Joanne Young, freelance illustrator. View Joanne's work at www.joanneyoung.net.

Copyright and the Internet: 10 Common Myths Busted

By Sharon Givoni

"… [T]he most innovative and progressive space we've seen - the Internet - has been the place where intellectual property has been least respected"

Over a decade ago, Internet campaigner, Lawrence Lessig[1], made this observation.

For illustrators, the Internet offers many marketing benefits and opens doors to further, and potentially endless, exposure. However, as with anything in Cyberspace, once your illustrations are posted online you lose a certain degree of control.

As a lawyer, I often see the same issues arise.

However, the numerous myths surrounding copyright are so intertwined that it is best to try and disentangle them one at a time. This is what this article will do— with illustrators in mind.

The mechanics of copyright:

The law in this area is, on the face of it, surprisingly simple.

It comes down to one thing: Do not copy.

Having stated that, it is surprising to see how often artworks are copied just because they have been posted online. Being inspired when you create art is one thing. Reproducing an illustration is quite another and it is the latter that the Copyright Act 1968 (Cth) (Act) seeks to prevent. So let's start at the beginning:

Why do copyright laws exist in the first place?

"What the law of copyright protects is some originality in the expression of thought."

Former Chief Justice Latham (High Court of Australia)[2]

It is clear from the quote that the purpose of copyright law is to provide incentive for people to create original works. It does this by giving creatives, such as illustrators, exclusive rights to control their artistic creations. These rights encourage illustrators to share and contribute to cultural development, and in most cases, it also means that they have a right to be remunerated for their efforts. While some may argue that a true artist doesn't create out of a desire to make money, the commercial reality of any profession is that you need to make money to live.

Now this is all well and good to state, but despite the fact that copyright laws apply to illustrations in Australia and internationally, enforcing copyright in this digital age can be a challenge.

On this point, let's examine some popular misconceptions and dispel the myths. This way if you do feel that your illustrations have been "ripped off", at least you will be one step closer to knowing where you stand.

Myth #1: If it is online, it is free to use

This is not true.

As an illustrator, you would know that just because you display your work online, this is not an invitation for someone else to reproduce or use your work in any way they please.

So long as they are original enough, most illustrations attract copyright protection. This means that the illustrator has the exclusive rights to:

- reproduce the work (eg. reproducing drawings on greeting cards or any other context, whether commercial or not);[3]
- publish the work (eg. allowing it to be featured in a book);[4] and
- communicate the work to the public (eg. posting it on a blog).[5]

1 *Tim O'Reilly and Richard, Code+Law: An Interview with Lawrence Lessig, Legally and Tachnically, Hollywood is Assaulting Some Basic Rights (29 January 2001) openp2p.com, http://www.openp2p.com/pub/a/p2p/2001/01/30/lessig.html.*

2 *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor [1937] HCA 45; Halsbury's Laws of England, 2nd ed., vol. 7, p. 521.*

3 *Copyright Act 1968 (Cth), s 31(b)(i).*

4 *Copyright Act 1968 (Cth), s 31(b)(ii).*

5 *Copyright Act 1968 (Cth), s 31(b)(iv).*

So, for example, if someone else were to reproduce or publish your illustration on their own website, this would infringe two of your "exclusive" rights. This includes your right to reproduce the work and your right to post it online.

Case Study one: When you get ripped off in cyberspace

Bronwyn Simmonds, owner of Melbourne-based graphic design agency, Beni Creative,[6] is all too familiar with this issue. She cites an experience where she designed a logo for her client's online business. By chance, she later discovered that the same logo was being used by an unrelated creative agency in India to promote its own business. Perhaps not as creative as they think they are! Needless to say, they took it down within days of her stern email.

Case study two: T-Shirt torment

Melbourne freelance illustrator, Joanne Young, is also no stranger to this scenario. She has come across people who have posted her artwork on their own websites, claiming to be the artist, one business went as far as reproducing one of her illustrations (which had previously been posted online) on a t-shirt range. A sample of Joanne's popular illustrations are pictured above and as a cover for this article.

6 *http://www.benicreative.com.au/.*

TIP: Monitor the marketplace! Although there are no 100% fool proof solutions to stop people from reproducing your work, copyright warnings and prominent watermarks can be used to help to deter copying.

Myth #2: Your clients paid for it, so they "own it"

Not so.

Clients often wrongly believe that because they pay for an illustration you have created, they own it and can use it without restriction. However, your clients will only have a right to use illustrations you create for the purposes agreed to at the time of commissioning the work. In legal speak, this is known as a licence.

TIP: Always be clear with your clients about the purposes of the illustrations and how they may and may not be used. This should be agreed between you and the client before work on the illustration starts and be recorded in writing. It goes without saying: if your client asks you to sign a legal document, make sure you have understood what it means and what the legal ramifications are before signing.

Myth #3: Copyright can be registered

There is no official registration system to register copyright in Australia, although such systems do exist in countries such as the United States, Canada and India.

In Australia, copyright protection is automatic and "springs" to life when the illustration is created.

TIP: If you plan to commercialise your artwork overseas, or use international websites such the popular etsy.com, registration of copyright may be warranted within those territories. In Australia, display the copyright symbol where possible beside your illustrations (more about this below).

It would look something like this:

© - your full name or company name if the company owns your copyright – Year of creation

Myth #4: Posting the drawing to yourself protects you

Illustrators often ask whether they should post their work to themselves and leave it sealed. The theory behind this practice is that it would serve as proof of creation of the work at a certain point in time, and is protection against claims of copyright infringement. However, because of the ease at which seals can be tampered with, this method is largely ineffective.

Similarly, other methods such as depositing the work in a bank safe or emailing it to yourself are also generally considered ineffective on a practical level. The weakness with these methods is that they risk luring the illustrator into a false sense of security. The illustrator assumes that

doing these things will provide them with protection when they don't mean much legally speaking.

Better options may be to document the evolution of your illustration using methods such as keeping draft sketches or a sketch book, or saving the drawings at each stage of development. Keeping a journal with illustrations or pictures or magazine clippings from which you have sourced your ideas can also help establish the progression and authenticity of your work.

TIP: Ensure your work is original and keep documented records of the process of creation. External back-ups of your digital files also helps.

Myth #5: People can own ideas

Put simply, there is no body of law that protects concepts or ideas in their own right. However it is a concept that people can find hard to grapple with, especially your clients.

There will be situations where an illustrator's client describes what they want in great detail and then when the illustrator draws it, their client believes they hold a stake in it. In practise however, one of the most fundamental principles of copyright law is that it does not protect ideas.

Rather, what is protected is the expression of ideas.

For example, the idea of a woman in a patterned floral dress is just that: an idea. However, the composition, shading and colour choices in the form of a tangible illustration or drawing makes up the way the idea is expressed. The illustrator has created the "expression". Therefore, the illustrator owns the copyright to the illustration.

This concept can trip people up and lead to misunderstandings between illustrators and their clients.

What you, as the illustrator, need to remember is that if your client has had no direct input in the actual creation of the work, you will own the copyright.

An example of direct input could be if a client supplied you with a photograph they had taken, with instructions for you to incorporate it into your work or to simply copy it. In that case, you may be co-owners of copyright.

TIP: If you develop this concern with a particular commission, it may help to politely remind the client at the outset that you own the copyright, even if they provide ideas. You can also incorporate something to this effect in your terms and conditions at the time of quoting. Stating these conditions in writing clarifies potential uncertainty.

Myth #6: Same, same, but different

Strange as it may sound, you can have two very similar illustrations that have been independently created and one

Image by Angie Rehe
http://angierehe.com

is not a copy of another. This may come down to simple coincidence. Coincidence is allowed under the law, and of course, each case will be different.

Sometimes copying can be inferred if it can be shown that the creator of the second work had access to the original drawing.

Fashion illustrator Angie Rehe knows this all too well when she posted an image online only to see a very similar version of it later reproduced by someone else who had originally asked her permission to use it for free which she had refused. (Image above).

Unconscious copying is also not allowed

It often comes as a surprise to people that even if you have "unconsciously" copied something, this can still amount to copyright infringement. The copying does not need to be intentional. So if someone has seen a drawing somewhere and happens to recollect it very well, they can still infringe

copyright by recreating it.

On the flipside, if copying cannot be proven, then you may not have a case for copyright infringement. In fact, this very issue emerged last year when a legal dispute arose between two competing fashion labels in Australia. The case was heard in one court and then appealed – all of this over a butterfly pattern.

Case Study: A case of déjà vu

In 2011, Ladakh Pty Ltd challenged its competitor, Quick Fashion Pty Ltd, over the use of a particular butterfly patterned fabric. Although the two prints looked remarkably similar, after looking at the evidence, the judge said that he could not find the "smoking gun" that would unequivocally prove that one fashion label had copied the textile design of another. Ladakh lost the case[7] and lost again when it appealed the first decision.[8]

TIP: If you see a work that looks identical to one that you have created, remember that coincidences can happen. First, try to find out as much as you can about the work that you think is a copy. If you still believe the work is a copy of yours, you may want to see a lawyer. Under the Act, there is a prohibition against making groundless threats of copyright infringement. Extra care is always warranted before sending any sort of "threatening" letter to someone.

Myth #7: If you change it by ten per cent it's okay

Contrary to popular belief, there is no such thing as the ten per cent rule.

This is because the legal test for copyright infringement is not based upon a percentage of a work. Instead, what counts is both the quality and quantity of what has been "taken". In legal speak the test for copyright infringement is whether an illustration has been "substantially reproduced".[9]

Thus, whether or not there has been an infringement will be determined on a case-by-case basis.

Case Study: Capture the vibe

How much difference does there need to be between two works to avoid copyright issues?

Melanie Blint, a graphic designer who manages the agency, Engana Graphics,[10] recalls an incident where an interior designer asked her to design a wallpaper from "scratch" with a similar design to someone else's vintage-style, dinosaur pattern. The client said they wanted it to be different enough so that there wouldn't be any copyright issues, but still have the same "feel" to it.

TIP: If you are referencing another work when creating your illustration you may be in a danger zone. Remember, while no one can protect an idea per se, if you take too much "inspiration" without enough of your own "perspiration," legal issues may arise.

Myth #8: If it's on the Internet, it's in the "public domain"

Many people think that images on the Internet are in the "public domain" and "free for the taking".

However, the term "public domain" has a specific meaning in law. It generally refers to works that are no longer protected under copyright law, or, as one US judge noted, "open to public use".[11] For example, copyright to a work lasts for seventy years after the death of the author. If a copyright to an illustration has expired, the illustration will then be in the "public domain".

Works such as Da Vinci's Mona Lisa are out of copyright and are in the "public domain" in the true sense of the phrase.

Examples of a Post-modern approach: Mona lives on

The above interpretations of the Mona Lisa are by Blek Le Rat,[12] Graffiti Artist 'Pegasus',[13] and Wikimedia Foundation,[14] respectively.

TIP: Don't make assumptions that just because images appear on the Internet they are in the public domain and not protected by copyright. Confirm whether copyright exists in relation to any image you find on the Internet before using it. If copyright to an image exists, obtain a

7 *Ladakh Pty Ltd v Quick Fashion Pty Ltd & Anor [2011] FMCA 519.*
8 *Ladakh Pty Ltd v Quick Fashion Pty Ltd [2012] FCA 389.*
9 *Copyright Act 1968 (Cth), s 14.*
10 *http://www.enganagraphics.com.au/.*
11 *Morgan v. Cree, 46 Vt. 773, 786, 14 Am.Rep. 640.*
12 *© Blek Le Rat Mona Lisa (2012). Colour screen print, 17'1/2 x 23. Under Creative Commons Attribution Share-Alike 2.0 Generic Licence accessible at: http://creativecommons.org/licenses/by-sa/2.0/deed.en.*
13 *© Pegasus, Mona Lisa, (2013, Islington London), Street Art/Graffiti.*
14 *© Wikimedia Foundation, Stylized Mona Lisa (2010) http://commons.wikimedia.org/wiki/File:Stylized_Mona_Lisa.svg. Under Creative Commons Attribution – Share-Alike 3.0 Unreported Licence accessible at: http://creativecommons.org/licenses/by-sa/3.0/deed.en.*

licence from the owner before attempting to use it.

Myth # 9: "Creative Commons" works are acceptable to use

Not quite. There's a catch.

But first, what does the term Creative Commons mean? It is basically a licensing system that's been around since 2001 and has been designed by people who want to share their works. This means that by uploading and designating it as a Creative Commons licence, the author is allowing you to do more with their work than if it was protected under traditional copyright.

However, this does not mean that anyone can do anything with it. One of the most important rules with Creative Commons is that the original author must always be credited and that you must comply with the terms of the licence, otherwise the whole purpose of the system is defeated.

There are six different licences that apply to Creative Commons works. These may include giving others the ability to use or modify the work, or the licence may limit use of the work to a non-commercial context.

TIP: If you incorporate illustrations into your works which fall under a Creative Commons licence, take note of what you can and what you cannot do with that work and always give the original creator credit.

Myth # 10: You must use the "©" symbol in order to be legally protected

The copyright symbol is a useful tool to remind others that you own copyright in a particular illustration. However, it is not legally necessary to display it for your work to be protected. You'll recall from earlier that copyright "springs" into life as soon as an illustration is created, so long as it is original and substantial enough.

Although a copyright symbol is not necessary, if you do use the copyright symbol on your illustrations, the Court makes a presumption that you own the copyright.[15]

TIP: While it is not necessary to display the copyright symbol on your works, it can help to deter potential "copycats".

Bonus Myth: Copyright is lost if it is uploaded on a social media platform (such as Facebook)

Generally speaking, no.

The terms and conditions of most social media websites usually provide that you retain copyright in all of your illustrations. However, if you upload your illustrations to social media websites you may lose a degree of control to your work. This is because when you upload an illustration to a social media platform you generally grant the site operator, under its terms of usage, a non-exclusive, transferrable, royalty-free, world-wide licence to exhibit your work.[16]

TIP: Before uploading illustrations to social media websites, such as Facebook or Instagram, check the terms of usage as they change frequently.

Conclusion

Something that is common to many illustrators is the feeling that sometimes they have weaker bargaining power. However, as more illustrators become aware of their legal rights, this strengthens the bargaining power of the industry as a whole. Hopefully this article has sketched out (excuse the pun) some useful general legal principles for you to follow and apply to your own day to day work in this industry. However, as with most things in life, there are often exceptions to the general principles covered, so don't take the above as if it is "set in stone". O

About the writer

Sharon Givoni is an intellectual property lawyer with many clients in the creative industry. She has run her own legal practise for some 20 years, has spoken at the Illustrator's Australia annual conference in 2013 and is the author of 'Owning It: A Creative's Guide to Copyright, Contracts and the Law', published by Creative Women's Circle. For more details about the book, go to: www.owningit.com.au.

Sharon can be contacted by email (sharon@iplegal.com.au) or called on 0410 557 907 or 03 9527 1334. To view her website, go to: www.sharongivoni.com.au.

Disclaimer: This article is intended as a summary only. Each case is different so if a problem does arise for you, seek legal advice tailored to your own circumstances. This article cannot be relied on as a substitute for legal advice.

Acknowledgements: The writer wishes to thank Darren Gansberg, Linda Xie and Nicholas McConnell for their feedback on this article.

15 *Copyright Act 1968 (Cth), s 126B.*

16 *At the time of writing, Facebook's policy was that a user retains ownership of the copyright in the work they upload to Facebook, however, they grant Facebook a non-exclusive, transferable, sub-licensable, royalty free, worldwide licence to use that copyright protected work. See: Clause 2, Statement of Rights and Responsibilities (https://www.facebook.com/legal/terms). However, the term can change in a minute so check for yourself if it is important to you.*