

Images are free ... *not!*

Copyright on the Net: simpler than many think



When shopping in the bulk-candy aisle at the grocery store, have you ever had the urge to just reach down and grab a piece when no one was looking? Sure, that might be *stealing*, but who's going to care about one little piece of candy? Along the same lines, lifting an image from a Web site or a CD-ROM may not seem like much in the global supermarket of bits and bytes, but it nevertheless constitutes legal copyright infringement.

Many Web designers, strong on technical skills but lacking traditional design experience, are unaware of copyright law and fair use regarding images on the Internet; some of these designers, say legal

experts, avoid learning what the law requires. Still others are aware of the dangers of image theft, but don't know how to properly protect their own work in a medium in which existing copyright laws are sometimes questioned. As the Web continues to grow, artists and designers are discovering the need to be familiar with both situations.

"There's a sense that, because it's digital, it's different," says intellectual property attorney Susan Rice of the often-invoked idea that material on the Internet should be public domain. "Technically, nothing has changed; the law hasn't changed, and the analysis hasn't changed."

The letter of the law

According to U.S. Copyright Law, Title 17, copyright protection belongs to authors of "original works of authorship," beginning *immediately* upon creation of the work in fixed form. With the exception of instances of fair use (such as quotations in reviews) and works made for hire (works that belong to the person or entity that hired the artist or designer), all rights to the work



belong to the copyright holder; *any* unauthorized use of the material is considered infringement. This instantaneous grant of copyright means that registration through the Copyright Office isn't required, even for unpublished works; more over, since 1989, use of the copyright symbol, ©, hasn't been required, either (though attorneys say both methods are "strongly recommended"). It is important to note, however, that copyright does not protect ideas—only the particular manifestations of those ideas.

"In reality," says photographer Stephen Johnson, who uses digital photography equipment and perhaps for that reason seems especially aware of copyright dangers online, "I think most of the copyright infringement that goes on is by people who are basically unaware ... choosing not to think through the consequences of taking something from someone else, figuring it's harmless."

According to attorney Patricia Gima, legal editor for Nolo Press, it can be worth a designer's effort to ensure that the images he or she uses don't violate copyright. "The best way to protect [yourself] is to get permission, to



hunt down who owns that photo," she says. Although potentially time-consuming, getting permission to use a work (by licensing it, which may or may not involve a usage fee) is preferable to the consequences of copyright violation, attorneys say.

For one thing, if the owner of material being used illegally opts to sue for copyright infringement, the material would most likely have to be removed from the offending context. For another, if the work was formally registered with the Copyright Office at the time of the infringement, the person being sued may be required to pay statutory damages (compensation based on damages such as lost reputation or decreased value for future uses of the work, as opposed to actual damages) for each infringement, along with attorneys' fees.

At the moment, the statutory-damages rule hasn't yet been tested against Internet copyright infringers; in print and CD-ROM production, it's easy to determine how many copies of a piece were created and distributed, but no precedent has been set for online distribution.



Thus CD-ROM publishers have found themselves pioneering the legalities of digital image copyrights. Because CD-ROMs are physical, fixed media, it is much easier for a plaintiff to prove damages through specific numbers. "CD-ROM producers have become painfully aware of the need to get permission," says Rice.

Statutory damages in federal courts can range from a low of \$200 to more than \$100,000 (depending on the court's judgment), so the trouble of tracking down an artist can outweigh the possibility of having to pay damages based on, for example, the number of hits to that image.

Little chance of getting caught

But many Web designers choose to risk using copyrighted images because they know that the size of the Web can minimize the chances of getting caught. "In the heat of the moment," says Gima, "when [designers] have a deadline and they need that image, the fastest way for them to get it is to go on the Web. And who's going to know any better? For all practical purposes,



they may be right. It depends on the image, it depends on where they took it, and who they took it from. [But] it doesn't make it right."

Rice agrees that, while copyright law works well when enforced, the decentralized expansion of the Internet makes it difficult to apply. "I think that if people are doing it with impunity," she says, "and not getting caught, and not getting demand letters [from copyright holders], and not getting sued, then there probably is no incentive to stop."

Applying and enforcing copyright law breaks down further in cases of partial image use, as in photo/illustration collages, and under the umbrella of "fair use." Copying an entire image and using it for one's own ends is an obvious kind of copyright infringement, but what about using a corner of an illustration as a pattern in a collage? Legally, the same rules apply, according to Rice. "If you're even taking just a portion of a photograph or of a design and working it into an overall collage, technically you are still supposed to get permission from the copyright owner if you don't already own it."

Ric Grefé, executive director of the American Institute of Graphic Arts



(AIGA), agrees. "We want to respect the rights of the creator in all situations," he says. "If it's an identifiable piece of an image created by somebody else, it's appropriate to get permission to use it."

Johnson, while conceding that there is a gray line in the copyright law regarding use of partial images, believes the ethics of appropriating copyrighted materials are strictly black and white. "There's no gray line whatsoever with regards to the rights to do it," he says. "If you sneak into my house and take only part of my jewelry, that doesn't give you the right to take any of it."

Looking for protection

So, finding themselves in the middle of legalese and threats to their copyrights, what can artists do to protect their work? According to Gima, even though copyright is immediately granted upon creation of a work, an artist's legal rights are limited if he or she hasn't registered the piece. "Registration gives the copyright holder enhanced enforcement of their copyright, and in fact, unless the work has been registered, the copyright holder can't even



bring a lawsuit," she says.

This doesn't mean, however, that unregistered works are necessarily vulnerable. An interesting twist to copyright registration is that the copyright holder can register the work *after* the infringement, and then file suit; but if this is the case, the holder cannot receive attorneys' fees or statutory damages.

"I have seen it inhibit many copyright holders from ever filing a lawsuit, because it's simply not worth their while," says Gima. "If they can't be assured that they're going to get their attorney's fees covered, and can't be assured that they're going to be able to get statutory damages, then quite often they choose, for practical purposes, not to file lawsuits."

There are solutions that can help copyright owners avoid lengthy and expensive litigation. A few companies are working on technological solutions such as HighWater Designs' FBI software, which encodes a hidden identifier, or "fingerprint," within a digital image that can be detected even after the image has been altered. Adobe PDF technology, used in the Acrobat suite of products, includes security options that prevent images from being copied from Web sites.



Some artists take the step of including copyright notices or watermarks on images they post to the Web, but they compromise image quality in the process. Glenn Mitsui, principal of Studio MD, a Seattle design firm, says, "Being an illustrator, you want to have your images look the best they can. Having a big "C" in the middle of it is very unappetizing."

Most importantly, he and Johnson agree that copyright infringement solutions aren't rooted in legalities.

"Ultimately," says Johnson, "much of this isn't going to be solved by litigation or copyright laws. The ultimate way of allowing us all to go forward is to build a better appreciation for ethics, and understand that you can't take from someone without their permission, and that permission often entails a fee. I need to feed my family. And if you take from me, you are taking food from my children, and it is that simple. People need to understand it in those direct human terms."

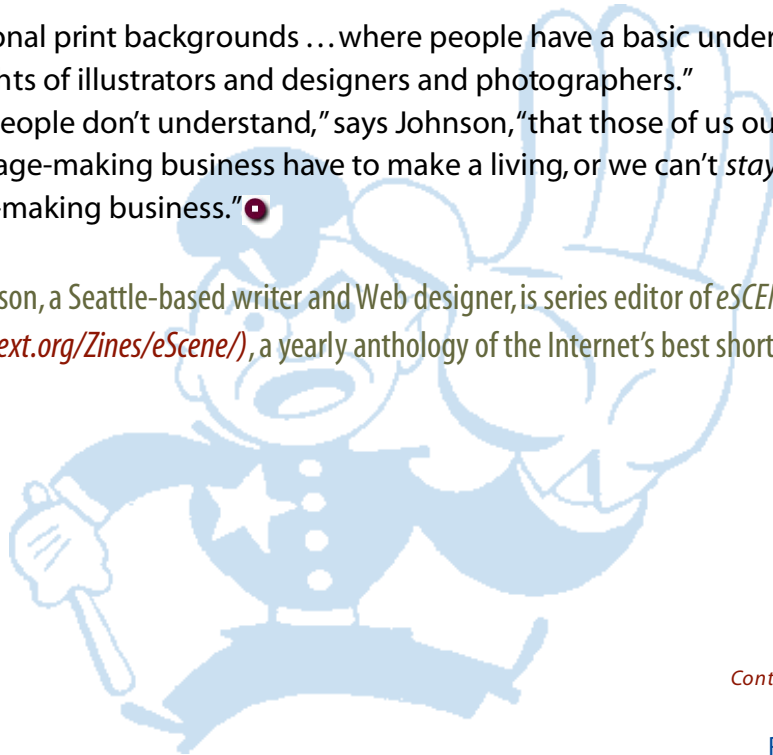
Conveying that understanding, however, can be a formidable task. "It takes education," says Mitsui. "A lot of these [designers] aren't coming from



traditional print backgrounds ... where people have a basic understanding of the rights of illustrators and designers and photographers.”

“People don’t understand,” says Johnson, “that those of us out there in the image-making business have to make a living, or we can’t *stay* in the image-making business.”

Jeff Carlson, a Seattle-based writer and Web designer, is series editor of *eSCENE* (<http://www.ertext.org/Zines/eScene/>), a yearly anthology of the Internet’s best short fiction.



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URLs

Glenn Mitsui: Studio MD
<http://www.studiomd.com/>

U.S. Copyright Office
<http://lcweb.loc.gov/copyright/>

Stephen Johnson
<http://www2.best.com/~sjphoto/>

HighWater Designs
<http://www.highwater.com/>

HighWater Designs Image Fingerprinting (FBI)
<http://www.highwater.com/fbi.htm>

Patricia Gima
<http://www.process39.com/CMLG/gima.html>

