

# from our premiere issue what's your copyright IQ?

**Before you cut that cartoon rendering** of the Mona Lisa out of a magazine and paste it onto your latest collage, take a little quiz.

I can obviously use an image of the Mona Lisa in my own work, because Leonardo de Vinci is long dead and his paintings are in the public domain.

- a) Yes
- b) No
- c) It depends

In fact, I'm sure I can't get sued over this collage, because I'm going to paste my cousin Myrna's face over the Mona Lisa's, and my own cousin wouldn't sue me. Heck, I'm making her famous.

- a) Yes
- b) No
- c) It depends

I can use part of someone else's work in my collage because it's only going to be a small part of my overall work.

- a) Yes
- b) No
- c) It depends

**editors' note:** This article was originally published in the Premiere Issue of CLOTH PAPER SCISSORS Magazine. For tips on juggling copyright issues with blogs, see Pokey Bolton's Musings column in the September/October 2008 issue of CLOTH PAPER SCISSORS.

By **Cate Coulacos Prato**

We sure hope all your answers were c, because when it comes to copyright infringement, the law is simple, but interpreting it is not—particularly when it comes to collage. Still, you don't have to throw your prized altered book into the fire just because it has Marilyn Monroe's picture smack in the middle, nor do you necessarily have to run out and hire an intellectual property lawyer to review your repertoire (though there are times when a lawyer can actually save you money, and we'll get to that later). We've talked to people who have been there and done that, and while we're not offering legal advice (we're a magazine, not a law firm) we can give you some tips on how to avoid running afoul of the copyright gods.

Simply put, the copyright laws are the government's attempt to protect authors of original works, so that the author (or artist) can exert control over how the works are used and, if applicable, be compensated when someone else uses the works. Copyright law is applied the moment the creator's thoughts are set down in print or on a visual or sound recording. Since 1978 you don't have to register your copyright to be covered by the law, though many people and companies do go through the formality. Indeed, many individual artists and corporate entities do choose to register their copyright to make it clear to others they own the rights to a particular work. It's not expensive to register your copyright, and it is essential if you foresee bringing an infringement suit at some point.

Collage artists pretty much ran under the radar until about 15 years ago when new technologies made copying other artists easier and rappers brought "sampling"—using a few notes of other people's music in their own recordings for a sort of music collage—to the public's attention.

With the explosion of digital technology and the Internet, copyright law is evolving so rapidly, "We're coming to a sort of crisis point, because people don't know what to do," says Steven M. Weinberg, an attorney based in Los Angeles who has been representing companies and creators in the fine and commercial arts, entertainment and publishing for more than 20 years.

For collage artists clipping magazines, overlying commercial fabrics, and downloading images, Weinberg says determining copyright infringement boils down to two questions: What are you taking and how much are you taking? To answer this question, artists often cling to the shield of the fair use doctrine (see glossary sidebar) or claim that because they're not selling their work, they don't have to worry about infringing on another artist's rights. But that's not always true.

If your work is highly topical or political, it's more likely that fair use applies, because the First Amendment comes into play (see Barbie sidebar). Also, if your collage or altered book is a personal piece just made for you, or as a gift to a friend, there's probably no cause for alarm. But you never know. Even work in the public domain—usually a safe bet because there is no copyright holder—can cause concerns. For example, Weinberg cited a case where an artist had rendered the image of the Mona Lisa in the style of a linotype and wanted to copyright the



image. Some museum directors and art connoisseurs objected because Leonardo's work is in the public domain and therefore the original Mona Lisa is not copyrighted. So why should this artist be able to copyright his version? The court ruled he could because he had altered the original image significantly enough to make it his own. Moral to collage artists: sometimes the Mona Lisa isn't the Mona Lisa; check before you copy.

Though every aspect of copyright law is open to interpretation, Weinberg says the legal lifeboat of copyright as it applies to collage artists is *de minimis*, taken from the rule that translates, from the Latin, "the law does not concern itself with trivialities."

In other words, says Weinberg, "If you're going to take from someone else's work, use as little as possible."

But how much is considered *de minimis*? It depends. The more you take and the more the commercial effect it has on your own art and the artist or company's work, logo, or symbol, the more you can consider it infringement.

For example, did you place a small image of Kermit the Frog in a sea of other amphibians? Or is Kermit the centerpiece of the collage with the possible interpretation being that the Muppet is the focus of your work? In other words, are you marketing your piece by using a popular character, or is it just a small part of the overall work? And, are you using Kermit in a way that would somehow damage his image or affect sales of Sesame Street products? Should someone contest your use of Kermit, these considerations probably will come into play.

While Kermit is a puppet, living and breathing celebrities (or the living, breathing relatives of deceased ones) have different ideas of whether they want you to use their image in your work. And even if they don't mind, if their name or image is associated with a product, their licensing company probably will.

"You don't know who is going to sue," says Weinberg. "There are people who will sue you for anything. Some companies believe

they must sue, even if you're a small-time artist, because if they let someone get away with it once, they're setting a legal precedent."

Kathy Alpert, owner of PostMark Press in Watertown, Massachusetts, had a fairly easy time sorting out the copyright issues concerning her business, greeting cards made from vintage postcards. She reproduces the art on postcards made in the late 1800s and early 1900s, before copyright existed.

However, what makes Alpert's cards unique is that she displays the original correspondence from the postcard on the back of her greeting cards. At first she worried that people who had originally written on the cards would complain, but then she realized anyone who was old enough to have written and mailed a card in 1920 would most likely have passed on by now. They might have living relatives, but she decided to chance it. So far, she hasn't had any complaints.

On the other hand, now that Alpert is making cards with images of vintage sheet music, she has to do more research because famous composers, dead but with estates, are sometimes involved. She hired Weinberg to help her with that and to oversee her licensing agreement to mass produce the cards, as well.

"It's one thing to decoupage an image from a magazine once. When you get into multiple reproductions and mass commercialization, if you tread on a copyright owner's territory you can be out some serious money," says Weinberg.

From Alpert's perspective, "I can let him worry about that and I can concentrate on my art," she said.

Though you may need a lawyer to sort out your copyright infringement issues, Weinberg says his best, free advice is this: "Use as little as possible. And if your gut tells you maybe you shouldn't use something, listen."

## tips for avoiding copyright infringement

- Limit yourself to copyright-free images or images, surface designs, and photos you create yourself
- Ask the person or company who owns the copyright if you can use their words or images. If they say no, don't. If they say yes, go ahead. If they say yes, but they want you to in some way credit them or pay them, you'll have to decide whether the terms are worth it or not and act accordingly.
- Use common sense. Is that little voice inside you raising a red flag? Does the copyright holder have a history of bringing lawsuits? Would you be mad if someone used your art in this way? Then consider another image, or at least don't put this one front and center.
- Consider your audience. If this piece of art is just for you, or for you and your friends and family, go and collage in peace. On the other hand, if the art will be on public display—even if you don't intend to sell the piece, get clearance from the copyright holder or get some expert advice.
- Don't assume friends and family won't get mad or even sue you. If you have a fabulous picture of Uncle Joe that you want to turn into a greeting card, ask Uncle Joe's permission. If Uncle Joe has passed on to the great lounge chair in the sky, ask his living relatives' permission.
- If someone does threaten to sue you, don't panic, most of the time they just want you to stop using the image (also known as cease and desist).
- If you're in doubt, ask a professional. You may be able to find a qualified lawyer who can advise you for free, often through an artist's guild or association, especially if you live near a large city. If that person thinks you may have gone over the line of infringement, you may want to take it to the next step and pay for expert advice.



- If you're entering into a licensing agreement, it's almost always a good idea to hire an experienced attorney to protect your own copyright as well as to keep from infringing on someone else's.

## the artist fought Barbie, and the artist won

Mattel, Inc. tried to sue Utah artist Tom Forsythe for copyright and trademark infringement over Forsythe's use of Barbie dolls in his work. Forsythe took a series of satirical photographs of Barbie in the nude, in provocative poses, and in and around household appliances. The artist claimed fair use, saying his work commented on the consumer culture and Barbie's power as a beauty myth and as such fell under First Amendment protection.

After much legal wrangling, a Los Angeles judge labeled the photos "parody," found in favor of Forsythe, and ordered Mattel, Inc., to pay the artist's legal fees that amounted to almost \$2 million.

## copyright lingo

**copyright:** A form of protection provided by the laws of the United States to the authors of 'original works of authorship,' including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works.

**fair use:** Under the fair use doctrine of the U.S. copyright statute, you may use limited portions of a work including quotes, for purposes such as commentary, criticism, news reporting, and scholarly reports. There are no legal rules permitting the use of a specific number of words, a certain number of musical notes, or percentage of a work. Whether a particular use qualifies as fair use depends on all the circumstances.

**public domain:** Works created before 1925, or later works for which the copyright has not been renewed, are in the public domain, meaning they are free of copyright and may be used at will. Be care-

ful, though. If an entity such as a museum owns the work, such as a van Gogh, and you plan to reproduce the image (for example, in greeting cards or in a book), you may need permission from the owning organization.

**derivative works:** Only the owner of copyright in a work has the right to prepare, or to authorize someone else to create, a new version of that work. Accordingly, you cannot claim copyright to another's work, no matter how much you change it, unless you have the owner's consent.

Source: [www.copyright.gov](http://www.copyright.gov).

## resources

- [www.copyright.gov](http://www.copyright.gov)
- [www.funnystrange.com](http://www.funnystrange.com)
- Steven M. Weinberg is a counselor, litigator and recognized expert in intellectual property, advertising and e-commerce laws. Weinberg is one of a small number of lawyers worldwide elected by peers to both the International Who's Who of E-Commerce Lawyers and the International Who's Who of Trademark Lawyers. He also has been chosen for inclusion in Best Lawyers in America. Weinberg has been representing companies and creators in the fine and commercial arts, entertainment and publishing for more than 20 years.

