AUSTRALIAN COPYRIGHT COUNCIL

INFORMATION SHEET G075v04
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Graphic Designers & Copyright

In this information sheet, we give a brief overview of copyright issues affecting graphic designers. People who use graphic design or engage graphic designers may also find it helpful. More detailed information is provided in our book *Graphic designers & copyright*.

Other information sheets that may be relevant are *Artworks*, *Logos*, *Websites*, and *Assigning & Licensing Rights*. For information about these and our other information sheets, other publications and seminar program, see our website http://www.copyright.org.au.

The purpose of this information sheet is to give general introductory information about copyright. If you need to know about how the law applies in a particular situation, please get advice from a lawyer.

A Copyright Council lawyer may be able to give you free preliminary legal advice about an issue not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions and libraries. For further information about the service, see www.copyright.org.au.

We update our information sheets from time to time. Check our website to make sure this is the most recent version.

Key points

- Drawings, logos, photographs and visual images are generally protected by copyright.
- Copyright does not protect ideas, styles or techniques.
- Ownership of copyright varies according to the circumstances in which the work was made.

Copyright protection generally

In Australia, copyright law is contained in the Copyright Act 1968 (Cth) and decisions of courts.

As a result of international treaties such as the Berne Convention, most foreign copyright owners are protected in Australia, and Australian copyright owners are protected in most other countries. For further information, see information sheet *Copyright protection in other countries*.

What does copyright protect?

Copyright protects a range of materials, including artistic works, written material (such as journal articles, novels, and reports), musical works and films.

Drawings, logos, photographs and other visual images are likely to be protected by copyright as artistic works. For example, the stylised letter “R” used as a logo by the Roland Corporation has been held to be protected as an artistic work. In another case, a logo consisting of three rectangles

and a triangle, arranged to form the outline of a house around the words “Aussie Home Loans” was also found to be an artistic work.

Although it is not entirely clear, the layout and typography of documents may also be protected as an artistic work. However, it is likely this will have only limited protection as a **published edition**. (The published edition copyright generally refers to the layout of a book or periodical, and protects the publisher’s investment in preparing the edition for publication.)

Copyright does not protect ideas, styles or techniques. For example, the “look and feel” of a newsletter or other publication is not generally protected by copyright. A person may therefore generally copy ideas about how a publication might be laid out (although photocopying a particular edition of another publication might be an infringement of copyright in the published edition).

Protection is automatic

There is no system of registration for copyright protection in Australia. Copyright protection does not depend upon publication, a copyright notice, or any other procedure. Copyright protection is free and automatic.

The copyright notice

While the copyright notice is not required for protection in Australia and in most other countries, it does notify people that the work is protected and identifies the person claiming the rights. Copyright owners can put the notice on their work themselves; there is no formal procedure. The notice consists of the symbol, followed by the name of the copyright owner and the year of first publication, for example: © Eric Gill Jr 2006.

Rights of copyright owners

Owners of copyright have the exclusive right to do certain things with their material. For example, owners of copyright in artistic works have the exclusive right to:

- **reproduce** it, for example by photocopying, scanning and digitising;
- **make it public** for the first time; and
- **communicate** it **to the public,** for example by faxing or emailing it, broadcasting it, or uploading it to a website.

Owners of copyright in “published editions”, however, only have the exclusive right to make a “facsimile copy” of that edition.

Dealing with copyright

Copyright owners can **assign** their rights: this means transferring all or some of the rights in the copyright item. You can assign certain rights only (such as the right to photocopy), or assign rights only in a certain territory or for a specific period of time. Alternatively, you can **license** your rights. This means giving a person permission to use the copyright item in specified ways (for example, the right to reproduce an illustration on company stationery, or to reproduce and communicate it on the company’s website). Licences may be exclusive (in which case no-one but the licensee is entitled to make the specified uses of the item) or non-exclusive (the same right can be licenced to more than one person). Conditions (such as payment) may be imposed on the person acquiring the licence or rights.

It is important to bear in mind that if you assign or grant an exclusive licence over copyright work you produce, you may not be entitled to make copies of the work even for inclusion in your own portfolio.

Contracts can be unwritten

Agreements do not necessarily have to be in writing to be legally binding. In some cases, courts will even decide that a term is implied in a contract even though it has not been expressly discussed. For example, where a client commissions a designer to create illustrations for use in advertising its products, the client will normally have an implied licence to use the illustrations for the purposes discussed.

However, it is best if all agreements and transactions relating to copyright are in writing, this is the only way to make it clear what has been agreed. Assignments and exclusive licences **must** be in writing and signed by or on behalf of the copyright owner to be fully effective. See further our information sheet *Assigning and licensing rights*.

Who owns copyright?

The general rule under the Copyright Act is that the creator of an artistic work is the first owner of copyright. There are, however, a number of exceptions to this general rule. These exceptions are explained below.

However, you should note that people involved in creating copyright material can reach any agreement they wish as to who will own copyright. The rules we discuss here only apply in the event that no other agreement is reached. Whether you want the rules in the Copyright Act to apply or not, it is always a good idea to have a written agreement about who will own copyright in any situation where you are creating copyright material for a client, or where more than one person is involved in creating copyright material.

Works created in the course of employment

Unless there is an agreement to the contrary, the first owner of copyright will be the employer if the artistic work was created as part of the employee's usual duties.

However, freelancers or contract workers may be the first owners of copyright in works they create as part of their job, depending on the terms and conditions of the agreement.

Works created by employees of newspaper and magazine publishers

If a work is created by an employee of a newspaper or magazine, the artist and the employer own separate parts of the copyright, unless there is an agreement to the contrary. This does not apply to freelance artists or photographers.

For artistic works created by an employee of a newspaper or magazine **before** 30 July 1998, the publisher owns the rights for newspaper and magazine publication and for broadcasting, and the artist owns all the other rights, such as book publication rights.

For artistic works created by an employee of a newspaper or magazine **since** 30 July 1998, the artist owns the rights for photocopying and inclusion in books; the publisher owns all other rights, including digital rights.

Works created or first published under the direction or control of government

If you create work for a Commonwealth, State or Territory government, you should note that the government will be the first owner of copyright in material **created**, or **first published**, under its direction or control. This can be altered by agreement.

This rule does not, however, apply to local governments. If you create work for local government, the same rules apply as for commissioned works generally, discussed below.

Commissioned works

In general terms, if a graphic artist is commissioned to create an artistic work, the graphic artist will own copyright, unless there is an agreement to the contrary. In these cases, the client will have the right ("licence") to use the work for the purposes for which it was commissioned.

However, it is important to have a clear agreement in place, stating exactly what rights each party will have, even if that agreement merely reflects what you think might otherwise be the case under copyright law. For example, if you are commissioned to create artwork for use on stationery or in a brochure, the agreement should make clear whether or not the client is entitled to use that artwork for other purposes, such as on its website, in television advertising or merchandising, and if so, whether or not any additional payment is to be made.

A written agreement can head off the misunderstandings and disagreements which can otherwise occur as to what clients can do with graphic art they have commissioned. For example, many clients won't understand that you may have a sliding scale of fees for different uses, and may assume that paying someone for graphic art on a one off brochure gives them world rights in the entire copyright. In some cases, such as where a logo is commissioned, without an **express** agreement to the contrary, there may be strong grounds for suggesting that the party commissioning the work may have the right to ask the graphic artist to transfer the copyright in the work to them, as one of the **implied** terms or conditions of the commissioning agreement.

If you **do** agree to transfer copyright to the client, you should make sure that the agreement provides for any rights you wish to retain, such as the right to use the work for the purposes of promoting your own services, and/or for any additional payments (for example, if profits are made from "downstream merchandising" sales of the design work).

As noted above, it could be argued that any copyright in layouts done by a graphic artist may be a part of the copyright in the client's "published edition", and not a copyright in any separate "artistic work". For this reason, it is especially important in these cases to have a written agreement setting out the rights of each party. Any subsequent disputes can then be resolved by reference to the agreement.

How long does copyright last?

Artistic works, including photographs or engravings, are generally protected for 70 years after the end of the year of the creator's death. Copyright in a published edition lasts for 25 years from the end of the year the edition is first published. For more information, see our information sheet *Duration of copyright*.

When is copyright infringed?

On one hand, if you own copyright in artistic works, you need to know when copyright is infringed in order to protect your rights. On the other hand, if you are using someone else's material, (for example if you are incorporating someone else's drawing or photograph into your design) you need to understand when you will need permission.

Dealing with copyright material in one of the ways controlled by the copyright owner (such as scanning or photocopying) without permission will usually be an infringement. Dealing with a part of a work may also infringe copyright, if that part is **substantial**, or important to the work. A substantial part of a copyright work is defined as an important or distinctive part. It need not be a large proportion of the work.

Photocopying a **substantial part** of a published edition may infringe copyright; using the layout ideas or style in a different publication will probably not be an infringement, because ideas and styles are not protected by copyright.

Copyright may also be infringed by **authorising** infringement. For example, a graphic designer who copies an illustration may infringe copyright in that artistic work. If the illustration was supplied by a client who asked the designer to copy it for her use, the client may be liable for authorising the infringement.

For more information see our information sheet *Infringement: what can I do?*

Exceptions to infringement

There are defences, or exceptions, to infringement which allow some uses of copyright material without permission – for example by reviewers and students. There are also special provisions for copying by libraries, educational institutions and government bodies. In some cases, certain procedures must be followed, and in some cases, fees must be paid. Further information on these defences and exceptions is provided in our information sheets *Research or study*, *Libraries (Non-profit)*, *Education institutions*, and *Governments (Commonwealth, State and Territory)*.

Generally, these exceptions are unlikely to be available to you if you are working as a graphic artist.

Moral rights

Creators of many types of copyright material, including the creators of artistic works, have **moral rights** in respect of their work, whether or not they also own copyright. These rights impose certain obligations on people who use their work. Creators of artistic works have the right to:

- be attributed as the creator of their work;
- take action if their work is falsely attributed as being the work of someone else; and
- take action if their work is distorted or treated in a way that is prejudicial to their reputation.

However, there are some exceptions. If you **consent** to a person doing something that would otherwise be an infringement of your moral rights, it will not be an infringement.

Even if you do not consent, a person will not infringe your moral rights by failing to attribute you or by treating your work in ways that might be prejudicial if their action is **reasonable** in all the circumstances. Factors taken into account in determining whether the treatment is reasonable include the nature of the work, the purpose for which it is used, and industry practices. For example, on the basis of these factors it might be argued that failure to attribute the creator of a logo would not infringe the creator's moral rights.

If you are concerned about how your work may be used by a client, you should ensure that the commissioning or licence agreement addresses your concerns.

See our information sheet *Moral rights* or our book *Moral Rights: A Practical Guide* for more information.

Some common questions

Where do I register my copyright and how much does it cost?

There is no system of registration for copyright protection in Australia. Copyright protection does not depend on publication, a copyright notice, or any other procedure. Copyright protection is free and automatic from the moment your work is on paper, or disk, or otherwise put into "material form".

How do I prove that I am the copyright owner if there is no system of registration?

If there is a dispute about who created something, or who owns copyright in it, which cannot be resolved by negotiation, it may need to be resolved by a court. A court considers all the relevant evidence. The most important is usually the oral evidence of the parties to the dispute and the evidence of any witnesses. Other evidence may include a copy of any agreement (between a graphic designer and his or her client, for example), and drafts or digital files. A copyright notice on the work may indicate who claims ownership, but it is not necessarily conclusive.

A client has not paid me. Who owns copyright in the work?

Ownership of copyright should be covered in the agreement with the client. Your solicitor should be able to draft a contract in such a way as to give you rights under copyright law as well as under the contract. Such a contract may assist you in the event that a client uses your work before paying you. For example, it might provide that the client has no licence to use the work, or any assignment of copyright does not take effect, until payment has been received.

If your agreement does not expressly cover the issue, or there is no written contract, the owner of copyright will generally be the creator, unless there is an implied agreement to the contrary. The client, however, will have a licence to use the work for the agreed purposes and while you may be entitled to recover the money owing to you as a debt, you may not be able to stop the client using the work for the purposes for which it was created.

A client has taken the drawings I produced for his approval and had them printed without my permission and without paying me. What can I do about this?

You will probably own the copyright in the work unless you and your client had an agreement to the contrary. In this situation, where the drawings were provided for approval, it is not clear that you have granted the client a licence to use the drawings for this purpose. Your rights will depend on all the facts, and you will generally need legal advice on your rights.

Does copyright protect ideas?

No. Copyright protects the expression or form that the ideas take. For example, the idea of creating a logo in the shape of a house is not protected by copyright, but it would be an infringement of copyright to copy the way in which a particular logo incorporated this idea. A client using a logo which is similar to that used by another company, business or film might also run into problems with other areas of law, such as trade practices.

Can I include work I have done for clients in my portfolio, illustration annuals, or on my website?

Again, this will depend on who owns copyright, and the rights agreed upon. As noted above, agreements do not necessarily need to be in writing, and in some cases a term may be implied by the circumstances of the agreement.

If you own copyright, or have retained the right to reproduce the works, you will not need permission.

If the client owns copyright, you will need the client's permission to reproduce the works in your portfolio, unless the agreement specifically allows you to make and communicate copies for these purposes. Ideally, you should sort this out at the time of commissioning and include this in the written agreement.

My client has asked me to copy the layout of an advertisement for a rival product. Will I be liable for infringing copyright?

It would not be an infringement of copyright to produce an advertisement that merely looks similar in style and layout to another advertisement, if the later advertisement did not reproduce a substantial part of any copyright material.

However, it is likely that other areas of law would apply in this situation. The client might breach trade practices law, or the law on passing off.

If copyright were infringed, you would probably be liable since you would have reproduced the copyright material. The client would also be liable for their own infringements in making any further copies of the infringing advertisement, and would probably also be liable for having authorised infringements by you and any printer or publisher.

Can other designers scan and manipulate my work without my permission?

If you are the copyright owner, people will generally need your permission to scan your work. They will also need your permission to alter the scanned work and create a new image, if an important part of your work will be recognisable in the new image. However, in some circumstances, including where the person is a client or former client, they may be entitled to do these things as a result of a written or verbal agreement. Unless this issue has been clearly negotiated and set out in a written agreement, you may need legal advice on whether a client or former client is in a position to have another designer use your work.

Depending on all the circumstances, even if you do not own copyright in the work, your moral rights may have been infringed. For more information, see our information sheet *Moral rights*.

Can I use someone else's photograph in my work if I change at least 10% or make 5 changes?

There is no rule in copyright law that permits reproduction of an image if a percentage of it is changed, or if a certain number of alterations are made. If you can put the two works side by side and identify important parts from the original that have been copied, it is likely that you need permission.

Do we need permission to use clip art in our publication?

Clip art is available from software companies and websites. Before using any clip art, you should read the "Terms and Conditions" carefully, as the licences limit the ways in which the clip art may

be used. If there is a statement that says the uses of the clip art are limited to private, non-commercial uses, then you should seek permission before incorporating clip art into anything you are creating for commercial purposes.

You should also note that a person cannot give you a valid licence to use clip art unless they own the rights, or have obtained the permission of the copyright owner. If you consider the copyright owner may not have granted permission for the image to be made available on the website, you should not use it.

What permissions do I need to use a particular font or typeface?

There have been a number of cases in which designs for individual letters have been held to be "artistic works" for the purposes of copyright. Copyright in many popular typefaces has, however, expired, where these were created and used by people who died more than fifty years ago.

Nonetheless, many popular typeface designs are still in copyright. Therefore, if you are drawing lettering by hand in a particular font (or recreating the font style in, for example, a computerised drawing program), it is likely that you will need permission from the relevant copyright owner.

If you are using a mechanical device such as a typewriter to create a document in a particular font, it is likely that you have an implied licence to reproduce the typeface in the documents you are generating.

However, if you are generating documents or designs using a computer, the issue is likely to be whether you are licensed to use the software that includes and generates the particular typeface. In these cases, check the licence agreement which accompanies the software, or any statements from the relevant company (for example, on its website, or in the "readme" files that often accompany software). These are likely to state what you can do with the software and the font/s. If you are outsourcing the printing of documents, it may be that the printing company will need its own licensed copy of the relevant font software.

Further information

For further information about copyright, see our website – http://www.copyright.org.au.

Information from the Arts Law Centre of Australia may also be of interest to you: see http://www.artslaw.com.au.

Reproducing this information sheet

You may download and print one copy of this information sheet from our website for your reference.

Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.

Australian Government

Australia Council for the Arts

The Australian Copyright Council has been assisted by the Australian Government through the Australia Council, its arts funding and advisory body.

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