any more. You signed away ALL your rights of copyright-- one of which was, to display the work.)

If you become a "star" in the art world, you won't be able to benefit financially from the earlier work you did as works made for hire; you don't own them anymore. And there is no way to get them back, period.

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How does a work become a "work-for-hire"?

In the case of independent contractors (or freelancers), the statute as written makes clear that there must be a written agreement between the parties that states that the work in question is a work made for hire, and that this contract must be signed by both parties prior to the commencement of the work in question. Recent court decisions have altered this to some degree-- the waters can now be muddied if the freelancer endorses a payment check from the client with a "work-for-hire" legend on the back; likewise, some megalithic corporations are attempting to tie up their freelance talents' PAST AND FUTURE contributions by having them sign blanket contracts that deem as "works made for hire" not only the current project, but all past and future work that that client may have previously or may, at some indeterminate future date, assign to the freelancer.

The reverse is true with employees (as "employee" is defined legally--a person who works for a salary, with benefits, a set place of work, and a schedule and working

conditions that are controlled by the employer). Everything an employee creates for his/her employer within the scope of his/her regular employment is a work made for hire, unless the employee has a contract with the employer that reverts the rights of authorship back to the employee.

How can an artist avoid the work-for-hire trap?

As a freelancer, you should try to avoid signing contracts that use the words "work for hire", or any similar language. If your client insists, offer them the alternative of exclusive rights for their particular need. Even an "all-rights" agreement would be preferable to a "work-for-hire" agreement, because after a period of time, you will have the option of terminating the rights transfer and reverting the rights back to yourself.

If you are an employee, you can try to negotiate rights back from your employer; if you do so, be sure to do so in writing, or it doesn't count.

What's the main difference between a "work-for hire" agreement and an "all-rights" agreement?

You can never terminate a work-for-hire agreement; once you sign one, the authorship and the ownership of the copyright in the work you created is transferred to the client for the entire term of copyright-- for "works-for-hire", that term is 95 years from first publication or 120 years from the year date of creation, whichever term is shorter. After that term, the works pass into the public domain, where everyone is free to use them.

An all-rights agreement (or any exclusive grant of rights that isn't limited as to the length of the term) can be terminated by the copyright owner at any point during a 5 year period that starts no sooner than 35 years after the grant of rights has been executed (i.e., the work's been done and paid for by the client, and published, if it was for publication). What this means is that you and your heirs can still benefit financially from your works, even if you've granted "all rights" to the works in question. There is a specific method for terminating these grants of rights that must be adhered to; be sure to refer back to the Copyright Office for specific instructions when the time comes.

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Getting the Most Out of Your Copyrights

What are the advantages of registering a copyright with the Copyright Office?

When you register your copyright with the Copyright Office, you are availing yourself of one of the cheapest insurance policies available for protecting your intellectual property. If your copyright is ever infringed upon, you must have registered your copyright before you can file a lawsuit against the infringer.

By registering your copyright prior to publication or within 90 days of the first publication of the first publication of your work, you are establishing a public record of your claim to authorship of your creation. Your registration certificate is proof of your "presumptive claim of ownership", leaving the burden of proving otherwise to the infringing party. You must register within 90 days of publication of your work, or at any time prior to the first infringement, to be entitled to the full range of remedies available under the law.

Additional benefits to registering prior to infringement are the ability to win statutory damages and the awarding of attorney's fees in any copyright lawsuit you would bring against an infringer.

How does a person register a copyright?

You need to fill out a form, and send the form, 2 copies of a published work to be registered (only 1 complete copy is needed for an unpublished work), and \$30.00 to The Register of Copyrights at the Library of Congress. You can download the forms you need online at:

<http://www.loc.gov/copyright/forms/>

It is a good idea to familiarize yourself with the different forms beforehand---there are a number of different forms for different kinds of art and text needs, and it's important to use the correct one. For the most part, graphic artists will be using Forms VA and GR/CP to register their works.

Do I have to register each work individually, at \$30 each?

NO! There are a couple of ways to accomplish group registration.

You can register groups of unpublished work all together as a collection, for the same fee. Use Form VA, and fill it out as you would for a single unpublished piece, except in Space 1 (Title) you give the title of the collection of works you are registering (i.e., The Collected Works of I.M.A. Artist, Volume 1, 1998-2000) and in Space 3(a), give the year date of the most recently completed piece in the collection.

If you are registering a published book, or a suite of prints that were published at the same time, they can be registered as a single work.

If you are registering work that you've done for periodicals over a 12 month period, you can register them all together using Form GR/CP in conjunction with Form VA, for the same \$30 fee.

When is my work considered registered?

Your work is registered as of the date that your full deposit (properly filled-out form, check, and copies of the work) is received by the Copyright Office. Since it can take as long as 6-8 months to get your Certificate from the Copyright Office, it's best to send your deposit via a trackable method of delivery that provides proof of receipt. Use USPS Certified Mail, Return Receipt, or any courier service that provides you with a dated proof of delivery.

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How can a person learn about the different forms and the other requirements for copyright registration?

I'm happy to say that this is one government office that really works for the benefit of the people! You can obtain excellent copyright information from knowledgeable professionals in the following ways:

- * Visit the website at <http://lcweb.loc.gov/copyright> to read about copyright, and to download forms & information circulars in .pdf format.
- * Mail a request for the free Copyright Information Kit to:

The Copyright Office
Information & Publications Section
Library of Congress
Washington, DC 20559

It can take some time to fulfill requests--allow 2-3 weeks for delivery of your order.

- * Call the Public Information Office at 202-707-3000; taped info is available 24 hours a day, 7 days a week. To talk to an information specialist, call weekdays from 8:30AM - 5PM Eastern Time (not available on weekends or legal holidays), and follow the phone tree instructions.
- * Use the Forms Hotline at 202-707-9100 to request registration forms and information circulars.
- * Use the Library of Congress "Fax on Demand" service at 202-707-2600 if you know what forms you'll need.

What constitutes infringement?

Strictly speaking, infringement is the unauthorized use of the copyrighted works of another party without their permission.

Making photocopies or scanning another person's work without their permission is an infringement; if you make your own art using art, photographs, text, music, etc., that was

created by someone else WITHOUT the copyright owner's express permission (and where the work being used by you is not in the public domain), you are infringing on the copyright owner's copyright.

What do I do if someone infringes my copyright?

First thing to do is REGISTER, if you haven't already done so. As long as you have registered your copyright PRIOR to the date of the infringement (the date it occurred, not the date you discovered it), you can avail yourself of the full range of legal options. Then, contact a lawyer. Guild members have access to referrals with lawyers who are experienced in copyright issues. If your means are limited, contact your state chapter of Volunteer Lawyers for the Arts; they provide free legal help for artists who fall within their income guidelines.

If your work was registered prior to infringement, a lawyer's letter may be all that's needed to address the problem.

Is there a legal test for what constitutes infringement?

Yes--if the average person would say that one artwork was copied from another, that would suffice: copying need not be exact to constitute infringement.

In a copyright lawsuit, the plaintiff (or copyright owner) must prove two things: first, that the defendant (or copyright infringer) had ACCESS to the work in question, and second, that the two works are SUBSTANTIALLY SIMILAR in the eyes of the average person.

(Note: Very often, in the case of a work that wasn't registered before infringement, the defendant will concede liability--in other words saying, "Yeah, I copied it, so what?"--thus moving the trial into the "damages" stage. This is where the difference between statutory and actual damages comes into play, and where the tactical advantage often goes to the defendant. Remember, without being able to rely on the statute, the burden of proving actual damages now rests upon the plaintiff. You can avoid this by registering your copyrights.)

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What are statutory damages? How are they different from other damage awards?

Statutory damages are the damages that the Copyright Law itself specifies should be awarded to copyright owners whose works are infringed; statutory damages can be awarded in amounts up to \$100,000 per infringement.

The difference between statutory damages and actual damages (the kind you get if you didn't register prior to infringement) is that you must prove your actual damages in that

portion of your lawsuit. This means that you, as the injured party, must find some way of proving the monetary value of the losses you suffered due to the infringement of your work. You have to hire the accountants to go through the infringers' books; you have to find some way of proving how much money you would have made if you had used your work in the same manner as the infringer. Even with a cooperative defendant, this is time-consuming and expensive.

When you are entitled to statutory damages, the judge awards the damages to you according to the what the law allows. Very often, an infringer will settle out-of-court to avoid a trial when faced with this alternative.

And what about the attorneys' fees?

When you have registered your copyright, and someone then infringes upon your copyright in your original work, you will probably need to hire a lawyer to handle your case. If you sue and you win, the judge will award you your reasonable attorneys' fees as part of your judgment. This scenario is often a powerful enough stimulant to the defendant to settle out-of-court, as the amount of the award of attorneys' fees is at the judge's discretion and can be very, very expensive to the defendant.

Another reason to register is that if you don't, then the judge CANNOT award attorney's fees--the law does not give him that option; you pay your lawyer out of your actual damages award (and the attorneys' fees can total more than the amount you win in court).

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What is "fair use"?

Fair use is a narrow exception to a copyright owner's ability to exclusively control the uses of the work in question; in general, fair use includes the use of the work in news reporting, teaching, scholarship, or research. For instance, use of an artist's copyrighted painting to illustrate an article about the artist would be considered "fair use"; but, making copies of that article to distribute to your class without the permission of the publisher of the article might not be a fair use--better to ask permission from the copyright owner of the article.

The criteria in the courts use in evaluating whether a specific instance is "fair use" or not include:

- a. the purpose and character of the use
- b. the nature of the copyrighted work
- c. the amount and substantiality of the portion of the work used, relative to the copyrighted work as a whole
- d. the effect of the use in question on the potential market value of the copyrighted work.

IMPORTANT: Fair use is a defense one would use if a copyright owner were to sue for infringement for using one of their works without permission. It's a fine point, but worth noting -- Fair Use is not an affirmative position one can take, but rather a defense against a charge of infringement (similar to a self-defense plea in a criminal case).

What about derivative works?

Derivative works require the permission of the author of the original work from which it is derived: that said, if the original work is unrecognizable as the basis of the derivative work, enforcement of the copyright in the original work would be impossible (because there not only has to be ACCESS, but SUBSTANTIAL SIMILARITY, to prove infringement.)

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Stock Art, Clip Art & Copyright

What is stock art?

Stock art is artwork that an artist has already produced (either for prior assignments or as self-generated work) for which s/he is marketing re-use rights to a variety of clients. The artist retains control over the uses to which the art will be put by selling limited rights to individual clients.

For instance, I was commissioned by a magazine publisher to create an illustration of a plate of Christmas cookies for one of their magazines; I sold only North American Serial (or magazine) rights for the specified magazine to that client. I reserved all other rights to myself. That illustration is now one of my stock pieces; I am free to sell rights to a book publisher, a greeting card publisher, a giftwrap manufacturer, a department store's promotion department, an advertising agency, a t-shirt manufacturer, or even another magazine publisher. As long as I am not selling the same exclusive rights to more than one party, I can sell the SAME illustration for ALL of the above uses.

The key is to draft your contracts to reserve as many rights as possible for your own use. In this way, YOU stand to derive the greatest benefit from your talent.

How does an artist sell the rights to existing art as stock art?

Many stock photography agencies have developed stock illustration departments. The artist signs a contract with the agency and places a minimum number of pieces with them; the artist may pay a fee for making transparencies and advertising each image in the agency's catalog. Profits from the sale of re-use rights are usually split between the

artist & agency, in a proportion determined by the contract between the parties. There are a growing number of stock illustration sources online as well.

Be aware of the terms of any contract you sign with a stock agency-- any agency that can sell rights to your work without consulting you is NOT working for YOUR benefit.

Some illustrators create their own stock catalogs, disks, or CD-ROMs and sell directly to clients through mass mailings and other self-promotion techniques. In this way, they control pricing and usage of their own work.

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What is royalty-free art? Is it the same as clip art?

Royalty free and clip art are essentially the same thing-- artwork that is either (a) already in the public domain (such as antique engravings), or (b) artwork created by an artist, in which the artist has signed away all rights for a flat fee or for an advance against a royalty paid on each CD-ROM of the artist's work. The artwork is then available for use by anyone who purchases the CD-ROM or clip-art book, for any purpose, under their license agreement with the publisher of the artwork, without the necessity of obtaining the permission of the artist. In most cases, the artist has lost all control over how, when, where, how often, and in what form the art may be used.

If an illustrator creates royalty-free art, s/he will only be paid whatever the initial agreement specifies, no matter how many times and in how many ways that art is used. If a freelance illustrator creates clip art, his/her work (especially if the artist has a discernible style) may flood the market to such a degree that original assignments no longer come in; s/he has destroyed his/her own market by creating a copyright-free glut of their own work.

Even when a royalty is paid to the artist on each CD-ROM or clip-art book sold, there is no way to control who uses the artwork; purchasers who use CD-ROMs often swap disks among themselves. Although this swapping violates the license under which they purchased the materials, there is no effective way to police such swapping. Bottom line is, the artist loses out, in every way.

(A personal cautionary tale: An illustrator friend of mine, who died 11 years ago, once did a decorative border with pumpkins and haystacks for a clip art publisher, for which he was paid \$400; every year at Thanksgiving time, I see that border EVERYWHERE---he never received anything BUT the original fee for the artwork.)

These Copyright FAQs are by no means an exhaustive exploration of the subject. Here are some other artist-friendly sources of information on copyright:

- * The Graphic Artists Guild Handbook, Pricing & Ethical Guidelines, 9th Edition; distributed by North Light Books
- * Legal Guide for the Visual Artist, by Tad Crawford; published by Allworth Press
- * Licensing Art & Design, by Caryn R. Leland; published by Allworth Press

If you haven't yet done so, be sure to visit the Graphic Artists Guild website at <http://www.gag.org>

Also on the Web, the Copyright Office, at <http://lcweb.loc.gov/copyright/>

You can download forms at <http://www.loc.gov/copyright/forms/>

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Licensing Intellectual Property In The Digital Age
New York County Lawyers' Association
New York, NY
March 10, 2000

Collective Administration of Media Photographers' Copyright Rights

by Richard Weisgrau, Executive Director
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The collective administration of copyright rights is well established in some segments of the copyright industries, particularly music and art, but it is a relatively new means of transacting business in the media photography business. It is emerging as an alternative to an agency system in which a variety of companies represent a number of photographers. While some are fully aware of the difference between collective administration systems and this existing agency system's approach to licensing rights, others do not recognize the seemingly imperceptible, but quintessential, difference: control of the license fee. This control is not evident on the surface. In fact, it is of little consequence to anyone except the photographer and the existing agencies. For media photographers the issues of increasing concern are the control of the value, alteration and subsequent nature of the use of images. Collective administration offers this control.

In decades past, beginning in the 1940's, the licensing of photography was relatively uncomplicated. Photographers licensed the original use of their images to either commissioning parties or other first time users, and they licensed any remaining rights in their images to additional users. Most photographers were and are sole proprietors, operating without the desire or regular need for staff support. Existing to create images, a majority of photographers were and are not motivated to build enterprises to serve more than their basic business needs. However, limiting oneself to such basic enterprise is to cut off sources of additional revenues which can flow from the licensing of residual rights of unpublished and previously published works. As the use of photography in publications flourished during the era of the picture magazines, assignments to produce the photographic content grew astronomically. The worldwide demand for photojournalism seemed insatiable. It did not take long for enterprising individuals to recognize this demand and develop businesses to satisfy it. The publishing world began to see names like Black Star, Magnum, Globe, PIC, FPG, and others cropping up. These agencies could provide photographers for assignment, license use of the images from those assignments, and they could license any residual rights in those images. Photographers were free to make photographs since their agents were taking care of business.

Over the years, the marketplace for images has grown larger and more diverse. Most of the great picture magazines are gone. The few that remain no longer employ photography as they did in the heyday of photojournalism. Television brought the news, documentaries and features with sound and motion into the home. The cost of distributing the printed

page has escalated. The public's taste for images has changed with the times. The cost of producing fine photography has increased. Yet, the demand for images grows and grows. Whether used in consumer, trade or corporate publications as informative content or in advertising and promotional media as persuasive content, the demand for images increases every year. This demand for images is increased by the use of images on the Internet, on intranets that connect the parts of institutions and companies, and by extranets that are beginning to connect these intranets to one another. In the decades to come, the demand for images will grow in direct proportion to the development of the global information infrastructure. What must grow with that infrastructure are systems for licensing the use of images. This need has not gone unrecognized by corporate America. Corbis, Getty Communications, Time Warner and other large corporations have moved aggressively to secure market position in this emerging information marketplace. The followers of developments in the marketplace in which these companies operate know well that dominance is a goal, not a dream of these major players.

The domination goal cannot be achieved without several things: 1) representation of a substantial volume of content, 2) control of the fee to use the content, and 3) control of access to the content. This dream of domination is not a new one. In 1989, before the merger with Warner, Time Inc. printed the following statement in its annual report: "In the future the winners in the entertainment industry will be those that control the copyrights and the means of distribution." The word "control" is worthy of comment. Notice that the word own was not used. This was not a mistake of editing or judgment. "Control" was a carefully chosen word. To illustrate, let's look at the Time Inc. Picture Library, which houses more than eighteen million photographic images. The copyrights to about one-third of the collection are owned by Time Inc. under the Work For Hire Doctrine or by contractual assignment from the photographers. Time Inc. has been licensing images from the collection for decades. It is licensing these images by all means possible, most recently on the Internet. It has secured the right to license many images, in which copyright is vested in a photographer, by contract. Under that contract, Time Inc. has sole control of the licensing fees. The contracts offered to photographers by Corbis and Getty Communications and by the companies held by them also provide control of licensing fees to the agent. These companies insist that such control is necessary to allow them to compete in the marketplace. Some contracts are non-exclusive. Others have some degree of exclusivity. Frequently, pseudo-exclusivity is a product of circumstance, since many photographers have no desire to market their own images and others do not care to deal with the problems of having more than one agent or vendor licensing residual rights. The common contractual factor is control of the fees. The common condition, regardless of contractual terms, is control of the content. All such agencies, not just the giants mentioned above, insist on the unrestricted right to license the photographer's images in any way and for any purpose. To be represented by these giants the photographer must surrender control. The photographer effectively becomes a principal without any control over the acts of the agent.

'Til recently, this system has gone unchallenged. In fact, the system has made money for photographers. Some photographers actually have abandoned the business of assignment photography to concentrate on producing independent work for distribution by agents. This paper is not a condemnation of such action or of the practices of the agencies. Instead, it is intended to describe the vision of new model for licensing copyright rights of photographers. This is a model in which the photographer, as copyright proprietor, actually retains and exercises the substantial control allowed by virtue of that ownership. This is a collective administration model, which provides for the licensing of copyright rights for both initial publication and republication rights of commissioned photography and for the licensing of the residual rights in non-commissioned photography.

This model, like any, is built to meet certain needs and within certain specifications dictated by practices of the trade with the industry. To have a thorough understanding of the model, one must understand the terminology to be employed. The definitions that follow are either current terms of art or have been fashioned to provide terminology where none has developed due to minimal experience of the trade.

* Collective licensing - a system of cooperative administration of copyright rights with non-cooperative pricing, in which rights holders combine to share the burden of administration while retaining the freedom to establish the licensing fees for the use of their works.

* Primary rights - copyright rights of higher value by virtue of use, e.g., an advertising or editorial illustration appearing in consumer, trade or educational media.

* Secondary rights - copyright rights of lower value by virtue of use, e.g., a photocopy or "quick" printed materials usually appearing in very small circulation or lesser media.

* Image file: an image or duplicate of same, regardless of the media in which captured.

* License: a permission to use certain of the copyright rights in an image.

* First generation publication right: the right to reproduce an image from an image file delivered to the user (licensee) by the provider (licenser), e.g., a photograph in a magazine or in a web site made from an image file delivered by the photographer or agency.

* Second generation right: the right to reproduce an image captured by copying by any means from a first generation licensed application, e.g., a copy of a photograph acquired by scanning a printed page or downloading a digital file from an electronic application

* Reuse right: the right to use a photograph published under a prior license for subsequent additional use, such as the republication of a photograph in a subsequent press run of a brochure, or in another application such as product packaging.

Some of these definitions, particularly those of primary and secondary rights, are debatable, as the terms have evolved to have different meaning depending on industry and segment therein and even from country to country. The terms "Primary right" and "Secondary right" have become the most problematic. Within the copyright environment, secondary has been used to describe rights to use content in both applications of lower quality and lower value. For example, the photocopying of text has been seen as secondary, while the printing of text has been seen as primary. In some European countries, the use of a photograph in print media is considered primary, while the use of the same image on cable television is considered secondary. Media photographers do not care to make such distinctions. The difference between a photograph and a digital copy of same is so imperceptible as to be meaningless in regard to the use of the image. Digital technology is eliminating the quality standard for determining whether a use is primary or secondary. The gradual disappearance of the quality distinction is coupled with another reason to abandon the words primary and secondary. The practice of determining value based upon size of audience in addition to type of media makes the word secondary useless. There is no reason to consider a cable TV use as secondary to a printed publication use. The more relevant factors for determining value are the placement and size of the image and the size of the audience to which it will be published. In short, to media photographers, use is use, and use is qualifiable and quantifiable, so fee is based on the analysis of such factors and not on broadband labeling.

Understanding the collective licensing model to be described herein requires a minimal understanding of the origin of most works to be licensed by such systems. Most professional photography is created under one of three circumstances. The most frequent is work commissioned by a client requiring certain rights to use for a negotiated fee and expenses. Photographers also engage in projects of their own with the hope of finding a market for the work thereafter. Probably the least frequent, but sometimes the most valuable, is the unplanned photograph of an unexpected situation. Regardless of origin of the work, its producers share a common dependency. To provide revenue to the photographer, the work has to enter the marketplace, be licensed and fees have to be collected. This dependency means that the individual photographer can be exploited by commissioning parties, agents and vendors. By the nature of the industry, even the smallest of clients, agents and vendors is a giant when compared in economic strength with the photographer. In the media photography food chain, Time, IBM, Corbis and Getty Communications are the whales. Photographers are the plankton. There is no balance of power, at least not yet.

Fifty years ago, media photographers banded together in an effort to bargain collectively for their rights and minimum fees. There is a complex history of that effort, which, being removed from the immediate context, will not be reported. Suffice it to say that antitrust concerns, FTC and Justice Department inquiries, denied petitions to the National Labor Relations Board, and Congress' unwillingness to vest such power in independent creators' hands, have simply forced photographers to seek other and legal means to retain control over and to protect the value of their work. The weakness of the individual can only be compensated for by collective action. With collective bargaining beyond reach, collective licensing is the only alternative with any prospect for improving the media photographer's situation.

In 1989, motivated by the previously quoted statement of Time Inc. regarding control of access and copyrights, ASMP - The American Society of Media Photographers, a business association of publication photographers with about 5000 members, began a process of investigating and evaluating the future business prospects for media photographers and the best means for ASMP to fulfill its purpose "to protect and promote" those interests. The study was completed in 1990, and the final report to the ASMP Board of Directors was adopted as the basis for strategic planning of ASMP's future efforts. The report recognized some certainties. These included the facts that within ten to fifteen years, the digital distribution of photography from provider to user would dominate the business, and that these digital systems owners would demand total control over content. It also concluded that such digital systems technology would be beyond the interest and means of most photographers, creating a reliance on systems owned by others, almost certainly large corporations. The perceived end result was that once control of the content and its value was in the hands of these large corporations, the rewards from professional publication photography would be diminished to a point where the economic benefit did not warrant the risk and hard work associated with success as a media photographer. Finally, ASMP projected that these corporations would end up owning the copyrights to many photographs, which would either be purchased outright or created as work for hire. It appeared that the incentive to be an independent, creative media photographer was threatened.

Since then, there is substantial evidence that ASMP's projections were and continue to be correct. Certain large corporations, calling themselves the "agents" of some photographers, have begun to sell royalty free images in direct competition to the royalty required images. Some have actually hired photographers to produce photography to which the corporation will own all rights. This work is marketed along side the work of the independent photographers represented by the agencies. In one case, the agencies make 50 to 70 percent of the license fee and in the other they make 100%. The idea of an agency competing with its principals seemed far-fetched a dozen years ago. It has become a

reality today. The photographers under contract with such agencies have had little alternative in the past. However, that is changing. Seeing the need for alternatives, ASMP set out in 1991 to establish one. Research provided the only feasible alternative to the status quo. Collective action was the only answer. If photographers could work collectively, it might be possible for them to leverage their effort into opportunity.

ASMP turned to the music industry as an example of what could be achieved. With the good advice and expertise of ASCAP, BMI and the Harry Fox Agency, ASMP developed an approach to establishing collective licensing for photographers. While we had hoped that one of these three entities might have wanted to expand into licensing right to use photography, that dream was quickly dispelled, as none was ready to pioneer this effort in an unrelated business. Having exhausted every effort to find an existing entity to support such an effort, in 1993, ASMP created its own licensing entity. MP©A - Media Photographers Copyright Agency was incorporated as a for profit corporation. Solely owned by ASMP, it emulated the relationship between the National Music Publishers Association and its licensing agency, the Harry Fox Agency. The MP©A set about the difficult task of building a start up enterprise. Capital was raised. ASMP members were recruited and were offered contracts that provided for maximum control to be left in the hands of the photographer.

Recently, the corporation was liquidated, and its operations were folded directly into the ASMP, as collective licensing was given top strategic priority by the Society. ASMP has transferred its educational mission to the ASMP Foundation, which it recently chartered. ASMP is concentrating on information services and collective licensing as its central missions to fulfill its advocacy purpose. This action was made easier as a direct result of a beneficial alliance formed

the ASMP and CCC, The Copyright Clearance Center, the nation's largest reproduction rights organization. Uniquely, the CCC had been ruled out as a possible ally in prior years, but due to certain policy and management changes and new strategic directions, it became a near perfect ally. CCC was already heavily engaged in the business of collective administration of copyright rights. It had an existing business with twenty years of history, and it was preparing to take its first steps in diversifying from secondary rights administration only by adding the administration of primary rights. CCC had or was developing the systems, so MP©A, which represented content owners whose work was well suited for primary rights licensing, did not have to build its own systems. When the alliance was first agreed to, the MPCA represented about 400 ASMP photographers. Today, the MPCA program of ASMP represents about 650, and the number grows daily. About 70% of these photographers have placed images into the CCC's online marketing and licensing system, MIRA. With approximately 70,000 images online, MIRA is still an infant in a world ruled by giants, but growth is inevitable, as more and more photographers become disillusioned with the terms of working with the giants, and as the giants demonstrate that their quest for dominance leaves little room to protect the value of photographers' images.

The ASMP, recognizing how long it took to establish flourishing collective rights administration in the music business, is nothing less than pleased that in a few short years it has helped established viable collective administration of media photographers' rights. With nothing less than a zealot's fervor, ASMP is continuing its fifty-five year history of protecting and promoting the interests of media photographers, by making the establishment of collective licensing systems for photographers its highest priority. The battle for control is not ending. It is just beginning.

ASMP has strategic plans to introduce collective licensing into four major areas. These are:

- * Licensing of residual publication rights in existing photography.
- * Licensing of rights to reuse previously licensed photography.
- * Licensing of rights to make copies of published photography.
- * Licensing of publication rights to commissioned photography

Once these goals have been accomplished, the media photographer can concentrate on making images, while copyright rights to her or his works are administered by a collective from the moment of creation to the moment copyright protection expires. This cradle to grave approach will take years to implement, but it is the inevitable, and currently the only means of allowing media photographers to protect the value of their work in the marketplace.

Licensing of residual publication rights in existing photography.

This program provides photographers with the opportunity to license their images collectively to a wide array of users via an Internet accessible service, named MIRA, operated by the CCC, Copyright Clearance Center. Photographers select photographs, which are then scanned at the photographers' expense. Scanned images, after being converted into a popular digital image format, are coupled to identifying text data and stored in a database. This database feeds an Internet server, and rights management software tracks everything from the photographers' prices to the final licensing details.

Each image in the system bears a unique identifier, e.g., MPCA0825A001. This number indicates that the image is covered under the MPCA contract (ASMP's licensing program); that its copyright owner is ASMP member #0825, and that it is image A001. This number can be used to identify the image forever. The numbers are assigned by software, and no number can be duplicated.

The images can be retrieved by a variety of search criteria at MIRA's Worldwide Web site. Any image retrieved can be licensed for a variety of uses. A fee for non-exclusive rights, based upon a variety of factors can be obtained online, as can be the license for use. Exclusive rights can only be obtained, where available, by direct contact with the service. The automated pricing, established by each photographer, does not extend to exclusive uses. Should a user wish a license that is beyond the scope of the automated system, the photographer is contacted to approve the transaction, including price. This system has already proven that the traditional agencies' stated need to control the price of content in their systems is unsupportable. The agencies mantra of need is supported by a claim that administration of hundreds of photographers' prices within the same system would cause chaos. Now proven untrue, the real reason for the control of prices becomes clear. The traditional agencies want control of fees so that they can price licenses to assure sales, regardless of the impact on the value of the photographers' works. In a 1999 survey of members who earn more \$30,000 a year in revenues from residual rights, ASMP found that the photographers, when licensing their own work, received higher fees than their agents for the licenses of the same nature as those sold by their agents, and that their average sale was higher than that of their agents' average sale. This helps demonstrate that agents do not protect the value of their photographers' works. It is a further justification of the need for and example of the benefit to be derived from collective licensing.

Licensing of rights to reuse previously licensed photography.

This program is not functional at the time of this writing. It is a system in development and in a very early beta test stage. The Eastman Kodak Company is working with ASMP to develop the system, and has committed to be its first user.

When an image is created at the request of a commissioning party, certain rights are negotiated for a license fee plus production fees and expenses. At times, the commissioning party will want to secure additional rights for additional uses in the future (reuse). The commissioning party can be disadvantaged in any negotiation for these rights, since the photographer controls the rights to an image, which the user is committed to use. Consequently, in many cases, the commissioning party insists upon purchasing all rights in the initial transaction. This results in tensions in the business relationship and more rights being purchased, presumably at higher cost, than needed. Research has shown that many users demand use all rights transactions because there is no effective means to assure fair pricing in a future negotiation, and because there is no rights management service to track the rights to images granted and used. This absence of tracking capability also leads to defensive posturing by users who fear any mistake will make them a target of an infringement claim. This reuse system will eliminate both concerns.

The reuse licensing program requires that the commissioning party and the photographer subscribe to the service, while only the photographer must grant licensing authority to the service provider. The system is fully automated and will operate either as an Internet or intranet application.

The system is designed to employ the initial negotiated fee as a factor for use in determining the fee for a reuse. To do that, a complex process of gathering and evaluating pricing data was required. Through that process, the relationship of values of different types of usage was plotted. There is a percentage relationship among the fees charged for different types of licenses when pricing the value of residual rights, such as those licensed in the previously explained system. Deducing that relative values that are acceptable in one kind of licensing should be acceptable in another, those percentage relationships were installed in a database program (the calculator). Users and photographers will have copies of this calculator to evaluate these relationships as they negotiate.

When the fee for the license to use the image in the initial (commissioned) application is agreed, it is entered into a rights management database, along with pertinent data about the image and the transaction, including a digital copy of the image. At a later date, should the user wish to reuse the image in any manner, it accesses the rights management database and records the details of the desired new use. The calculator factors the fee-determining ratios and the original usage fee, generating the reuse fee. A license is then issued by the system, and the user is now permitted to use the image. The system invoices the user, collects the fee, and pays the photographer. A flat fee for service is deducted from the photographer's license fee, and the user is assessed a flat fee for the transaction. Flat fees are charged because the cost of a transaction is the same regardless of the size of the license fee.

The system will reduce the probability of suits for copyright infringement. When participating in the system, the photographer agrees not to file a suit for an unauthorized use by the participating user, but rather to rely upon the systems' determination of value in the event of the failure of a user to secure license for a reuse. In effect, participation

in the system is seen as due diligence on the part of the user by the photographer who will forgive an omission, provided that the required fee is paid when such an omission is discovered.

Licensing of rights to make copies of published photography.

Photographers' images are published in many applications and different media. Today's technology makes copying those images, while retaining high quality, a very easy task. The quality of a scanned image is close to the quality of the printed image of which the scan is made. The quality of a downloaded digital image file is identical to the copied file. Copying no longer means inferior quality. It is a viable means of content acquisition. Anticipating the need to make licenses available for such copying and subsequent use, ASMP is fostering the development of automated licensing of such copying. This second generation licensing will be of growing importance in future years as scanner technology continues to improve, and as the Internet develops into an even greater communications tool.

Second generation licensing requires that images be published with an identifier that is readable by the prospective licensee. This identifier will be a number that identifies the photographer and the image. Any application containing the image would display information about how and where to receive a license to download or scan and use the image by providing the identifier and the details of the desired use. CCC has the technology and systems in place to license these rights. Adaptation of the MPCA reuse licensing system's rights management application, coupled with same pricing schematic MPCA developed for photographers working through the MIRA system, would allow ASMP to license these rights.

The success or failure of such a system is dependent upon the cooperation of publishers, which must be willing to display identifiers linked to images and contact data for licensing information. It is quite conceivable that this will result in a revenue sharing arrangement between photographers and print and electronic publishers. Technology makes strange bedfellows on the path of progress.

Licensing of publication rights to assigned photography

Last to be described is the system that would actually be the beginning of a licensing chain in which the programs previously described would follow. Within ASMP, about ninety percent of members earn the major portion of their income from assignment photography. While most members engage in licensing existing (stock) photography, it provides only supplementary income. This fact clearly demonstrates the need for some collective administration of the rights to assigned work.

The fact that commissioned work is usually the object of some negotiation between the parties means that it cannot be automated until after a deal is agreed. This complicates any collective licensing attempt, since many photographers and clients want to maintain flexibility to meet each other's needs. Pricing photography is complicated, as the skill of the photographer, coupled with the complexity of the job, are subjective values. This is especially true in advertising and corporate photography. Editorial photography, on the other hand, fits a neater mold. Most publishers have an established fee structure for a set of rights, and most photographers accept it, since there is an ongoing process of evolving practices of the trade which has proven effective over the past four decades. The existence of these trade practices make editorial photography more suitable as a proving ground for collective licensing. While no system has been created or even designed at this point, in 1996, the ASMP's Board of Directors did create policy that would allow the incorporation of such an effort into ASMP's strategic plan, with subsequent operational planning and execution depending upon budget approvals. It is only a matter of time before ASMP acts on this aspect of collective licensing. It has chosen to work the chain backwards to take advantage of the more automatable processes of licensing the rights to existing images. The systems being developed for that licensing will make the task of implementing the more difficult assignment rights program easier.

In a collective licensing program for editorial assignment photography, the administrator would primarily exist to issue licenses, manage rights, collect fees, and distribute royalties. While it could recommend appropriate fees, the final decision on fees to be charged would be the photographers'. This is the difference between a collective licensing and a collective bargaining service. Terms and conditions governing the transaction, as previously mentioned, are usually governed by practices of the trade. Where they are not, the collective could employ publisher-specific contracts.

A collective licensing system would reduce the costs of all the parties involved. It would free the photographer and publisher of administrative burden, including rights management and excessive. A publisher could be invoiced once a month, with full accounting details on the invoice. The invoice would include all work performed and delivered within given period. The publisher would issue one check for the invoice. The collective would then distribute checks to individual photographers. In the process, each publisher would have access to a database of all the work it commissioned and accompanying rights. This could be an invaluable reference tool.

Interlocking systems

Once these systems are individually completed and operational, they will be tied together. Collective administration of rights will be pervasive in the field of media photography. Photographers will have their rights administered from point of creation and throughout the useful life of the work. Photographs created on assignment will be available for automatic reuse by the client, and, if available for licensing remaining rights, photographs will automatically be entered into online marketing services for further distribution. Published assignment and stock images will be identifiable as to source of rights. Users of photography will be able to obtain licenses with automated ease. Photographers will be able to concentrate on creating images. Collective licensing will bring better profitability to user and provider. Collective licensing is the inevitable solution to administering media photographers' rights in the information age.

Internet addresses

- * ASMP www.asmp.org
- * MP©A www.mpca.com
- * CCC www.copyright.com
- * MIRA www.mira.com

U.S. Copyright Office Forms

Copyright Office application forms are available in Adobe Acrobat PDF format, which requires the latest Adobe Acrobat Reader program. Fill-in versions may be completed online and then printed.

Forms submitted to the Copyright Office must be clear, legible, and on good quality 8.5-inch by 11-inch white paper. The office produces completed registration certificates by scanning the submitted applications. Thus, poorly printed applications will result in poor-quality registration certificates.

Important Printing Instructions:

- * Print forms head to head (top of page 2 is directly behind the top of page 1).
- * Use BOTH SIDES of a single sheet of paper. (Note: Short forms are one-sided.)
- * Dot-matrix printer copies are not acceptable.
- * Inkjet printer copies require enlarging if you use the Shrink to Fit Page option.
- * To achieve best results, use a Laser Printer.
- * For more information, read Printing Solutions for PDF forms.

The forms below may also be downloaded from our FTP site. In addition, you may request Forms by Mail.

NOTE: Filing fees are effective through June 30, 2002. After that date, please check this website or call (202) 707-3000 for the latest fee information.

10 Big Myths about copyright explained
(<http://www.templetons.com/brad/copymyths.html>)

An attempt to answer common myths about copyright seen on the net and cover issues related to copyright and USENET/Internet publication.

- by Brad Templeton

Note that this is an essay about copyright myths. It assumes you know at least what copyright is -- basically the legal exclusive right of the author of a creative work to control the copying of that work. If you didn't know that, check out my own brief introduction to copyright for more information. Feel free to link to this document, no need to ask me. Really, NO need to ask.

1) "If it doesn't have a copyright notice, it's not copyrighted."

This was true in the past, but today almost all major nations follow the Berne copyright convention. For example, in the USA, almost everything created privately and originally after April 1, 1989 is copyrighted and protected whether it has a notice or not. The default you should assume for other people's works is that they are copyrighted and may not be copied unless you know otherwise. There are some old works that lost protection without notice, but frankly you should not risk it unless you know for sure.

It is true that a notice strengthens the protection, by warning people, and by allowing one to get more and different damages, but it is not necessary. If it looks copyrighted, you should assume it is. This applies to pictures, too. You may not scan pictures from magazines and post them to the net, and if you come upon something unknown, you shouldn't post that either.

The correct form for a notice is:

"Copyright [dates] by [author/owner]"

You can use C in a circle © instead of "Copyright" but "(C)" has never been given legal force. The phrase "All Rights Reserved" used to be required in some nations but is now not needed.

2) "If I don't charge for it, it's not a violation."

False. Whether you charge can affect the damages awarded in court, but that's essentially the only difference. It's still a violation if you give it away -- and there can still be heavy damages if you hurt the commercial value of the property. There is an exception for personal copying of music, which is not a violation, though courts are right now deciding if that includes such widescale personal copying as Napster.

3) "If it's posted to Usenet it's in the public domain."

False. Nothing modern is in the public domain anymore unless the owner explicitly puts it in the public domain(*). Explicitly, as in you have a note from the author/owner saying, "I grant this to the public domain." Those exact words or words very much like them.

Some argue that posting to Usenet implicitly grants permission to everybody to copy the posting within fairly wide bounds, and others feel that Usenet is an automatic store and forward network where all the thousands of copies made are done at the command (rather than the consent) of the poster. This is a matter of some debate, but even if the former is true (and in this writer's opinion we should all pray it isn't true) it simply would suggest posters are implicitly granting permissions "for the sort of copying one might expect when one posts to Usenet" and in no case is this a placement of material into the public domain. It is important to remember that when it comes to the law, computers never make copies, only human beings make copies. Computers are given commands, not permission. Only people can be given permission. Furthermore it is very difficult for an implicit licence to supersede an explicitly stated licence that the copier was aware of.

Note that all this assumes the poster had the right to post the item in the first place. If the poster didn't, then all the copies are pirated, and no implied licence or theoretical reduction of the copyright can take place.

(*) Copyrights can expire after a long time, putting something into the public domain, and there are some fine points on this issue regarding older copyright law versions. However, none of this applies to an original article posted to USENET.

Note that granting something to the public domain is a complete abandonment of all rights. You can't make something "PD for non-commercial use." If your work is PD, other people can even modify one byte and put their name on it.

4) "My posting was just fair use!"

See other notes on fair use for a detailed answer, but bear the following in mind:

The "fair use" exemption to copyright law was created to allow things such as commentary, parody, news reporting, research and education about copyrighted works without the permission of the author. That's important so that copyright law doesn't block your freedom to express your own works -- only the ability to express other people's. Intent, and damage to the commercial value of the work are important considerations. Are you reproducing an article from the New York Times because you needed to in order to criticise the quality of the New York Times, or because you couldn't find time to write your own story, or didn't want your readers to have to pay for the New York Times web site? The first is probably fair use, the others probably aren't.

Fair use is almost always a short excerpt and almost always attributed. (One should not use more of the work than is necessary to make the commentary.) It should not harm the commercial value of the work -- in the sense of people no longer needing to buy it (which is another reason why reproduction of the entire work is generally forbidden.)

Note that most inclusion of text in Usenet followups is for commentary and reply, and it doesn't damage the commercial value of the original posting (if it has any) and as such it is fair use. Fair use isn't an exact doctrine, either. The court decides if the right to comment overrides the copyright on an individual basis in each case. There have been cases that go beyond the bounds of what I say above, but in general they don't apply to the typical net misclaim of fair use. It's a risky defence to attempt.

Facts and ideas can't be copyrighted, but their expression and structure can. You can always write the facts in your own words.

See the DMCA alert for recent changes in the law.

5) "If you don't defend your copyright you lose it." -- "Somebody has that name copyrighted!"

False. Copyright is effectively never lost these days, unless explicitly given away. You also can't "copyright a name" or anything short like that, such as almost all titles. You may be thinking of trade marks, which apply to names, and can be weakened or lost if not defended.

You generally trademark terms by using them to refer to your brand of a generic type of product or service. Like an "Apple" computer. Apple Computer "owns" that word applied to computers, even though it is also an ordinary word. Apple Records owns it when applied to music. Neither owns the word on its own, only in context, and owning a mark doesn't mean complete control -- see a more detailed treatise on this law for details.

You can't use somebody else's trademark in a way that would unfairly hurt the value of the mark, or in a way that might make people confuse you with the real owner of the mark, or which might allow you to profit from the mark's good name. For example, if I were giving advice on music videos, I would be very wary of trying to label my works with a name like "mtv." :-)

6) "If I make up my own stories, but base them on another work, my new work belongs to me."

False. Copyright law is quite explicit that the making of what are called "derivative works" -- works based or derived from another copyrighted work -- is the exclusive province of the owner of the original work. This is true even though the making of these new works is a highly creative process. If you write a story using settings or characters from somebody else's work, you need that author's permission.

Yes, that means almost all "fan fiction" is a copyright violation. If you want to write a story about Jim Kirk and Mr. Spock, you need Paramount's permission, plain and simple. Now, as it turns out, many, but not all holders of popular copyrights turn a blind eye to "fan fiction" or even subtly encourage it because it helps them. Make no mistake, however, that it is entirely up to them whether to do that.

There is one major exception -- parody. The fair use provision says that if you want to make fun of something like Star Trek, you don't need their permission to include Mr. Spock. This is not a loophole; you can't just take a non-parody and claim it is one on a technicality. The way "fair use" works is you get sued for copyright infringement, and you admit you did infringe, but that your infringement was a fair use. A subjective judgment is then made.

7) "They can't get me, defendants in court have powerful rights!"

Copyright law is mostly civil law. If you violate copyright you would usually get sued, not be charged with a crime. "Innocent until proven guilty" is a principle of criminal law, as is "proof beyond a reasonable doubt." Sorry, but in copyright suits, these don't apply the same way or at all. It's mostly which side and set of evidence the judge or jury accepts or believes more, though the rules vary based on the type of infringement. In civil cases you can even be made to testify against your own interests.

8) "Oh, so copyright violation isn't a crime or anything?"

Actually, recently in the USA commercial copyright violation involving more than 10 copies and value over \$2500 was made a felony. So watch out. (At least you get the protections of criminal law.) On the other hand, don't think you're going to get people thrown in jail for posting your E-mail. The courts have much better things to do. This is a fairly new, untested statute. In one case an operator of a pirate BBS that didn't charge was acquitted because he didn't charge, but congress amended the law to cover that.

9) "It doesn't hurt anybody -- in fact it's free advertising."

It's up to the owner to decide if they want the free ads or not. If they want them, they will be sure to contact you. Don't rationalize whether it hurts the owner or not, ask them. Usually that's not too hard to do. Time past, ClariNet published the very funny Dave Barry column to a large and appreciative Usenet audience for a fee, but some person didn't ask, and forwarded it to a mailing list, got caught, and the newspaper chain that employs Dave Barry pulled the column from the net, pissing off everybody who enjoyed it. Even if you can't think of how the author or owner gets hurt, think about the fact that piracy on the net hurts everybody who wants a chance to use this wonderful new technology to do more than read other people's flamewars.

10) "They e-mailed me a copy, so I can post it."

To have a copy is not to have the copyright. All the E-mail you write is copyrighted. However, E-mail is not, unless previously agreed, secret. So you can certainly report on what E-mail you are sent, and reveal what it says. You can even quote parts of it to demonstrate. Frankly, somebody who sues over an ordinary message would almost surely get no damages, because the message has no commercial value, but if you want to stay strictly in the law, you should ask first. On the other hand, don't go nuts if somebody posts E-mail you sent them. If it was an ordinary non-secret personal letter of minimal commercial value with no copyright notice (like 99.9% of all E-mail), you probably won't get any damages if you sue them. Note as well that, the law aside, keeping private correspondence private is a courtesy one should usually honour.

11) "So I can't ever reproduce anything?"

Myth #11 (I didn't want to change the now-famous title of this article) is actually one sometimes generated in response to this list of 10 myths. No, copyright isn't an iron-clad lock on what can be published. Indeed, by many arguments, by providing reward to authors, it encourages them to not just allow, but fund the publication and distribution of works so that they reach far more people than they would if they were free or unprotected -- and unpromoted. However, it must be remembered that copyright has two main purposes, namely the protection of the author's right to obtain commercial benefit from valuable work, and more recently the protection of the author's general right to control how a work is used.

While copyright law makes it technically illegal to reproduce almost any new creative work (other than under fair use) without permission, if the work is unregistered and has no real commercial value, it gets very little protection. The author in this case can sue for an injunction against the publication, actual damages from a violation, and possibly court costs. Actual damages means actual money potentially lost by the author due to publication, plus any money gained by the defendant. But if a work has no commercial value, such as a typical E-mail message or conversational USENET posting, the actual damages will be zero. Only the most vindictive (and rich) author would sue when no damages are possible, and the courts don't look kindly on vindictive plaintiffs, unless the defendants are even more vindictive.

The author's right to control what is done with a work, however, has some validity, even if it has no commercial value. If you feel you need to violate a copyright "because you can get away with it because the work has no value" you should ask yourself why you're doing it. In general, respecting the rights of creators to control their creations is a principle many advocate adhering to.

In addition, while more often than not people claim a "fair use" copying incorrectly, fair use is a valid concept necessary to allow the criticism of copyrighted works and their creators through examples. But please read more about it before you do it.

In Summary

- * These days, almost all things are copyrighted the moment they are written, and no copyright notice is required.
- * Copyright is still violated whether you charged money or not, only damages are affected by that.
- * Postings to the net are not granted to the public domain, and don't grant you any permission to do further copying except perhaps the sort of copying the poster might have expected in the ordinary flow of the net.
- * Fair use is a complex doctrine meant to allow certain valuable social purposes. Ask yourself why you are republishing what you are posting and why you couldn't have just rewritten it in your own words.
- * Copyright is not lost because you don't defend it; that's a concept from trademark law. The ownership of names is also from trademark law, so don't say somebody has a name copyrighted.
- * Fan fiction and other work derived from copyrighted works is a copyright violation.
- * Copyright law is mostly civil law where the special rights of criminal defendants you hear so much about don't apply. Watch out, however, as new laws are moving copyright violation into the criminal realm.
- * Don't rationalize that you are helping the copyright holder; often it's not that hard to ask permission.
- * Posting E-mail is technically a violation, but revealing facts from E-mail you got isn't, and for almost all typical E-mail, nobody could wring any damages from you for posting it. The law doesn't do much to protect works with no commercial value.

DMCA Alert!

Copyright law was recently amended by the Digital Millennium Copyright Act which changed net copyright in many ways. In particular, it put all sorts of legal strength behind copy-protection systems, even limiting in some views some fair use rights.

The DMCA also changed the liability outlook for ISPs in major ways.

Linking

Might it be a violation just to link to a web page? That's not a myth, it's undecided, but I have written some discussion of linking rights issues.

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