

Creativity, Ethics and the Law

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1. Introduction

It's been said that imitation is the sincerest form of flattery. However, if someone is copying your web site or graphic design, you may be losing a lot of money. How? Because as the designer/artist you have a right to get paid every time your work is used or displayed. The key in this process is that designers should receive some kind of payment when others use their artistic creations. Unfortunately, that is not always the case.

Every time someone makes an unauthorized copy of a creative work, or illegally downloads a piece of artwork off the internet, the designer, along with the publisher, is losing money. Many people feel justified copying other people work because, in their minds, it only hurts "big" design firms or publishing companies or other content providers. However, a lot of "little people" work in the graphic design field, and these are usually the ones who suffer most from this type of lost income.

Arguments regarding the need for stronger or weaker copyright laws tend to be generated by two groups. One group, users of existing copyrighted material, characteristically argues for greater ease of access to creative works. Therefore, they would like to see less restrictive copyright laws. The other group, those who control copyright protected works, almost always fight to get more powerful copyright laws enacted.

2. Copyright

Because copyright is the over-arching concept affecting both sampling and parody, we will start our discussion with a general look at copyright law. The federal laws that provide our copyright protection are rooted English law. The term "copyright" was originally used to describe the right to copy a book. After movable type was invented, reproducing books and sheet music in large quantities became much easier than copying by hand. Therefore, the earliest copyright laws were designed to help the creator of a song or composition collect payments from anyone wishing to duplicate the work.

As uniquely American arts and entertainment creations increased, our federal government recognized a need to protect intellectual property of an artistic nature. Hence, the concept of copyright protection was gradually extended to other artistic creations in addition to literary works. American copyright laws were intended to encourage people to create works of art by providing them the right to own and profit from their works.

The Copyright Act of 1976 governs the use of all artistic and literary creations. The body of copyright law enacted in 1976 was so comprehensive, congress gave the public two years to learn and adjust to the changes. Therefore, the 1976 Copyright Act actually took effect on January 1, 1978.

The Act requires persons who use copyrighted material to get permission of the person or company in control of the copyright before creating a new derivative work. For example, a complex PowerPoint presentation might be derived from many existing copyrighted works -- text, music, clip art and various design elements. If the creator of the presentation uses several different

non-original elements, the producer must get permission from each copyright holder before using them.

A design element is considered intellectual property, and is, therefore, protected by federal copyright. Unlike tangible property, such as a car or house, intellectual property can take many forms. For example, a page design or story board can be contained on a web site, a newspaper page a poster or used in a television commercial.

The copyright laws in the United States grant exclusive rights to owners of copyright. The exclusive rights protect:

1. making physical copies of the work;
2. distributing copies for sale, rental or lease;
3. performing the work in public;
4. making derivative works; and,
5. transmitting the work in digital form.

However, there are two important caveats to consider. First, the Copyright Act does not allow protection for ideas themselves (you cannot, for example, copyright the *idea* of web page. Second, the act makes exceptions to copyright protection for uses it terms "fair use" (Sect 107), and it is this concept that causes the most trouble in the music industry.

Fair use, according to our copyright laws, makes exceptions to the exclusive rights of the copyright owner. The fair use concept means the exclusive rights of the copyright owner apply to all uses of the work, *except*, under certain circumstances. The act attempts to give a list of fair use exemptions, but qualifies the list with the phrase "such as." Examples of fair use include limited reproduction of a work for face-to-face teaching in a classroom, use of excerpts for literary criticism and reviews, and parodies.

The act also says the courts, in determining copyright violation, are allowed to use subjective standards such as how much economic damage was done to the original copyright holder, how much of the original work was copied, etc. The only thing that the industry agreed on in 1978 was the new laws did not define the concept of fair use very well.

Several factors come into play when trying to ascertain whether or not a sample or a parody has infringed on the copyright of another work. These factors include: How much of the original work was used; how much damage to the commercial viability of the original work has been caused by the new work; and, the purpose of the new work.

3. Copyright Infringement

If someone uses a work without the permission of the copyright owner, they have "infringed" on the owner's rights. Remember, copyright laws are federal laws. Therefore, copyright infringement is a federal matter.

Courts have been forced to look at infringement claims on a case-by-case basis. There is a common misconception that one can use a few pieces of a design or web page without infringing on copyright. However, this concept is without legal merit, and

sampling any recognizable portion of a work could constitute infringement.

4. Conclusion

Most law abiding citizens would never think of taking a piece of lawn furniture from their neighbor's yard without permission. But, many designers don't view intellectual property, such as songs and art work, the same way: They take portions of other people's work for their own use. Their rationale is usually, "I only used a small portion of your work to create my new and different work."

As technology improves, society as a whole will be forced to ask some tough questions: If someone samples your work, how much is "too much"? And, if someone makes a parody of your ad, and earns a large amount of money from it, should they share some of their income with you.

These are serious questions that have taken up a great deal of time in our legal system. If one looks back at the creation of any new technology, it can be seen that laws and regulations have a difficult, if not impossible, task of catching up with the social and economic results of the new technology. Computers, and the associated design technology they provide, have opened up a whole new area of debate about the ethical and legal aspects of the industry. Providing a balance between access to new works and protection of those works will not be easy in the future. The debates have begun, and there are no signs they will end any time soon.

5. Web Sites

<http://lcweb.loc.gov/copyright> An extensive official site for information about copyright. This site offers instructions on how to register songs and recordings with the Office of Copyright, Library of Congress. It also has downloadable forms.

<http://fairuse.stanford.edu/> This website provides a wealth of information about copyright and fair use. It also provides access to other websites related to copyright legislation and case law.