



Copyright

by
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What is copyright?

Copyright is the exclusive right to control reproduction and commercial exploitation of creative work. Copyright is the reason designers have the ability to charge for their work product, because they are being paid for granting rights to use the work. Art directors and agencies also need to understand copyright in order to secure appropriate legal rights for their clients from vendors such as photographers, illustrators, authors, and programmers.

What does copyright protect?

Copyright protects any kind of artwork, including illustrations, photographs, and graphic design. Software and images created by software are protected. However, there are certain types of creative expression that copyright does not protect. Abstract industrial designs are not protected, even when they are recognized as icons of modern art (e.g., Bauhaus furniture). Representational art on utilitarian items, such as elaborate paintings or floral motifs on furniture and fabric designs, are protectable. Factual information, such as research results, raw data, and maps, are not protected, but unique illustrative expression comprising a map is protectable.

Typeface designs and letterforms are not protected, but type font software is protected. You can hand-trace letterforms or do your own calligraphy without violating copyright, but if you copy a letterform digitally, you will probably be violating the software copyright. Simple geometric shapes are not protected, but unique combinations of shapes and other elements may be protected. Also: titles, names, and short phrases do not qualify for copyright protection. These limitations mean that logos comprised solely of type are not protected by copyright, and some logos that are a combination of common shapes and type are not protected. Logos that include illustrative elements are protectable. (Logos are protectable as trademarks, but trademark rights will belong to the company that uses the logo as their brand; typically, your clients.)

Blank forms and “layouts” are not protected, but a unique combination of text and images, such as in a brochure or webpage, are protectable under a concept called “compilation copyright.” But the compilation has to be somewhat unique. Some websites have been denied protection because they utilized a simple grid layout.

Who owns copyright?

Except under certain circumstances,¹ you own the copyright in your work at the moment you create it in a “fixed” form of “expression.” A fixed form of expression is any tangible medium that can be perceived by humans, including traditional forms—such as paintings, sculptures, writings—and new forms that require a machine to perceive (e.g., GIF files, CDs, websites).

¹ See *"What about work made for hire?"* below

What about “work made for hire”?

Generally, the person who creates a work is considered its “author” and the automatic owner of copyright in that work under copyright law. However, there is a limited exception. Under the “work made for hire” doctrine, if you are an employee, your employer is considered the author and the automatic copyright owner of any work you create within the scope of your employment. This can be problematic for designers employed by design agencies (including individual partners who own an agency) or working as in-house designers.

You may want to ensure that you can still use your work product if your employment ends, especially work product that your employer did not use (for example, rejected logo designs). You can do this by having a written agreement with the employer saying explicitly that you can do so, which could even state that you retain copyright in your work. But even if you don’t have copyright ownership, you will want to make sure that you retain rights to keep copies of your work product and that you can show your work in your portfolio. Most copyright lawyers believe that portfolio use is fair use,² provided that the work does not disclose confidential information, and is presented honestly as work created for the employer. Nevertheless, some employers include provisions in their employee agreements that would not allow it. These provisions may be legally enforceable.

In most cases, the work-made-for-hire doctrine applies only to formal employees who are on an employer’s payroll. If you are doing the work as an independent contractor, your work can legally be “work made for hire” only if your contract specifically says so, and your work fits one of a few narrow categories. The categories relevant to designers are:

- » *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 supplementary work, such as illustrations for a book or article,*
- » *a compilation, such as a brochure or website, or*
- » *a work for use in an atlas.*

Despite these limitations, many client contracts include work-made-for-hire clauses. Whether such clauses are appropriate to the specific situation depends on what you are creating for your client and how they intend to use your work product.³

² See “What about fair use?” below

³ See “What about work made for hire?” below

What happens if the work is not made for hire?

When you perform graphic art services for a client, your client is paying for rights to use your work under your copyright. Identifying the scope of such rights can be the most important part of your contract with your client.

You own your copyright unless you sign a written assignment giving copyright ownership to someone else. In that case, your contract with your client will say something like you “assign all rights, including copyright.” But you can also give (or lend) your client just a piece of your copyright. Copyright is really a “bundle” of several different exclusive rights. For graphic designers, the relevant exclusive rights are the rights to:

- » *reproduce,*
- » *display, and*
- » *make adaptations (“derivative works”) based on your work.*

Each exclusive right in the copyright bundle can be owned separately. For example, you can give a newspaper the exclusive right to reproduce your comic strip, and you can keep the exclusive right to adapt the strip for an animated film. Moreover, you can give permission, or a “license,” under any of the bundled rights on a nonexclusive basis. For example, under your reproduction rights, you can grant a publisher the right to reproduce your painting as a book cover, and you can keep the right to reproduce it as a giclée print.

Also: it’s possible to terminate a license or assignment of rights (not a work made for hire) during a five-year period starting 35 years after the date of publication or 40 years after the date of execution of the transfer, whichever period ends earlier.

When should a client own my copyright?

Frequently, your client will want to own your copyright. That means your client will own the entire bundle of rights, and you no longer have the right to control how often, or in what manner, the work is used. This is not always necessary or appropriate. Generally, it is better for the scope of the license to closely track the client’s intended use of your work. For example, suppose you are hired to do a spot illustration for an article in a weekly magazine. Your fee is the standard, reasonable amount for that one-time use. However, if your contract assigns copyright to the magazine, the magazine can use your illustration again, for example, it might adapt the illustration to create a logo for an ongoing weekly column, without any further compensation to you.

On the other hand, if your contract grants a one-time license to reproduce the illustration, the magazine must seek your permission, in the form of another license with another fee, before it can legally adapt your illustration for the column logo. This is true even if your license to the magazine is exclusive,

that is, if you agree not to allow any other entity to publish the illustration. The magazine's rights would still be limited to the one-time use identified in your contract.

Another important reason to retain copyright is to ensure that you have the right to create similar works for other clients. If you assign copyright to one client, and then create a similar illustration for another client, the second illustration could infringe the first client's copyright in your earlier work. For example, in one case a jury found such infringement with respect to greeting cards that the same artists had created for different companies.

Obviously, for some types of work it is appropriate for the client own your entire copyright, for example, corporate identity packages, logos, websites or any other works that are intended to have an ongoing, exclusive marketing presence for your client. It would not be appropriate for you to re-license that kind of work to another client. In such situations, you should ensure that you have the continuing right to display and reproduce the work in your print and online portfolios; otherwise, you no longer need to worry about copyright.

What if my client wants my digital files?

Ownership of physical work product, including digital files, is separate from copyright ownership. This means that your client's possession of your work product does not automatically transfer copyright to your client. Unfortunately, many clients do not understand this distinction, and they may think that once they have your digital files, they can do anything they want with them. Unless you are granting copyright ownership or an unlimited license to your client, it may not be advisable to give your client full access to your native files. Instead, provide only the files the client needs to use the work for the licensed purposes.

How long do copyrights last?

U.S. copyright terms have gone through many changes over the years. Most copyrights (in works created after 1978) now last for the life of the author plus 70 years. Works made for hire last for 95 years after publication, or 120 years from the date of creation if they weren't published. Older works have different terms depending on many complicated factors, such as when they were created, and whether their original terms were renewed under older laws.

Copyright in anything created before 1924 has expired, and such works are in the public domain, meaning they are not protected by copyright. Some government works are also in the public domain if they were created by U.S. employees, for example, NASA photographs.

Internationally, most countries protect copyrights for the life of the author plus 50 or 70 years. Most other countries do not have a separate category with a different duration for works made for hire.

What is copyright infringement?

Copyright infringement happens whenever someone makes copies or commercially exploits a copyrighted work without the copyright owner's permission. Copyright is not a monopoly like a patent. The second work must actually be copied from the first work. If you just happen to create a very similar work independently, that is not infringement.

Problems often arise when one artist uses another artist's work as reference. To be infringing, the second artist's works need not be identical. The standard for infringement is whether the second work is "substantially similar" to the original work. (Contrary to popular belief, there is no "20 percent rule," i.e., you cannot escape infringement by changing something by 20 percent. Infringement is not a mathematical calculation.)

"Substantially similar" means that an average person viewing the two works would recognize that the "artistic expression" in one was copied from the other. The focus on "artistic expression" is meant to distinguish between illegal copying, which is infringement, and being inspired by someone else's work, which is not illegal. "Artistic expression" means the specific artistic choices and details that go into a work, such as composition, rendering and colors, but not general concepts such as subject matter or similar artistic style. However, courts often describe infringing works as having the same "look and feel" as the originals. Sometimes work depicting similar content in the same unique artistic style are held infringing, even if specific details are different.

Unfortunately, infringement is a common occurrence in the graphic arts. Here are some examples:

- » *A licensee re-uses the work beyond the scope of the license, as in the example above where the magazine adapts the illustration for a column logo.*
- » *An illustrator makes a painting from a photograph.* Many people think photographs are just factual records, and thus can be freely copied, or that changing the medium is sufficient to avoid infringement. This is not correct. Photographs are fully protected as copyrighted works. If you copy the artistic expression of a photograph, e.g., the lighting, point of view, composition, props, etc., you have infringed the copyright in the photograph.
- » *An illustrator copies the unique way another illustrator draws figures.*
- » *An ad campaign uses slogans, images, and page designs similar to those of another ad campaign.*

Many designers are surprised to learn that infringement occurs even when you merely copy someone's work for intermediate purposes, as in the following examples:

- » *An advertising agency creates a comp using images from an artist's or photographer's portfolio. The comp itself is an act of infringement. If a different artist is hired to create the final artwork, and that final work is substantially similar to the art that was used in the comp, it counts as a second infringement.*
- » *An image is digitally copied (e.g., scanned or downloaded) in order to manipulate it with a program like Photoshop. The mere act of making the precursor digital copy counts as a separate act of infringement, regardless of whether the final manipulated image is substantially similar.*

Who is liable for infringement?

Any person or entity involved in the unauthorized use of a copyrighted work, from the initial copying through publication and distribution, is liable for infringement, whether or not they knew that the work was illegally copied. This means that design agencies and their clients can be liable for an infringement even when they did not know that someone else's work was copied. For example, in one old case, a photograph was used in a comp without permission. The ad agency hired another photographer to do the final photograph. The original photographer sued the ad agency and the agency's client for whom the ad was created. The court awarded the photographer \$2,750 in actual damages (the fee he would have charged had he been given the final assignment), \$57,358 for the ad agency's net revenue earned from the project, plus his attorneys' fees, and an injunction preventing further use of the infringing ads. In today's market, those monetary amounts would be much greater.

Is it safe to use online images?

No. Just because images are easily found and copied online does not mean they are in the public domain. Online images are still protected by copyright unless their copyright has expired. Use of imagery found online is becoming more and more common, and infringement claims against innocent agencies and clients often result. It is important to carefully review outside vendors and their work product, and to include warranty and indemnity clauses in your vendor contracts to protect against such claims. Designers who need to use online images should ensure that they have secured proper permission to do so.

Is Creative Commons a viable option?

Creative Commons is a non-profit organization that offers free use of copyrighted works, including images, under several licensing options.⁴ Licenses for commercial use are available. All of the licenses are irrevocable. Creative Commons ("CC") is part of the "copy left" movement, which aims to foster sharing and collaboration of creative content. Users can search the CC

⁴ <https://creativecommons.org/share-your-work/licensing-types-examples/>

users must honor the terms of the particular license they choose, or face potential infringement claims. All licenses include an attribution requirement, which may not work for some design projects. However, you can contact the copyright owner to ask them to waive the attribution requirement.

If you need to make a living from your images, sharing your images through CC may not be a good idea. Many artists, especially those just starting their careers, think that any public exposure of their work is valuable, so they are willing to share their images in exchange for attribution. Although failing to provide attribution would be a breach of the CC license and a copyright infringement, courts have not been friendly to such claims. In one recent case, the court held that a photographer did not establish a basis for monetary damages because he could not show that the lack of attribution actually cost him any paying gigs, or that he was ever likely to get paying licenses for the photographs because they were offered without charge through irrevocable CC licenses.

What about fair use?

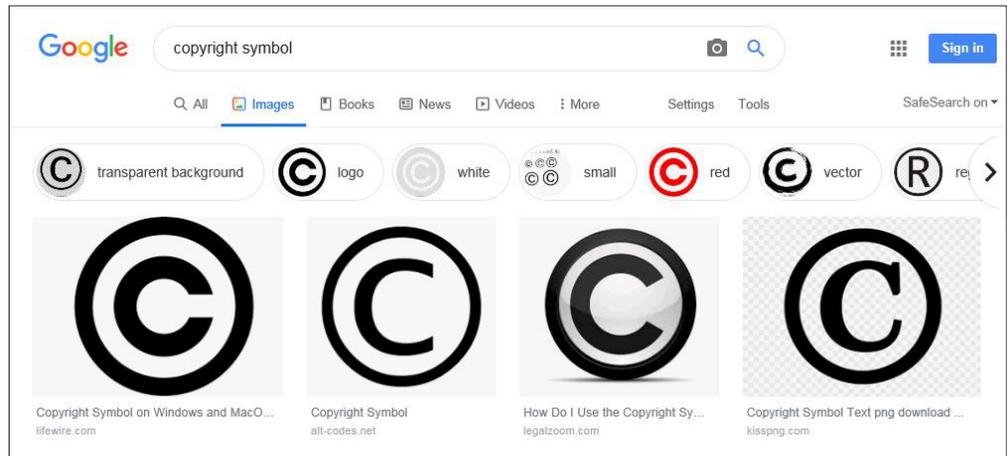
“Fair use” will excuse an otherwise infringing use under certain limited circumstances. Unfortunately, “fair use” does not necessarily correlate with what lay people would recognize as fair. In particular, giving credit to your source does not make your work fair use. The courts balance several factors to determine whether a particular situation legally qualifies as fair use:

- » *the purpose and character of the defendant’s use, including whether it is for profit* (however, that the defendant is a non-profit organization, or that the defendant did not actually make a profit does not necessarily mean the fair use defense will work),
- » *the nature and character of the plaintiff’s copyrighted work* (fictional and highly creative works get stronger protection against fair use than factual works),
- » *the amount of the plaintiff’s work used in the defendant’s work* (but even a small amount, if it is the “heart” of the plaintiff’s work, can weigh against fair use),
- » *the effect this type of use could have on the plaintiff’s market for the copyrighted work.*

These factors are weighed differently by different courts in different circumstances, and thus the outcomes of fair use defenses are hard to predict. Generally, non-commercial editorial or educational uses will be fair use, because these are closer to First Amendment speech. Parody will also qualify, but only if the work directly parodies something about the original work. For example, a Los Angeles federal court rejected the fair use defense for a parody entitled *The Cat NOT in the Hat! A Parody by Dr. Juice*, which used verses and artwork reminiscent of Dr. Seuss to mock the O.J. Simpson trial. The court did not believe the book directly critiqued Dr. Seuss.

“Transformative” works may also be fair use. A work is “transformative” when the copyrighted material is “transformed in the creation of new information, new aesthetics, new insights and understanding.” Unfortunately, this has proven to be a very subjective determination. Complex collages have consistently been found to be transformative, but other types of works have been treated unpredictably by the courts. Moreover, even if a work itself has not been transformed, a new use might be deemed transformative. For example, online displays of low-res images have been deemed fair use, as have thumbnail displays of images in a printed timeline.

FIGURE 1:
Courts have ruled that thumbnail images displayed in search results qualify as fair use.



Do I need to register my copyrights?

Most people know that you have copyright ownership as soon as you create your work. However, it is less widely understood that under U.S. law you have no rights to enforce your copyright until you have a copyright registration. The Supreme Court has ruled that you cannot go to court until the Copyright Office actually issues your copyright certificate (or issues a refusal to register the work). It can take several months to over a year from the time you file an application for the registration to issue. In many cases, waiting until you get a registration means you can't effectively deal with an infringement.

Early registration is important for other reasons as well. Generally you must have filed for copyright registration before the infringement occurs in order to have the full scope of copyright protection (the exception is if you filed within three months of the first publication of your work; in that case, you have full protection even if the infringement occurs earlier). Full protection for such early registration gives you two important remedies: the right to recover your attorneys' fees when you win the lawsuit, and the right to an award of statutory damages. Statutory damages means a jury can award you an amount of money even if you cannot prove the infringement caused you a specific monetary loss. Currently, the law sets a minimum of \$750 and a maximum of \$30,000 for basic

infringement, and up to \$150,000 in statutory damages for willful infringement. If a defendant can prove that it didn't know your work was copied, statutory damages can be reduced to \$200.

Many artists know that they cannot afford litigation, so they believe these advantages of early registration are not relevant. However, in most cases it is the possibility of a lawsuit, rather than actual litigation, that gives you the bargaining power to stop an infringement, and often, to obtain a monetary settlement. When defendants receive a letter raising an infringement claim, their first step is to determine whether you have a copyright registration that predates the infringement. If you do, they know that you are entitled to sue them for statutory damages and recover your attorney's fees. Your registration enhances their risk of both defending a lawsuit and incurring monetary damages, so they are motivated to settle. On the other hand, if they learn that you don't have an early registration, most infringers assume that you will not be able to sue them, and they will be less inclined to negotiate in good faith for a reasonable settlement.

There is no substitute for early registration. (Contrary to a popular myth, there is no "poor man's copyright"—putting a copy of your work in an envelope and mailing it back to yourself will not provide any legal protection.) The best practice is to register any work that will be seen by the public or potential clients, including your portfolio and websites. Unauthorized copying is temptingly easy, and infringements are common. Early registration is the best proactive step you can take to ensure that you will have the full power to react in the unfortunate event that your work is infringed.

FIGURE 2:
Copyright.gov
is the official
site of the U.S.
Copyright Office,
which is part of
the Library of
Congress..



Don't copyright notices protect my work?

Copyright notice used to be required to secure copyright protection when a work was published. This is no longer true, but it is still a good idea to include a notice on your work, especially work you are showing online.

The common form of copyright notice is "© [year of completion] [your name]". "Copyright" or "Copr." can also be used in place of ©.

A copyright notice prevents copyists from claiming that they didn't know the work was copyrighted. Also, under the Digital Millennium Copyright Act ("DMCA"), there are penalties for intentionally removing copyright notices, and other forms of "copyright management information" ("CMI") such as

watermarks and metadata. The copyright notice or CMI must be embedded in or immediately adjacent to the work. Courts are consistently holding that general copyright notices, for example, in website footers or links to user policies, do not qualify. Also, many courts have found that using systems that automatically remove CMI doesn't qualify as intentional removal and have denied claims on that basis.

The DMCA also allows copyright owners to report online infringements to website hosts, who (at their discretion) can remove infringing material. By doing so, the host receives immunity from infringement claims. You don't need a copyright registration to use the DMCA notice and take-down procedure. However, the notice is not a direct claim against the infringer, and there is no provision for collecting monetary damages. The infringer also has the option to file a counter-notice claiming no infringement, after which, if you don't sue the infringer within 10 days, the infringing content will be reposted.

The DMCA can be an important tool in policing online infringement, but it is not a substitute for a basic copyright infringement claim, and copyright notice is not a substitute for registration. More information about the DMCA can be found at <https://www.aiga.org/what-can-you-do-when-your-work-is-copied-online>

How do I register my work?

The Copyright Office has an online application system that should be used to register your works. Although paper forms are still available, they are disfavored and given lowest priority. It can take two years or more for a paper application to be processed. The paper forms also cost more. They will soon be eliminated altogether.

To use the online system, create an account at <https://eco.copyright.gov>. When you login, you will find tutorials that can help you work through the registration process. You can use the system to register a single work or, under some circumstances, a group of works under one registration. Here are the most important things for designers to understand for successful registration:

You must decide whether your work is published or unpublished.

It is very important to correctly designate your work as published or unpublished on your registration. Some courts have invalidated registrations that get this wrong. Under the copyright statute, there are two definitions of "published." First, a work has been "published" if copies of it have been distributed to the public with your authorization. Unauthorized copying does not count. Merely displaying your artwork to the public, such as in a gallery, also does not count.

Second, a work is "published" if it is distributed to a "group of persons" that you authorize to distribute it further, or to publicly display your work.

For online works, it is often difficult to make the distinction between what has been “published” or “unpublished,” and the Copyright Office will not help you decide. However, the general consensus among copyright lawyers is that if you show your work online, for example in a portfolio on your own website or another site, without offering viewers an authorized way to copy or download the artwork, that will qualify as an unpublished “display” of the work. On the other hand, if you are selling downloads of digital image files from your site, that would be considered a distribution of copies, and those works would be “published.” This makes sense under the first definition of “published.”

But what about the second definition? What if you post your work on a social media site? The terms of use for most social media sites state that you grant them a license to copy your posted content for their own purposes, and sometimes, that other users can repost your content. Work shown on social media sites could be considered “published” because you are giving your work to them with the understanding that they will enable further distribution of copies of your work. One court in Texas recently held that posting images on Flickr does not qualify as publication, but it is not clear whether the copyright owner had chosen to allow copying of his work (Flickr lets users choose a no license option, or one of the Creative Commons licenses). In light of all this uncertainty, the best practice would be to apply for registration before you post your artworks online, because then you can be sure they are unpublished, and you can safely register them together as a group of unpublished works.

If you are displaying work online that has already been published elsewhere, for example as physical prints, or downloadable materials distributed by your client, those works are “published.”

Follow the Copyright Office tutorial closely

Unfortunately, the online application system is not particularly user-friendly. It is important to study the tutorials before you begin. If you are registering a single work, the system will ask you if the work is published or unpublished. Be ready to give the exact date of publication for published works.

For unpublished works, first figure out if you can use a group registration option. For illustrations and designs, you can register up to 10 unpublished works together using the “Group of Unpublished Works” option. Photographers can register up to 750 photographs using the special “Register a Group of Photographs” option.

In addition to the requirement that all of the works must be unpublished, there are several more limitations for using the group form:

- » *Compilations cannot be included.* A “compilation” is a combination of several different elements into one overall work. This would include works featuring photographs or other imagery and typography, such as printed advertisements, brochures, movie posters, album covers, and web pages. Unfortunately for graphic designers, this means a lot of graphic design will not qualify for group registration. Such works must be registered separately. Stand-alone illustrations and logos (provided they are not pure typographic designs) are eligible for group registration.

- » *The works must be the same type of work.* You cannot combine, for example, all elements of a comprehensive marketing campaign, including print and radio advertisements, web page designs, logos and animation, together under one application. Those works must be registered separately by medium.

- » *Each work has to be created by the same person(s).* If you collaborate with another designer to create some of the works, those joint works cannot be included in the same group registration as works you create on your own. This is a question of joint authorship, so be careful here. Merely working with a client or an art director does not mean those people contributed copyrightable expression to your work product. Ideas for content and instructions for revisions are not considered copyrightable and will not make those people joint authors and thus joint owners of your copyright.

- » *The copyright claimant(s) must be the same as the author(s).* The “copyright claimant” on a registration form is the person who is claiming to own copyright in the work. This is a tricky one, because in some circumstances a “copyright claimant” can be someone who owns an exclusive license to use your work in certain ways, rather than having been assigned your entire copyright. For example, your contract may say that your client will be the only one who can reproduce your work for a certain period of time. Technically, that would mean your client owns a registrable copyright interest in the work as your exclusive licensee. However, for group registration purposes, the client cannot be listed as a copyright claimant, and it is okay to list only yourself as the artist and claimant.

- » *Works made for hire may only be registered together.* If you are a design studio and you want to register unpublished works that were created by your employees and your independent contractors, you can combine these two categories of works only if the independent contractors signed valid work-made-for-hire contracts, and your studio will be

⁴ See <https://www.aiga.org/copyright-for-compilations>

the author and the copyright claimant under the work-made-for-hire category of authorship. To be valid, a work-made-for-hire contract with an independent contractor must include the magic words “work made for hire,” must be signed by both parties, and must fall within certain types of works listed in the statute. If your independent contractors did not sign an explicit work-made-for-hire contract, then you need to have a written assignment of copyright, and their works cannot be combined in the same group application as works created by your employees.

If the group option doesn’t work for you, follow the tutorials to register your unpublished works according to the Copyright Office’s guidelines. If you have trouble, consult an attorney. Getting the registration correct is worth paying for a short amount of your attorney’s time.

Conclusion

Copyright can offer important protections for designers as well as those who hire designers, but only if you understand the legalities and take appropriate steps to ensure that you are on the right side of copyright law. The law can be complex and intimidating, but it is not insurmountable. When in doubt, consult a copyright attorney.

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The information in this article is provided to help you become familiar with legal issues that may affect graphic artists. Legal advice must be tailored to the specific circumstances of each case, and nothing provided here should be used as a substitute for advice of legal counsel. Linda Joy is an attorney, painter and former graphic artist/illustrator. She practices intellectual property law, arts law, and mediation for artists in San Francisco. She can be reached at 415-882-3200 or Ljk@owe.com.