

# *Transformative Works and Copyright: A Visual Artist's Primer*

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## *Transformative Works and Copyright: A Visual Artist's Primer*

*By Shannon Petty*

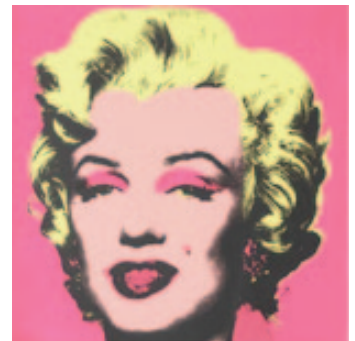
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Graphic design often relies on outside input to create new artistic works. Clients come to designers with ideas and designers continually look to other works for inspiration. The nature of this artistic discipline naturally creates confusion among designers as to what rights, if any, they may have in their work.

U.S. Copyright law exists in order to encourage artistic progress through the creation and dissemination of creative works. Copyright protection is present in original works of authorship fixed in any tangible medium of expression that allows the work to be communicated to others. This includes pictorial, graphic and sculptural works. A graphic work may be "fixed in a tangible medium" as soon as it is put on paper or saved onto something such as a computer disk or memory card. From the moment the work is saved, copyright protection commences. The designer then automatically obtains the exclusive rights to reproduce, prepare derivative works, distribute, and publically display the work. Copyright law provides these exclusive rights to stimulate creation of new works in the artistic community.

### *What does copyright really protect?*

Copyright protects how a work is depicted, not the subject matter depicted. If you see a devil on a bar menu, you can use the same concept, but not the exact same design, to create a new and original menu. Copyrights do not protect themes. Your new devil-themed bar menu receives copyright protection even though the concept existed elsewhere as long as it contains a transformative element. A transformative work adds a new purpose or character to a preexisting work by altering its expression with a new message or meaning. A work must do more than merely substitute an existing design to be transformative. Note how the second image below takes the Marilyn Monroe photograph and alters its design and presentation to make a new transformative work.



The fact that two works share the same subject matter does not prove infringement. Infringement is the unauthorized use of an artist's exclusive rights in his or her work. Just as students may consult the same research sources to write independent papers, courts have noted that artists are free to consult the same source to create another original work. It is then well within a designer's rights to look to other art to create a new, original work. Visual artists should be warned, however, that caveats exist to this rule. One rule to observe is that artists should be sure to avoid taking the "heart" of a piece of work, except in cases of parody (which is detailed in PVLA's "Parody, Satire, and You" pamphlet). Taking a picture and making only minimal changes may not be transformative. If in doubt, look for notice of copyright and contact PVLA for advice on how to proceed.

### *What should I do to obtain copyright protection for my work?*

Copyright protection subsists in an artistic work. This means a work is legally protected from the moment it is saved in a form so that others may view it. No formal requirements to file or provide notice of copyright exist, but doing so provides a designer with very valuable protection.

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Copyright notice includes the name of the owner and the year in which the work was first completed and made public — for example, © 2008 Philadelphia Volunteer Lawyers for the Arts. Notice can be a valuable tool for infringement claims. Failure to include notice allows for the “innocent infringer” defense, reducing damages established by law from up to \$150,000 per work infringed to as low as \$200. Providing notice eliminates the need to question if a party knowingly infringed on your work. Notice may also be useful to artists who cannot afford registration fees.

A copyright owner may register the work at any time. Although it is optional, registering your work is required if you ever need to litigate a copyright claim in court. Registering your work before infringement occurs also allows the artist to collect damages set by law and attorney fees. Registration may be completed by mail for a \$45 filing fee, or online for \$35. Online registration also allows an artist to register multiple works quickly at a discounted rate. If possible, you should always try to register your work before making it available to the public.

### *Ownership of Copyright*

The creator of a work is generally the owner of the work's copyright. In certain instances, such as a work for hire, the creator of a work may not have rights in it. A work qualifies as a “work for hire” in two ways. First, the work must be made by an employee within the scope of his or her employment. The design work of a full time employee for an in house design firm will likely be considered a “work for hire.” Secondly, works created by independent contractors (freelance) may be works for hire if:

The work is designed to be:

1. A contribution to a collective work
2. Part of a motion picture
3. Part of an audiovisual work
4. A supplementary work
5. A compilation
6. An instrumental text
7. A test
8. An answer material for a test
9. An atlas

AND

The parties agree IN A WRITTEN, SIGNED DOCUMENT that the work is one made “for hire.”

Any work that does not fit into one of the nine categories above does not qualify as a work for hire. Works that fit one of the nine categories but do not have a written and signed document will also not be deemed works for hire. If a work cannot be classified as a work for hire, then the creator owns the copyright. Ownership of newly copyrighted works lasts for the life of the author plus seventy years. During that time, the owner may sell or transfer all or some of his rights at his discretion. For further explanation of works for hire, review PVLA's pamphlets on copyright or call us at 215-790-3836, ext. 1 for more information.

### *What is copyright infringement and how can it be proved?*

Copyright infringement is the unauthorized use of an artist's exclusive rights in his or her work. Examples of copyright infringement in the digital world include unauthorized downloading of text, files, or graphics from the internet. It essentially involves copying another's work without permission. Notice becomes very important in cases of copyright infringement — if the creator puts up copyright notice, then the copying is not innocent and the creator is entitled to larger monetary compensation.

Not every copy made of a copyrighted work is categorized as infringement. Courts prove copyright infringement by looking for access to the work and substantial similarity in the work. Access means that an alleged infringer has a reasonable possibility of seeing the copyrighted work. Reasonable access may be inferred where a designer sends a copyrighted work to a third party or posts on a website the infringer visits. Access may also be inferred where the designer's work is widely disseminated. It then doesn't matter whether the infringer actually saw the work but merely that he had the possibility to see it.

Courts use different methods to determine if the two works share substantial similarities. This assessment is usually determined by examining the work and the evidence presented. Generally, the costs and time involved with copyright litigation require the copyright owner have strong evidence and not mere speculation to support a case.

Visual artists should note the fine line between transformative works and taking too much of someone's art. The pictures below illustrate the nature of a transformative work. While all photos share a common theme of bloody lips, there are several differences in design, presentation and purpose. The Angelina Jolie photo was taken after her separation from Billy Bob Thornton (and those blood vials!). The subsequent photos, both released in 2008, share a common theme but make individual contributions to satisfy the transformative requirement.

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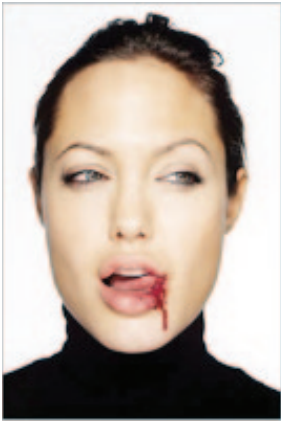


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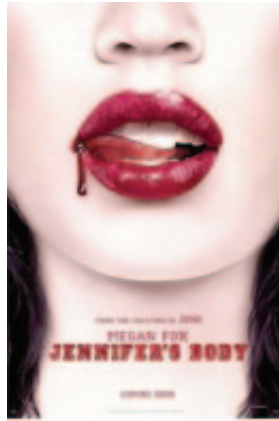


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### What resources and tools do graphic designers have available?

- The American Institute of Graphic Arts (AIGA) has chapters in a number of cities and is designed to advance the graphic arts community through exhibitions, competitions, publications, educational activities, and public interest work. For more information, visit their website at [www.aiga.org](http://www.aiga.org).
- The Graphic Artists Guild (GAG) works to increase recognition of graphic arts as a profession, educate members in business skills, and lobby for artists' rights legislation. For more information, visit their national website at [www.gag.org](http://www.gag.org) or the Philadelphia chapter at <http://philadelphia.gag.org>
- Philadelphia Volunteer Lawyers for the Arts (PVL) provides pro bono and low cost legal services to artists and arts and cultural organizations.

For more information regarding transformative works, copyright, or any other arts-related legal issues, contact:

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- Finding a Live/Work Space for Artists
- Censorship, Obscenity, and Indecency
- Guide to Licensing Stock Photography
- Documentaries — A Sample Release Form
- Intellectual Property — An Artist's Primer
- Transformative Works and Copyright for Visual Artists
- Music Licensing
- Nonprofit Incorporation
- Music Performing Rights Organizations
- Music Publishing — A Sample Contract between Composer and Publisher
- The Right to Publicity
- Parody and Satire
- A User-Friendly Guide to Copyright
- Financing your Film Project
- "The Naked Cowboy v. M&M" — An Explanation of Trademark Infringement
- The Visual Artists Rights Act of 1990
- Privacy and Photography
- Invasion of Privacy