

Graphic Design Copyright: Inspiration vs. Infringement

How much do you know about design [copyright](#) laws, trademarks and design patents? If you're a graphic designer, it's crucial to understand the intricacies of intellectual property rights and fair use policies.

Below, check out a brief excerpt from Lesson 1 of [Intellectual Property Rights for Graphic Designers](#), a HOW U course developed by William M. Borchard.

In this online course, Borchard takes an in-depth look at what intellectual property rights are, how you can protect your design work, how you might be infringing the design rights of another, to what extent you can use another's designs, and practical steps you should take for protection and to avoid infringement.

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Inspiration

All designers look to prior works for [inspiration](#). The crucial inquiry, however, is whether the source of the inspiration has been transformed sufficiently that the new design can be considered "original" rather than "derived." In making this determination, you compare the designs side-by-side or you overlay one design on the other. Then, you decide whether the protectable elements of the two designs are "substantially similar."

It is very difficult to predict the outcome of a particular claim that a later design infringes an earlier design. It is certain, however, that the cost of dealing with an infringement claim can be high, both in terms of interference with the continued use of the design at issue, the cost of changing it, the cost of possible lost income, and attorney's fees. Accordingly, you should try to find your inspiration from several different sources, should not use elements taken from only one of them, and should retain your notes and source materials so that you can substantiate your creative process.

Infringement

There is a disconnect between the views of graphic artists and the views of judges as to what constitutes substantial similarity. The judicial standard that is most commonly applied is as follows:

Whether the ordinary observer, unless he set out to detect the disparities, would be inclined to overlook

them and regard the aesthetic appeal of the two works as the same.

On the other hand, designers are more likely to focus on the individual design elements and the differences between the designs. This has given rise to some widely held myths:

Myth 1: Many designers believe that the designer point of view as to specific changes will be given legal recognition. This is not necessarily so. A Judge will look at the overall visual effect—the total concept and feel—regardless of the individual elements that may have been changed, added or even removed. For example, the design of an oriental carpet which was a simplified version of a Persian antique, was copied in part with some changes and additions and was viewed by the designer as being original. However, an appellate court viewed it as being derivative and infringing. (*Tethenkian v. Einstein Moomjy, Inc.*)



Myth 2: It is commonly believed that a specific number of changes in a design — such as five, six or seven changes — are automatically sufficient to make the later design original. This is not true. Rather, a Judge will consider whether the changes were sufficient so that the new design would be considered transformative of the original design rather than derivative of it.

For example, artist Shepard Fairey took a digital copy of an Associated Press photo of Barack Obama, made changes in it, and used it for the “HOPE” posters he sold during the 2008 Presidential campaign. AP asserted an infringement claim, and Fairey went to court for a declaration of non-infringement. Fairey eventually settled AP’s infringement claim by paying more than \$1 million to AP. (*Fairey v. Associated*

Press)



Fair Use

The [Copyright Law](#) provides a limited right to make fair use in a later work of elements that otherwise would be found to have been copied from, or derived from an earlier work. This is known as “fair use,” but it rarely applies to designs because it generally relates to uses for purposes such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.” (Copyright Law § 107.)

In determining whether a particular use is a fair use, the Copyright Law mentions the following factors, which are not exhaustive:

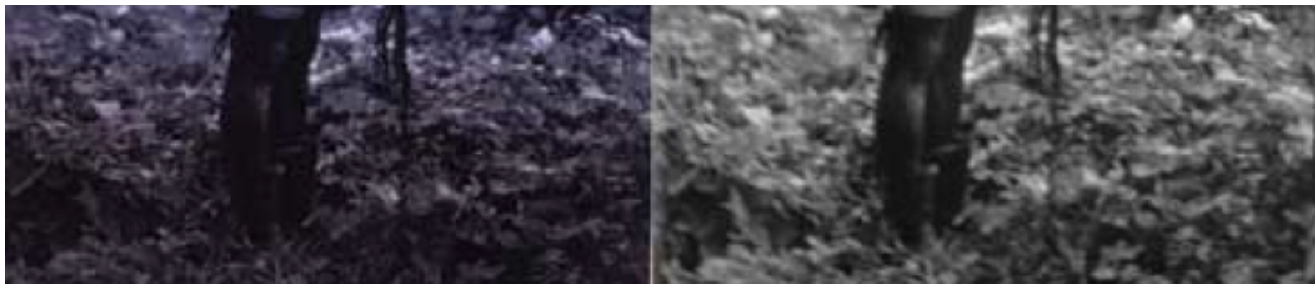
1. “The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.” A commercial use is less likely to be found to be fair use.

2. “The nature of the copyrighted work.” Fair use is less likely for unpublished works than for published works, for creative works than for factual works, and for readily available works than for rare works.
3. “The amount and substantiality of the portion used in relation to the copyrighted work as a whole.” This concerns both quantitative and qualitative amounts used. There is no per se rule. Using an entire photograph in a compilation probably is not fair use. But using a qualitatively important detail from a photograph also might not be fair use.
4. “The effect of the use upon the potential market for or value of the copyrighted work.” This has been said to be the most important factor. Lost licensing revenues may be part of this analysis.

The courts have applied a fifth factor, namely, whether the use is “transformative.” For example, fair use also was found where small digital “thumbnail” reproductions of photographs were used in a visual search engine. *Kelly v. Arriba Soft Corp.* Similarly, small reproductions of Grateful Dead concert posters in an illustrated biography of the band were considered transformative and constituted fair use. (*Bill Graham Archives v. Dorling Kindersley Ltd.*)

One of the more controversial fair use areas involves so-called “appropriation art” in which an earlier work is reproduced in a later work with some changes. Richard Prince tore 35 photos from a book published by photographer Patrick Cariou, pinned them to a piece of plywood, and exhibited them with varying degrees of alterations. The court compared the artistic works side-by-side, and in a discussion that has been controversial, found that most of them were sufficiently transformative in aesthetics, size and expression to qualify for fair use. (*Cariou v. Prince*)





To learn more about design copyright laws and how to protect your own work, register for [Intellectual Property Rights for Graphic Designers](#) with William Borchard.

More resources about copyright and intellectual property rights for graphic designers:

- [Selling Graphic and Web Design](#), an OnDemand Webinar by Donald Sparkman
- [Business and Legal Forms for Illustrators](#) (eBook) by Tad Crawford
- [Stock Photography: Understanding Copyright from Wrong](#) (MP3)