

january's big idea

greenfield belser ltd

The Copyright Follies: You May Not Own What You Think You opt-out

Finding the "almost right" stock photo or illustration is easy. Finding the exactly right match for your firm's message can take hours or even days. And when you find it, you want it for your own-as an integral part the look of your brochure, as an instant identifier on your Web site and for as-yet-unimagined future projects.

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That moment of discovery is a good time to consider the copyright follies.

In this brief review of the pitfalls of ill-considered purchases of stock images and commissioned artwork, you will learn that:

1. You may not have the rights you need to use images you've purchased.
2. You may already have exhausted the rights you purchased.
3. Just because you demand further rights, doesn't mean you can get them.

WHEN DID ARTISTS BECOME SO DIFFICULT?

Before the advent of the Internet, commercial photographers and illustrators were relatively relaxed about enforcing copyrights to the images they produced. Before art became part of the "intellectual property revolution," commercial artists depended on commissions of original work as their main source of income. Today, the licensing of rights for subsequent use has become the bread and butter for many.

The dot.com boom was the turning point. The headlong rush to build Web sites for businesses large and small was a boon to commercial artists. They learned quickly from their new patrons, the Web developers and their lawyers, who assiduously guarded the rights to each pixel on their sites. Many artists hired their IP counsel of their own. And many became part-time artists and full-time IP portfolio managers.

A cottage industry was born. Today, hundreds of vigilantes are employed to detect unauthorized use of images on the Web by using keyword searches and other techniques to find their prey.

FOLLY #1A firm bought a "royalty free" CD of images. Some of the images looked great in its printed materials. Others added dash to its Web site. No problem, until one of the images appeared on packaging of a software product the firm sells to its clients.

Cost: \$10,000 in fees to the producer of the CD. The tiny type on the back of the CD jewel case specifically excluded use of the images on "any article offered for sale."

READ THE FINE PRINT

Stock and royalty-free imagery is neither free or without strings. But very few buyers know this! All stock houses forbid the use of their images in any form other than the "derivative work" for which the image is originally licensed. (Here, "derivative work" refers to any product such as a Web site, collateral brochure, print advertising, etc.)

Royalty-free images usually come with limitations on which uses are royalty free. Use for a logo or in product packaging, for example, generally requires additional fees.

The use of stock images is even more insidious. A stock house will license to you an image of Marilyn Monroe but you cannot use it for commercial purposes without permission of her estate. Moreover, many stock images of people do not have model releases! Often images of buildings and other landmarks have similar problems. You

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may find a photo of the New York Stock Exchange or the Transamerica Building in a stock-image catalog, but you won't be able to use either without first negotiating a license with the owners, who have copyrighted their buildings.

FOLLY #2 A firm received many compliments from law students on an amazing photo of a rain forest used in its recruiting brochure. That positive feedback led the firm to scan the image for its Web site without advising the designers of the brochure, who had negotiated the rights for the image with the photographer.

Cost: \$21,000 in additional fees to the photographer.

KNOW WHAT YOU NEED. NEGOTIATE FOR PACKAGES OF RIGHTS.

As designers, our goal is to get the rights you need at a fair price, while maintaining our good relationships with illustrators and photographers. The issue of rights is often confusing even for the experienced buyer of illustration or photography, and it can lead to big trouble if not understood. The key is to negotiate your rights up-front. It's cheaper and your protections are clear.

Negotiating for several uses at the same time can give you considerable leverage. Bundling use on a Web site with use in printed materials usually costs less than bargaining for those uses separately.

We often negotiate with artists for the use of their images for the initial printing and reprints over a two-year period. This means you can reprint your brochures without having to consult the artist or photographer. Reprinting your brochure without securing the right to reprint may subject you to significant liability under the copyright law for copyright infringement with the possibility of significant damages. Generally, if you wish to use the images in any other way-in a newsletter, advertising, Web site or other medium-you must tell us so we can negotiate with the artist for additional usage rights.

BUY ONLY WHAT YOU NEED.

Just because you want to buy the exclusive right to use a particular image, doesn't mean you should. Why? Because the costs can be prohibitive. Commercial artists know they can sell the same image multiple times to diverse users. With that goal in mind, they tend to be reluctant to cede rights to any one licensee for more than a few years. Purchase of exclusive (not by anyone else, anywhere) rights is often out of reach for all but the deepest-pocketed advertisers of consumer products.

Buyout rights usually triple the cost of illustration or photography and, in our experience, aren't needed anyway. It's like paying rent for office space you never use.

FOLLY #3A firm was delighted to find in a stock book a set of six illustrations that were perfect for use on its Web site. The design called for use of each illustration in a two-inch square frame, as shown the design they sent to the illustrator's agent. During site development, the Web designers decided the pages would look better if the illustrations were enlarged to 4-by-4 inches. Two months after launch of the new site, the agent made a routine check of the site.

Cost: \$40,000 in additional fees to the illustrator.

DON'T EXPECT TO "OWN" THE WORK THAT YOU COMMISSION.

Even original work does not automatically come with exclusive rights. This is often a bitter lesson for novice buyers of artwork. The graphics industry standard allows one-time rights for a specifically identified use! That does not include (1) reprints nor any other uses (2) other than those clearly delineated in writing. That's not a standard we made up. It's "trade custom" and, without a negotiated agreement, copyright law and trade custom rule!

The days of "work for hire" contracts with artists are largely past. Today, many illustrators and photographers categorically refuse to consider contracts that transfer ownership of their work to an employer. If you commission original artwork for a brochure or other use, don't expect to own the rights for all time and all uses without payment of a hefty fee. Buyouts of all rights to original art can triple the cost and may not be available at any price.

WHAT'S THE BEST SOLUTION?

Think ahead. If you believe the images will have other uses, let's negotiate for these uses when the artwork is commissioned. A good formula is to ask for "trade usage" wherein you gain rights to use the artwork in any way you wish within your industry for a certain number of years-three or four years is almost always adequate. These rights may increase your illustration or photography costs by 100%, but you will have bought a package of rights adequate to your needs.

