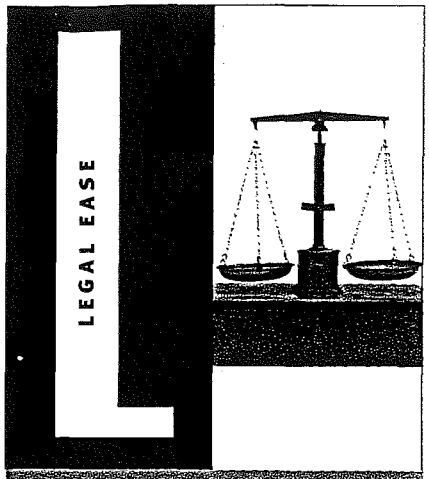

Business

Protect Your Work with **Copyright Law**

By Jean S. Perwin

Copyright law is confusing to most designers—it's hard to find sound, practical copyright information when you need it. *HOW* packs the basic knowledge you need to navigate the maze of U.S. copyright law in this easy-to-follow primer.

Every designer, illustrator, photographer and creator of computer-generated art asks the same questions: "How do I protect the work I create and make available in digital form?" and "How do I avoid unfair use of other people's work?" First, let's review the basic background of copyright law.

Although copyright law has been around since the Statute of Anne in 1710, it often had to adapt to new technology. Copyright law changed to accommodate the printing press, juke boxes, the photocopy machine, VCRs and now the computer, with its ability to digitize images and copy and transfer them in ways unimaginable to the original writers of copyright law.

Although the law is often far behind technological changes, one issue stands out in recent court decisions involving electronic copyright problems: No matter how sophisticated the technology that copies an image, if the copying is unauthorized, it's still copying and probably is copyright infringement. That's good news for you if you know the law and want to protect your creative property.

Copyright Basics

You can't protect yourself until you know what you are—and aren't—entitled to under copyright law. Thus the burning question: What is a copyright? A copyright is a bundle of different exclusive rights that you own when you create works of visual art and photography and that only you can exploit.

The five basic copyright rights are:

1. Reproduction rights: The right to make identical or substantially similar copies of a work.

2. Adaptation or derivative rights: The right to create derivatives of an original work.

3. Distribution rights: The right to be the first to sell a work.

4. Display rights: The right to display a work publicly.

5. Performance rights: The right to perform a work for the public.

For designers, illustrators and photographers, reproduction rights and derivative rights are generally the most important copyright rights. These rights are the most commercially exploitable and, therefore, should be carefully protected. But in the case of electronic copyrights, the courts have been focusing on the right of display when determining how online copying might constitute copyright infringement.

Why You Should Register

You own a copyright from the moment you create a work for your lifetime plus 50 years—whether it's published or not and even if you don't register it. In the case of pseudonymous and anonymous works, the term is 100 years from creation or 75 years from publication, whichever expires first. This timeline also applies to an employer's ownership of designs created as work-for-hire.

Registration with the U.S. Copyright Office isn't required; even without it, you still have enforceable rights as a copyright owner. For example, you can still write a cease-and-desist letter telling someone to stop using your copyrighted designs. (Yes, it's OK to use the term "copyrighted" even if your work hasn't been registered.) And you don't have to file a registration right away—you

e at any time, although you do e to register before you can legally nle an infringement action. But timely registration has several important advantages.

In a copyright infringement case (all of which are handled by federal courts), you must provide proof of two things—that the infringer had access to the work and that the work was copied. Once you've proven this, you're entitled to damages. These damages will be either the amount of your actual damages (which you must show you lost because of the defendant's infringement) or statutory damages—damages established by federal law. You can't sue for both actual and statutory damages because such an award would be double recovery, a legal no-no. The copyright owner decides which type of damages to sue for; the court—either the judge or a jury—determines the amount. By law, statutory damages are $500–$20,000 for the use of your image and up to $100,000 if you can prove the infringement was willful.

If you register your copyright within three months of when you make your image public, you'll be entitled to attorney's fees *and* statutory damages. But if you file your registration after the initial three-month period, you'll be entitled only to the actual damages you can prove.

The benefits of registration become clear when you realize that the actual, provable damages suffered by a creative whose work was copied are usually very small. But attorney's fees and costs in copyright litigation can be as high as $50,000 or more. Without the ability to recover attorney's fees from the infringer and collect statutory damages, many creatives with legitimate copyright claims could never afford justice.

What and How to Register

Not every piece of your work must be registered, but you should file copyright registration on any work that will be seen by a lot of people or that's used frequently.

Always put a copyright notice on your work. Every one of your designs, every disk that contains your work and every digital file should have a copyright notice on it: "© Your Name Here 1997." A proper notice eliminates a defense of "innocent" infringement.

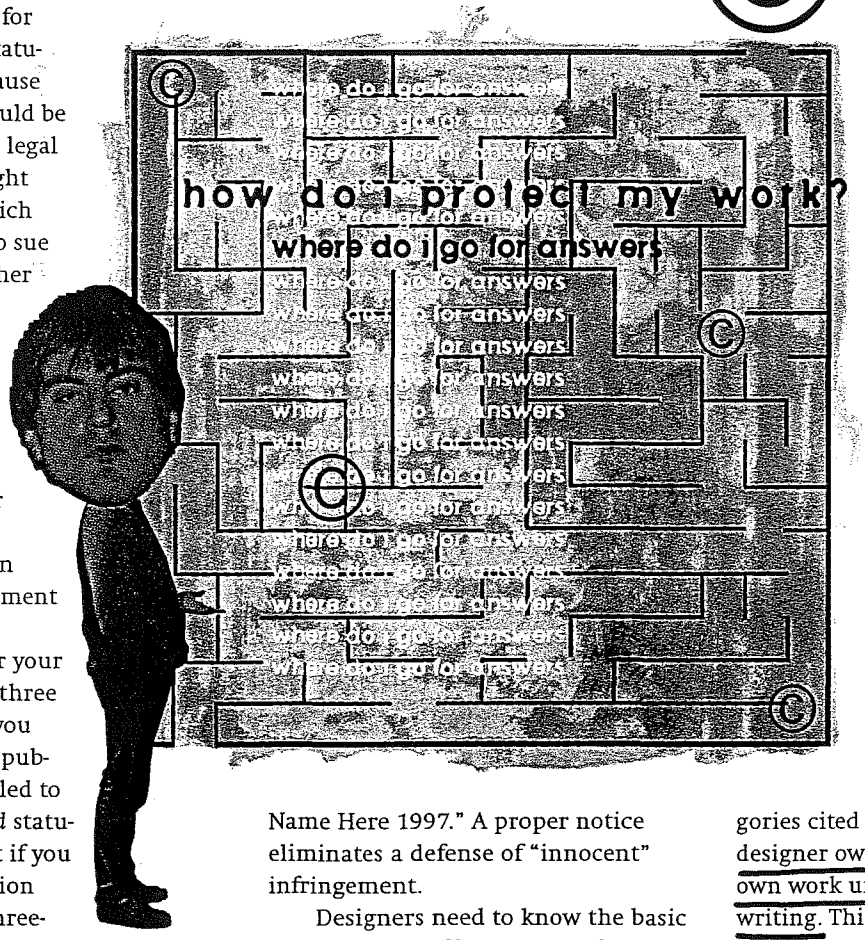

Illustration: Stephen Sullivan

Designers need to know the basic copyright law affecting work-for-hire. The simple definition of work-for-hire is work that's created in an employer/employee relationship. All the copyrights in design work created by an employee automatically belong to the employer. The employee has no rights in the work. It's possible, however, to retain your copyright rights as an employee with a written agreement that transfers these rights to you.

But like many things in the law, work-for-hire isn't a simple concept. The copyright law considers certain commissioned work to be work-for-hire—but only if you transfer your rights in writing. If you're a freelancer or independent contractor and you're commissioned to create a project in one of nine specific categories—and there's a work agreement in writing—your materials will be considered work-for-hire. These nine categories are contribution to a collective work; part of a motion picture; part of an audiovisual work, including the Web and CD-ROMs; a supplementary work; a compilation; an instructional text; a test; answer material for a test; and an atlas.

If the work doesn't fall within one of these nine categories (and most freelance design work doesn't), or if it does fall within these categories but the work agreement isn't in writing, it won't be considered work-for-hire.

The legal presumption in freelance and independent contractor situations (unless the work falls in one of the nine categories cited above) is that the designer owns the copyright in her own work unless it's transferred in writing. This has led many clients to require the transfer of all rights to them for work done by freelancers. Read employment agreements carefully to make sure you know whether or not you're transferring your copyright rights. Similarly, your estimate forms and invoices should make it clear that you aren't transferring these rights.

XHIBIT 7–1 FORMS OF INTELLECTUAL PROPERTY

	PATENT	COPYRIGHT	TRADEMARKS (SERVICE MARKS AND TRADE DRESS)	TRADE SECRETS
Definition	A grant from the government that gives an inventor exclusive rights to an invention.	An intangible property right granted to authors and originators of a literary work or artistic production that falls within specified categories.	Any distinctive word, name, symbol, or device (image or appearance), or combination thereof, that an entity uses to identify and distinguish its goods or services from those of others.	Any information (including formulas, patterns, programs, devices, techniques, and processes) that a business possesses and that gives the business an advantage over competitors who do not know the information or processes.
Requirements	An invention must be: 1. Novel. 2. Not obvious. 3. Useful.	Literary or artistic works must be: 1. Original. 2. Fixed in a durable medium that can be perceived, reproduced, or communicated. 3. Within a copyrightable category.	Trademarks, service marks, and trade dresses must be sufficiently distinctive (or must have acquired a secondary meaning) to enable consumers and others to distinguish the manufacturer's, seller's, or business user's products or services from those of competitors.	Information and processes that have commercial value, that are not known or easily ascertainable by the general public or others, and that are reasonably protected from disclosure.
Types or Categories	1. Utility (general). 2. Design. 3. Plant (flowers, vegetables, and so on).	1. Literary works (including computer programs). 2. Musical works. 3. Dramatic works. 4. Pantomime and choreographic works. 5. Pictorial, graphic, and sculptural works. 6. Films and audiovisual works. 7. Sound recordings.	1. Strong, distinctive marks (such as fanciful, arbitrary, or suggestive marks). 2. Marks that have acquired a secondary meaning by use. 3. Other types of marks, including certification marks and collective marks. 4. Trade dress (such as a distinctive decor, menu, or style or type of service).	1. Customer lists. 2. Research and development. 3. Plans and programs. 4. Pricing information. 5. Production techniques. 6. Marketing techniques. 7. Formulas. 8. Compilations.
How Acquired	By filing a patent application with the U.S. Patent and Trademark Office and receiving that	Automatic (once in tangible form); to recover for infringement, the copyright must be	1. At common law, ownership is created by use of mark. 2. Registration (either with the U.S. Patent and Trademark Office or with the	Through the originality and development of information and processes that are

EXHIBIT 7–1 FORMS OF INTELLECTUAL PROPERTY (CONTINUED)

	PATENT	COPYRIGHT	TRADEMARKS (SERVICE MARKS AND TRADE DRESS)	TRADE SECRETS
How Acquired (continued)	office's approval.	registered with the U.S. Copyright Office.	appropriate state office) gives constructive notice of date of use. 3. Federal registration is permitted if the mark is currently in use *or* if the applicant intends use within six months (period can be extended to three years). 4. Federal registration can be renewed between the fifth and sixth years and, thereafter, every ten years.	unique to a business, that are unknown by others, and that would be valuable tc competitors if they knew of the information and processes.
Rights	An inventor has the right to make, use, sell, assign, or license the invention during the duration of the patent's term. The first to invent has patent rights.	The author or originator has the exclusive right to reproduce, distribute, display, license, or transfer a copyrighted work.	The owner has the right to use the mark or trade dress and to exclude others from using it. The right of use can be licensed or sold (assigned) to another.	The owner has the right to sole and exclusive use of the trade secrets and the right to use legal means to protect against misappropri-ation of the trade secrets by others. Th owner can license o assign a trade secret.
Duration	Twenty years from the date of application; for design patents, fourteen years.	1. For authors: the life of the author, plus 70 years. 2. For publishers: 95 years after the date of publication or 120 years after creation.	Unlimited, as long as it is in use. To continue notice by registration, the registration must be renewed by filing.	Unlimited, as long a not revealed to othe
Civil Remedies for Infringement	Monetary damages, which include reasonable royalties and lost profits, *plus* attorneys' fees. (Treble damages are available for intentional infringement.)	Actual damages, plus profits received by the infringer; *or* statutory damages of not less than $500 and not more than $20,000 ($100,000, if infringement is willful); *plus* costs and attorneys' fees.	1. Injunction prohibiting future use of mark. 2. Actual damages, plus profits received by the infringer (can be increased to three times the actual damages under the Lanham Act). 3. Impoundment and destruction of infringing articles. 4. *Plus* costs and attorneys' fees.	Monetary damages for misappropriation (the Uniform Trade Secrets Act permits punitive damages up to twice the amount of actual damages fc willful and maliciou misappropriation); *plus* costs and attorneys' fees.