



Copyright for Compilations

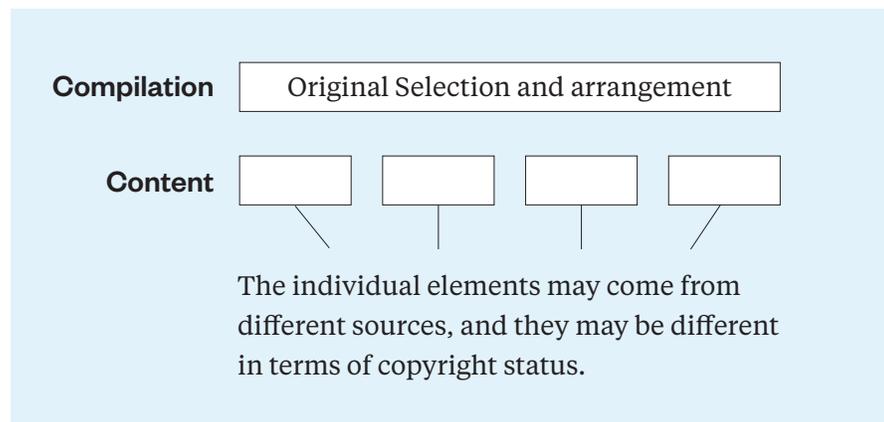
by
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There's a persistent urban legend out there that says "graphic design is not protected by copyright." We've heard this from academics, lawyers, and even some employees in the U.S. Copyright Office. But is this really true? Fortunately, the answer is no. Under U.S. copyright law, there is a legal category of copyright protection for a type of work called a "compilation." Graphic design and web design can often fit this category.

A *compilation* is defined as a selection and arrangement of materials or data. Because the overall focus of copyright is on "original works of authorship," the selection and arrangement must exhibit some degree of originality in order to qualify. Simple grids or commonplace layouts will not be considered original.

Copyright for the compilation will be separate from any copyrights that apply to the content. That is to say, when you create only the layout, your copyright protects only your selection and arrangement, but not the individual elements that have been included. However, if your work includes both layout (e.g., a web page) and some individual elements (e.g., a logo, photos, text or illustrations included on the web page), you will own copyright in both the layout and the elements you created.

FIGURE 1:
If you only do the selection and arrangement, your compilation copyright will be separate from any rights to the elements included.



Different categories of content

Over the course of our careers, we work on compilations that include a variety of content from different sources. This interaction of compilation and content can play out in five different ways:

1. Elements that are not copyrightable: You might select elements that don't have any restrictions on their use because they don't have enough creative expression to qualify for their own copyright protection under U.S. law. This includes such things as facts, lists of data (like the information included in directories and bibliographies), blank forms (such as blank "to do" lists and simple calendars that might be added to an executive organizer), and common geometric shapes or symbols (such as circles, squares, hearts, and smiley faces). You do not need permission to incorporate them.

FIGURE 2:
Blank forms do not qualify for copyright protection.

Application for Employment

Position You Are Applying For _____ Desired Salary _____
 Date Available for Work: _____

PERSONAL INFORMATION

Last Name _____ First Name _____ Middle _____
 Address _____ City _____ State _____ Zip _____
 Home Phone: _____ Cell Phone: _____ Email address: _____
 Social Security Number: _____
 Are you a U.S. Citizen? [] Yes [] No
 Have you ever been convicted of a felony? [] Yes [] No
 If selected for employment are you willing to submit to a pre-employment drug screening test? [] Yes [] No

EDUCATION

School Name	Location	Years Attended	Degree Received	Major

Other training, certifications or licenses held: _____

EMPLOYMENT

Employer: _____ Dates Employed: _____
 Work Phone: _____ to _____
 Address: _____
 City: _____ State: _____ Zip: _____
 Position: _____
 Duties Performed: _____
 Supervisors Name and Title: _____
 Reason for leaving: _____
 May we contact them? [] Yes [] No

REFERENCES

Name	Title	Company	Phone

Acknowledgement and Authorization

I certify that all answers given herein are true and complete to the best of my knowledge.
 I authorize investigation of all statements contained in this application for employment as may be necessary in arriving at an employment decision.
 In the event of employment, I understand that false or misleading information given in my application or interview(s) may result in discharge.

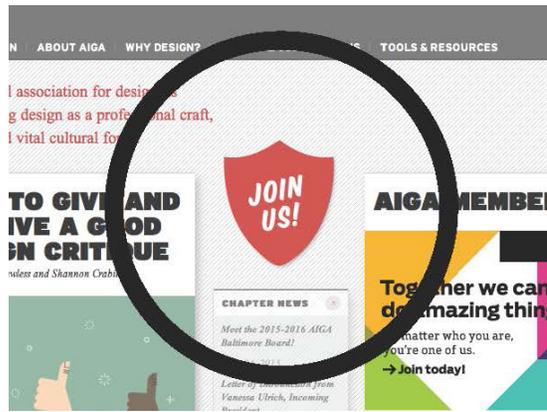
 Signature of Applicant Date

FIGURE 3:
Simple calendars do not qualify for copyright protection.



FIGURE 4:

Common geometric shapes or symbols are not protected by copyright. You do not need permission to incorporate them in your project.



2. Elements in the public domain: Your project might include elements that did qualify as creative expression but they are now old enough that their copyright protection has expired. These works are in the “public domain,” meaning they are not protected by copyright (contrary to popular misconceptions, “public domain” does not mean “publicly available,” as in easy to find online). Permission is not needed to use any element whose copyright protection has expired, but of course you need to check the dates to verify that expiration has in fact taken place. Generally, anything that was created before 1923 is now in the public domain. After that date, it becomes complicated, so you should check with the source or a copyright attorney. Projects in this category include such things as books and CDs of vintage clip art, like the many collections of Victorian illustrations that are published by Dover Books. (If you are accessing this type of collection, you can use the individual elements but you cannot copy the entire collection. To avoid infringement of the publisher’s compilation copyright, you should also refrain from reproducing entire pages or many elements from just one source.)

3. Copyrighted elements owned by others: If your compilation includes elements from other artists, photographers, or other creators (all called “authors” in copyright parlance) that were created more recently, then those items are still fully protected by their own individual copyrights. You can only use them with permission from the rights holders. Examples include brochures or websites where all of the content was licensed from third parties, or where the content was created by your client’s employees or owned by your client. This is familiar ground for designers. We are used to negotiating and paying for licenses from photographers, illustrators, and writers. As a starting point for those negotiations, keep in mind that U.S. law presumes that permission covers non-exclusive usage rights only. All other rights (including rights to permit use by the licensee’s direct competitors) remain vested with the individual authors unless your contract specifically states otherwise. Exclusive or all-rights transfers can only be done by a written agreement signed by the copyright owner.

*A note regarding **government works**:* there is one small exception to this rule—elements that were created by the U.S. government, such as photographs or murals created by employees of the WPA, or photos taken by U.S. satellites, are in the public domain as a matter of U.S. copyright law. However, if the U.S. government purchases or licenses a work rather than creating it in-house, those works are protected by copyright. So it is not safe to assume all government works are in the public domain. When in doubt, research the original source of the government work, or ask the appropriate government department for such information.

*A note regarding **fair use**:* You may have heard a lot about a copyright concept called “fair use.” Fair use means that even though you have used a copyrighted work owned by someone else, you do not need permission to avoid infringement. The concept of fair use is meant to protect the public’s free speech rights to comment on and learn from copyrighted works. Unfortunately, “fair use” does not just mean what laypeople might consider “fair.” For example, giving credit to the original copyright owner of the material does not make your use of it fair use. Instead, the courts apply a complicated analysis of four factors to determine if a use qualifies as fair use. Generally, the most important considerations under this test are whether your new work is “transformative” — meaning it uses the original work as “raw material” and “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message” — and whether uses like your new work will interfere with the economic market for the original work. With respect to compilations, commercial works such as websites are not likely to qualify as fair use, even if the client is a non-profit organization. In this context, non-profits and educational institutions are still making commercial use of the copyrighted works, because such uses are part of the copyright owner’s licensing market. Fine art collages that combine many different elements to create an entirely new image, on the other hand, will generally be considered fair use. Parodies are also more likely to be considered fair use. However, the term “parody” in copyright law is also narrowly defined. A work will only qualify as a fair use parody if it specifically mocks the original work, not if it merely uses that work to mock or critique something else.

4. You’ve created some of the elements: If you’re working on a project where you create some of the individual elements as well as the overall selection and arrangement, then your copyright will be for a **COLLECTIVE WORK**. In this special situation, your copyright includes your compilation authorship plus the individual components that you created specifically for this project. For the other elements that you did not produce, you would of course still need permission from those other authors. Examples of this include a website that uses content from the client or other sources plus new content, such as a logo, created by the site designer, or a magazine where the art director who created the publication design also did the masthead and some editorial illustrations,

or an anthology of short stories where the person who assembled the collection also contributed the cover art.

5. You've created all of the content: Lastly, you might design a compilation where you also create all of the content. This is not a common situation on projects done for clients, but it might happen on a personal project or an in-house promotional piece. If all of the content is new and was created just for this project, then you will own copyright in the entire collective work.

In contrast, you might be assembling an anthology of past work. If you're turning your portfolio into a coffee-table book, those pre-existing elements are already separate and independent works in themselves and you must be clear about whether you retained the copyrights. On some projects such as logos, websites, or corporate branding systems, it's likely that you assigned all rights to the client at the end of the project. Although generally, you have a fair use right to show your work, your client contract may have restricted your rights to reproduce this content, especially if it has not been published. When in doubt, check with the copyright owners before including it in your promotional materials.

Who owns the compilation?

So now that you've created a compilation copyright, who owns it, and why does it matter? If you're an in-house designer, your employer owns the compilation copyright for each project. However, if you're an independent contractor or an outside agency, you will start out owning the compilation copyright (and any elements you created for it), unless you have signed a valid "work-made-for-hire" contract (more about this in a moment). Often, it will be fine with you for the client to ultimately own the copyright in your work.

However, your initial ownership of the compilation copyright can be important in the unfortunate event that your client refuses to pay for your work. If your client contract has spelled out specifically that copyright is transferred only on condition that the client has paid for your work, then your client will be infringing your rights if it uses your compilation design without paying you. This gives you better leverage to get paid than just a potential breach of contract claim. If you have an infringement claim, the client would be facing potential injunctive relief requiring the client to stop using the work and, if you had already registered the work before the pay dispute happens, having to pay statutory damages and attorneys' fees, which together could add up to much more than the money owed to you under the contract. In contrast, a breach of contract claim will only get you paid the money you are owed. Attorneys' fees would not be awardable unless the contract includes a prevailing party attorneys' fees clause.

Accordingly, you should explicitly negotiate with your client about who will end up owning the compilation copyright and how it can be used. Many clients assume that when they pay a designer as an independent contractor to do work for them, the client will automatically own all intellectual property rights in the designer's work product. This is not correct. The designer retains ownership of the intellectual property in her/his work unless and until the designer signs a written agreement that either validly identifies the designer's work as work made for hire, or transfers ownership of the intellectual property to the client.

Work made for hire: This is a term of art in copyright law that is often misunderstood and misused in contract forms. For independent contractors, your work has to fit within certain statutory categories to qualify as work made for hire, or else legally the "work made for hire" language will not be valid. The statutory categories include compilations and contributions to collective works, so generally, everything you create as part of a compilation work will qualify. Nevertheless, AIGA generally does not recommend that designers sign work-made-for-hire contracts. This is because if you agree to designate your work as work made for hire, all new work you create for the project, including preliminary works and working files, and any improvements in technology or other general design skills, will become the exclusive property of your client. You will not be able to re-purpose or adapt any of this work for other projects, even the creative directions that your client rejected. And, your client can reuse all of that work, without any further compensation to you. Work made for hire is appropriate if you are working onsite at your client's location and using your client's equipment. It would also be appropriate if you are working as an independent contractor onsite at a design studio. Otherwise, if you want your client to own copyright in your work, the better option is to include an assignment of rights.

Assignment of rights: With assignment language, you can give your client full rights to the final deliverables, but you can retain rights in your preliminary works, designs and directions not accepted for development by this client, and all of your design skills, including any innovations you may have developed while working on this client's project.

License: As an alternate to giving your client copyright in the compilation, in some cases you may want to keep intellectual property ownership and simply grant a license to the client. A license is a limited permission given by a designer to the client to use the intellectual property comprising the work product in a certain way. The extent of the license you grant will vary based on the type of work involved. For most compilations, such as website designs or publication designs, an EXCLUSIVE LICENSE will be appropriate. An exclusive license means that even though you are retaining your copyright ownership of your work, you will not be giving permission to anyone else to use it.

This means your client will not have to worry that you might create similar designs for others. However, you can recapture rights in the work (and then will be able to repurpose it for other projects) when the client stops using it, or at the end of a specific license term. A limited or NON-EXCLUSIVE LICENSE may be appropriate in some circumstances, for example, when the rights your client receives should be limited to use on certain products, in particular media, in a certain territory, or for a specified time period. Other basic limitations include whether or not you will allow your client to modify your work. Non-exclusive licenses work best for small, one-time projects that will have a limited life span, and typically involve a minimal fee — for example, print advertisements, brochures, annual reports, or work for non-profits or clients with limited funds. The client is paying a relatively small fee for limited rights to use your work. You retain the intellectual property rights in your work so you can re-purpose it for other clients.

For further guidance on these options for ownership and usage, please take a look at the instructions and model contract language published by AIGA: www.aiga.org/standard-agreement. While you are negotiating, you should also clarify for your client that rights to the compilation are different from rights to the content, and ensure that appropriate permissions have been obtained for the various elements included in the compilation.

I do not routinely register copyrights in my work for clients, as they are generally the ones who will own the copyright. However, I think talking to clients about registering their compilation copyright is a great way to affirm our collaborative relationship and the uniqueness of our work product, which can only be created by the pairing up of designer and client. Registration is appropriate to truly protect that unique work product, and discussing compilation copyright registration with our clients enhances their confidence in the value of our work as designers.

— *Steve Barretto, Barretto-Co*

Additional issues for websites

If you're a web designer, two additional copyright issues will come up on your projects. First, if you're placing content into a template created by someone else as opposed to creating an original layout, then your arrangement will not be eligible for copyright because it is not your compilation authorship.

Second, you need to be clear about who owns the underlying code. Software is a separate category of creative work. If you're a web developer building a site with lots of original coding, that new code qualifies for its own copyright protection.

However, this is not the case if you're laying out a site using software like Adobe Muse that doesn't require you to do any original coding. When you're using preformatted code created by someone else, they own the software copyright to the code and your use of it is restricted to the terms of the license that you received from them.

Be an expert

Compilation copyright is a very important issue for graphic designers and web designers. We need to be experts on this topic so that we can make smart decisions for our own firms and provide proper guidance to our clients. When in doubt, consult a knowledgeable copyright attorney, preferably one who works regularly with designers. It's better to invest in understanding these issues and making good decisions up front than to deal with a costly mistake later on.

Registering your compilation copyright

Copyright protection happens as soon as you create your compilation. However, you need a copyright registration to fully protect your rights, and early registration is particularly important if a dispute is likely. That's because you can only get statutory damages (a deterrent amount that a court can order an infringer to pay you, regardless of actual profits or losses) and attorneys' fees if you register your copyright before an infringement happens.

The Copyright Office has an online process for registering your copyrights called eCO: <http://copyright.gov/eco/>. It's not particularly user-friendly, but you can figure it out with the help of their PowerPoint tutorial. The guidelines are not clear, however, when registering copyright in graphic design, and there are some pitfalls to avoid:

- 1.** Most importantly, *never use the words* GRAPHIC DESIGN, FORMAT, OR LAYOUT in your application. Do not use these words in the title of your work or to describe your authorship. The Copyright Office conflates these words with the concept of a blank template, which is not copyrightable. Instead, use the terminology described below.
- 2.** The first screen you encounter will ask you to answer three questions. First: Are you registering one work? Check "No," even if your only authorship is for the compilation. The next question asks if you are the only author and owner of the work. Generally, you will check "Yes," because you will be registering only the compilation authorship and any elements you created, and you won't be listing any other authors. Finally, the last question asks if the work includes material only authored by the same persons. This is a bit confusing, because it seems to be the same as the second question. But this one is asking about what's in the entire work, not just the authorship you are registering. So the answer is "No," unless this is a personal project that includes only elements you created.

FIGURE 5:

On the eCO website, click these boxes to start the process of registering a compilation copyright.

The screenshot shows the 'Registration Process Overview' page on the Copyright website. At the top, there is a navigation bar with 'Home', 'My Profile', 'Help', 'Contact Us', and 'Log Out'. Below the navigation bar, the page title is 'Registration Process Overview'. There is a '<< Back' button and a link to 'Register a claim in 3 steps'. The instructions state: 'Register a claim in 3 steps in the following order: (1) Complete an application, (2) Make payment, (3) Send us a copy of your work. To begin, please answer the following questions about the work(s) you are registering, then click the "Start Registration" button. Your answers to these questions will determine the appropriate application for registering your work.' There are three questions with 'Yes' and 'No' options:

- Question 1: Are you registering one work (one song, one poem, one illustration, etc.)? Check "NO" to this question if the work is one of the following: a collection of works (such as: book of poetry, CD of songs and photographs), a collective work, website or database because these works do not qualify for the single form. Yes No
- Question 2: Are you the only author and owner of the work (or the agent of the individual author who is also the only owner)? Check "NO" to this question if the work was created by multiple people, is a "work made for hire," or if any part of the work was created by or is owned by another person. Yes No
- Question 3: Does the work you are sending contain material created only by this author? Check "NO" to this question if the copy includes content or contributions by anyone else, even if the claim is limited to only the contribution by this author or the material has been licensed, permissioned or transferred to the claimant. Yes No

At the bottom, there is a 'Start Registration' button.

3. Next, you will be asked to identify the "Type of Work." Check "Work of the Visual Arts."

FIGURE 6:

On the Type of Work screen, select "Work of the Visual Arts".

The screenshot shows the 'Type of Work' screen on the Copyright website. At the top, there is a navigation bar with 'Home', 'My Profile', 'Help', 'Contact Us', and 'Log Out'. Below the navigation bar, the page title is 'Type of Work'. There are three tabs: 'Form', 'Pay', and 'Submit Work'. The 'Form' tab is selected. The page displays the following information: Case #: 1-3940022851, Application Format: Standard, Type of Case: Work of the Visual Arts, Date Opened: 8/25/2016. There are 'Continue >>' and 'Save For Later' buttons. The instructions state: 'Please select a "Type of Work" appropriate for the work you are registering from the dropdown list. Read the description below and then click the box below to confirm your selection. Click "Continue" to begin the application.' There is a red warning message: 'Type of Work cannot be changed after you click "Continue." Click here for more information.' The 'Type of Work' dropdown menu is set to 'Work of the Visual Arts'. Below the dropdown, there is a description: 'Select **Work of the Visual Arts** if you are registering a pictorial, graphic, or sculptural work. Visual Arts works include two-dimensional and three-dimensional works of fine, graphic, and applied art; photographs; prints and art reproductions, maps, technical drawings; and architectural works.' There is a note: '* This type of Visual Arts work must be registered using the Standard Application.' At the bottom, there is a checkbox that is checked and a red asterisk: '* Click the box to confirm you have read the above description and selected the most appropriate type of work.'

FIGURE 7:

In the box labeled "Title of this work", be careful not to use these trigger words.

The screenshot shows the 'Title' screen on the Copyright website. At the top, there is a navigation bar with 'Home', 'My Profile', 'Help', 'Contact Us', and 'Log Out'. Below the navigation bar, the page title is 'Title'. There are three tabs: 'Form', 'Pay', and 'Submit Work'. The 'Form' tab is selected. The page displays the following information: Case #: 1-3940022851, Application Format: Standard, Type of Case: Work of the Visual Arts, Date Opened: 8/25/2016 09:10:19 PM. There are 'Save' and 'Cancel' buttons. The instructions state: 'Give only one Title and Title Type at a time on this screen, then click "Save". Step 1: Click on "Title Type" to determine the type of title. Step 2: Select the Title Type. You must select "Title of Work Being Registered" at least once. Step 3: Enter the title from the work that corresponds to the Title Type you selected. Step 4: When you have finished adding all titles, Click "Save" to save the title.' The 'Title Type' dropdown menu is set to 'Title of work being registered'. Below the dropdown, there is a text input field for 'Title of this work'.

Never use these words in your title: "Graphic design", "format", or "layout".

4. When you get to the screen for “*Author*,” you will see a checklist for indicating the nature of your authorship. “*Compilation Authorship*” is not on it, so you need to check “*Other*” and describe your graphic design there as “*compilation authorship, namely, the selection and arrangement of _____*”, and fill in the blank with the correct descriptors for the elements included in your layout: e.g., “*2-D Artwork*” (for illustrations, logos, and other graphic elements), “*Text*,” “*Photographs*,” “*Map*,” “*Animations*,” “*Sound Recordings*” (for music), “*Audio-Visual Works*” (for videos or interactive games), etc. If you also created any of those individual elements, check the boxes for those, or if there’s no box, e.g., for “*Text*,” add it as a separate description in “*Other*.” If you wrote original software code, include it here and call it a “*Computer Program*” (and follow the special instructions for submitting appropriate deposit specimens for the code).

FIGURE 8 :

On the Authors screen, fill in the box at the bottom with: “*Compilation authorship, namely, the selection and arrangement of _____*”.

An important note: the Copyright Office instructs its examiners to reject claims of compilation authorship if the compilation has less than four individual elements. Courts do not impose this limitation. If your work could fall into this gray area, consult an attorney to help you with the application.

5. When you get to the “*Limitation of Claim*” screen, you will see the same checklists repeated twice. This is where you need to differentiate between elements you created and elements from your client or other sources. In the first column, “*Material Excluded*,” check the boxes that describe the elements from your client or other sources (include non-copyrightable elements, public domain elements, and elements owned by others), and use “*Other*” to include any types of works that aren’t covered by the checklist. In the second column, “*New Material Included*,” repeat exactly what you did for the “*Author*” screen. Again, you will need to use the “*Other*” box to describe your compilation authorship. Sometimes the same box will apply in both columns. For example, maybe you created some graphics and also incorporated some of your client’s pre-existing illustrations. In that situation, “*2-D Artwork*” will be checked in both columns.

FIGURE 9:

On the Limitation of Claim screen, the “New Material Included” column must match what you already entered on the Author screen

Registering websites

The Copyright Office acknowledges that websites are dynamic works with changing content. Unfortunately, however, there is no accommodation of that fact in the registration process (copyright law requires a work to be “fixed” to be copyrightable, so future content cannot be covered by an existing registration). When you register your copyright in a website, the registration will cover only the content that you claimed as your authorship and that existed at the time you submitted the application (the effective date of the registration is retroactive to the application date). If you are registering your work on a client’s website, the static form of your compilation when you finished it should be sufficient, assuming your client will be responsible for creating and adding new content after that.

However, if you are registering your own portfolio site, you will be updating your site pretty often with new content that you own. In that situation, it is best to adopt a regular timeline for adding new content, and file new registrations for each update. Your new registrations will be for “Derivative Works” based on the original site. Use the “*Limitation of Claim / Material Excluded*” field to indicate that some of your compilation authorship was pre-existing, and use the “*New Material Included*” field to indicate what types of new content you have added. Or, as an alternative, you can file for your individual works separately, or as collections of individual visual works, apart from the website compilation authorship. This might be a good strategy if the basic design of your website is not changing. For additional guidance, you should take a look at this publication from the Copyright Office: <http://copyright.gov/circs/circ40.pdf>.

Disclaimer

This article provides information about the law to help designers safely cope with their own legal needs. However, legal information is not the same as legal advice—the application of law to an individual’s specific circumstances. Although care has been taken to make sure that this information is accurate, it is recommended that you consult a lawyer if you want professional assurance that this information, and your interpretation of it, is appropriate to your particular situation.

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