

## AN EXCERPT FROM THE LATEST

*New York Times* bestseller. Grandma's secret meatball recipe. An Ansel Adams photo. Exactly what—and how much—can a magazine print before it must seek permission? If the magazine doesn't own the copyright—meaning it didn't create the work or doesn't hold the right to use it (for example, by contract with a freelancer)—it's presumably owned by someone else. Whether a magazine wants to reproduce the work (e.g., print a photo), make a derivative use of a work (e.g., translate an article into French for an overseas edition) or publish a work electronically (e.g., upload articles or images on a website), designers and editors need to think about copyright issues.

## Copyright Basics: The Law and Its Exceptions

In the United States, copyright attaches automatically when a work is created in a tangible form. No registration or notification is required. Of course, there are exceptions. Copyright doesn't protect ideas or concepts, nor does it protect facts, names, titles, slogans, works that aren't original (such as standard calendars and measurements) or works in the public domain. Magazines can print a work, or portion thereof, if the copyright has expired. They're also free to print works if doing so constitutes "fair use," such as with parody, criticism or news reporting.

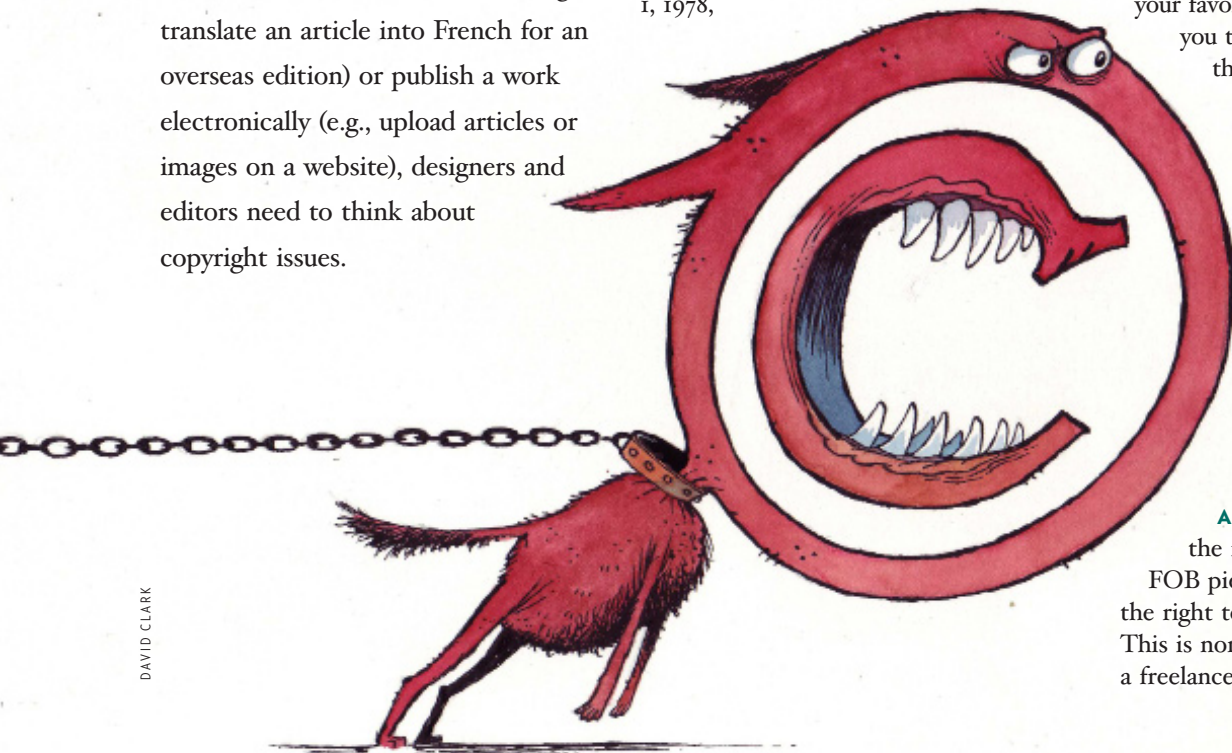
To determine whether a copyright has expired, consider this: Works created on or after January 1, 1978,

are generally copyrighted for the life of the author plus 70 years. Works created before January 1, 1978, fall under different, more complicated rules. For guidance, visit [www.copyright.gov](http://www.copyright.gov) (click on "Copyright Basics" and scroll down to "How Long Copyright Protection Endures").

The Copyright Act gives a four-part test to determine fair use, but the guidelines are fuzzy. "There are at least a thousand cases out there interpreting fair use, and they're all over the map," says Joshua Kaufman, a partner at Venable LLP and head of its copyright and licensing group. Kaufman notes that courts balance all four factors, but tend to look to the last—economic impact—most. Meaning, if your use deprives the copyright owner of income, the scales won't be tipped in your favor. Other factors are whether you transformed the material so that it's used for a different purpose than the original and whether the amount taken was appropriate in light of the use. There's a better chance fair use will apply if the answer is yes. Finally, you'll have more leeway if the nature of the copied work is factual (a biography) instead of creative (a novel).

### Practical Applications

**ARTICLES:** Whether it's slated for the feature well, a column or an FOB piece, publications must secure the right to print the stories they run. This is normally done by contract with a freelance writer. The most common



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# COPYRIGHTS AND WRONGS

(and usually the fairest) is payment in exchange for first North American serial rights. At the other extreme, work-for-hire grants the publication full legal authorship, but the doctrine will only apply if the writer is a W-2 employee or if such rights are in the contract. Otherwise, “it doesn’t matter if the magazine calls up a freelance writer, assigns the article, offers use of the magazine’s computer and hands out press credentials—a freelancer will own the copyright by default,” Kaufman says. Regardless of what terms are negotiated, the contract should clearly identify the rights purchased.

**BOOK EXCERPTS:** A pregnancy magazine wants to run a selection from *What to Expect When You’re Expecting*. Or a business publication wants to highlight a passage from *The Tipping Point*. If the excerpt is printed as part of a book review, it would probably fall under fair use as a critique or commentary. But if it’s running as a stand-alone article, it would likely be an infringement unless the magazine received the author’s permission.

#### POETRY, MUSIC LYRICS AND MOVIE

**QUOTES:** “Quotes are always tricky,” Kaufman says. Quoting short and isolated portions of a work to illustrate a point will normally be considered fair use, as will general references. Yet even so, publishers tend to require clearance of small uses. They may not have the legal backing to support their position, but “paying for permission will cost less than hiring a lawyer to prove you shouldn’t have to pay,” Kaufman says.

**RECIPES:** The mere listing of ingredients won’t infringe on a copyright, but an original literary expression in the form of explanations or directions might. So a magazine could reprint the spices in grandma’s secret meatball recipe, but it couldn’t reproduce her entire cookbook (the specific arrangement of recipes is unique). Unless an exception applied, a publication also couldn’t reprint the instructions of a recipe written in a distinct voice, even a simple recipe such as Amy Sedaris’ method for cooking

hotdogs, set forth in her book *I Like You*: “1. Wake up. 2. Turn the stove on,” etc.

#### THE NEW YORK TIMES’ BESTSELLER

**LIST:** Whether a magazine can reprint a copy of *The New York Times’* bestseller list is—drum roll please—undecided. *The New York Times* sued Amazon.com after the online bookstore printed the list on its website, but the case settled. “The settlement allowed Amazon.com to print the list, but in alphabetical order, not in order of sales,” explains Peter Friedman, a professor at Case Western Reserve School of Law. “It doesn’t constitute precedent of any sort,” he notes, meaning that *The New York Times* could decide to sue another publication for reprinting the list.

**CHARTS, TABLES AND GRAPHS:** Whether copyright protection applies to charts, tables and graphs that set forth figures and illustrate scientific data will “depend on the originality of the representations,” says Friedman. Because facts are not copyrightable, it doesn’t matter how much work it takes to compile information (as the folks who arranged the telephone book discovered after they sued unsuccessfully), but if “a fair amount of creativity and thought goes into graphic representation of data” a copyright will likely apply.

#### PHOTOS, ARTWORK, CARTOONS AND

**DRAWINGS:** Copyright broadly extends to photos, artwork, cartoons and drawings. The handful of instances where courts held otherwise are “few and very fact specific,” says Kaufman. Obtaining permission will almost always be necessary.

#### What about the Internet?

Just because a publication has the right to produce certain material in print doesn’t necessarily mean it can publish it on the Web. “Magazines can publish an electronic copy [of their print magazine] without seeking permission as long as it’s verbatim,” said Kaufman (meaning, scanning it on microfiche). Otherwise, magazines should secure electronic rights. Acknowledging the

*Copyright guards its owner  
against unauthorized use.  
Follow these guidelines to  
avoid being bitten.*

BY JENNY ROUGH

source is not sufficient.

Services such as Creative Commons make certain works more readily available—in these situations, the owner of the copyright grants a license for others to copy their work—but the license usually has limitations, such as not allowing the work to be used for commercial purposes or as part of an ad campaign. “People see ‘Creative Commons’ or ‘royalty-free’ and don’t read the license,” Kaufman says. It’s important to understand the fine print.

#### Seeking Permission

When in doubt, seek permission. Just because you find something in your filing cabinets or used an image in a back issue doesn’t mean the magazine owns the copyright. Start with agencies such as publishing houses—they can often direct you to the owner. If you’re working with a freelancer, remember to spell out the rights in the contract. Obtaining the copyright before publishing a work may be a pain, but it’s a big deal. “No one is trying to rip one another off,” says Kaufman, “but people don’t like to deal with copyright issues and they end up making incorrect assumptions.” **[FPO]**

**DISCLAIMER:** The information in this article does not constitute legal advice. The legal concepts outlined may be subject to exceptions and qualifications, and laws are subject to change depending on the jurisdiction. When in doubt, seek an attorney who can offer advice based on your facts and circumstances.

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