

Who owns your portfolio?

It might seem logical that you own the designs you create; but it's not always true

By **Suw Charman**

WITH THE ADVENT of the first graphical internet browser came a whole new design discipline – web design – and with it came a new way of getting work. Instead of collating examples of their best work in a book to be carried from interview to interview, designers started to use websites to display their talents. Online portfolios allowed designers to include not just a set of images, but links to the finished sites so that prospective clients could examine code and functionality. Now designers of all ilks can send not a physical portfolio but a simple URI to new employers, and can promote themselves online using their website as their business card.

But the very thing that makes an online portfolio so useful – the ease with which it can be found – is also its biggest drawback, because if you include content which one of your former clients or employers thinks is infringing their copyright, they can quickly and easily find you and take action.

Signing away your rights with 'Work for Hire'

When designer Jason Santa Maria put his portfolio online he wasn't expecting to get a **Cease and Desist** letter from a former employer citing clauses from his contract and demanding that he remove any references to them, including all images, from his site. Jason had fallen foul of his old **Work for Hire** contract which transferred ownership of all rights in his designs to the company he worked for. It meant that the only legal way he could use his designs in his portfolio was to obtain express permission from the rights owner, his former employer, or challenge the restriction in court.

"I wasn't entirely aware of the ramifications when I signed," Jason admits. "I was young and inexperienced. Most design shops accept that people will use the work they do in their public portfolios, but because you are now able to have a body of work on your website which can be accessible by anyone at anytime, I think you will see an increase in situations like this. Information is so readily available that you can't assume people aren't looking and, more importantly, aren't taking notice.

"Most companies don't care about [you putting your work in a portfolio], since you aren't taking money out of their pocket, you aren't reselling the work. But Work for Hire agreements can be dangerous things because you have basically signed away the copyright to your work and your ability to be compensated for further usage."

Although they govern the transfer of copyright in a work from the creator to another party, Work for Hire agreements are actually a specialised area of employment law (rather than copyright law), and have been used abusively by companies who want to treat designers like employees, but without providing any of the benefits.

As Jason says, "I do feel employers are being a bit unreasonable in these situations. Work for Hire agreements can be used to sincerely protect a business and its interests, but they can also be used to take advantage of artists. Designers who are just entering into the field can be easily pressured into signing Work for Hire contracts because they either don't know any better or badly need a job. Generally, it isn't a bad thing to sign Work for Hire contracts for full-time or salaried employment, because any rights you are giving up are assumed to be covered by your access to employee benefit programs and the protection that being employed provides. Freelancers and contractors are not privy to such benefits and need to charge more to cover their expenses, as well as maintain the rights to their work."

Copyright activist Cory Doctorow, from the Electronic Frontier Foundation (EFF), agrees: "In the real world, it's pretty clear that commissioners of design work often have more market power than the designers themselves, so it's hard for designers to dictate terms. But I think that it's in designer's interests to strenuously object to these clauses where they appear in contracts, or at least demand a buyout."



If your potential client can give you a good business reason why you should sign over your copyright, then you should negotiate a higher fee for your work.

If your potential client can give you a good business reason why you should sign over your copyright, then negotiate a higher fee for your work. “If you find yourself looking at a contract with this kind of material in it,” says Cory, “where you agree that you won’t use your own work to promote your own career, you should go, ‘Wait a second! That’s the kind of thing I charge extra for. Are you sure you need this service?’”

But for many companies, their reasoning is based on fearful and defensive thinking – they are concerned about what might happen if their intellectual property ‘fell into the wrong hands’ or how they would be perceived if their web designer’s portfolio ranked higher in the search engines than their own site. These sorts of fears are usually groundless, but you can’t always rely on your clients to behave rationally and if they don’t, Jason points out, “You can always say no. Employment contracts are always a negotiation, but if they react poorly, this may be a signal for things to come. If you can, get [your agreement] in writing because their word is not good enough, especially if things go south after a few years.”

If you feel that the contract you are about to sign might be weighted against you, seek independent legal advice – your future employer will have their own lawyers who, generally speaking, are not on your side. It will pay you to understand the details of the contract under which you are expected to work so that you know your exact position before you start negotiating.

Clients of clients

Another potentially sticky situation is if you work for a company which has a restrictive contract with its clients, a problem that [Cameron Moll](#) came up against. As creative director and lead designer for a web-based site builder application called Array Express, Cameron had to abide by the agreement between his employer and one of their clients, Tupperware.

“I was never privy to the contract we held with Tupperware,” says Cameron, “but I was aware that we were not to post any screenshots without Tupperware’s permission. This included not only the marketing materials we developed to help them push the system to reps, but also any marketing materials we used to advertise the Array Express system to other companies.”

This agreement, of course, also covered Cameron’s portfolio at the time.

Non-Disclosure Agreements (NDAs), either between you and your employer or your employer and their client, can also cause problems.

“An NDA’s meaning depends first and foremost on what it says,” explains Wendy Seltzer, intellectual property lawyer with the EFF, “but even an NDA doesn’t usually prohibit someone from disclosing information once it has become publicly known, and confidentiality restrictions often expire when the information is no longer commercially sensitive.”

The law is on your side

If you haven’t explicitly signed away your rights, then the law comes down on your side quite decisively. In copyright law, the fair use/fair dealing limitations and exceptions are based upon judging whether the use you are making unduly prejudices the legitimate interests of the rights holder and whether you are making a use that is socially beneficial.

Cory says, “It’s clear that reproducing a design in your portfolio doesn’t prejudice the rights holder’s interests: it wouldn’t cause people to commission fewer designs; it doesn’t make it harder to sell whatever it was that the design was commissioned for. And it has socially beneficial uses for people who want to understand design and where it comes from, how designers progress, which designers are the best and so on. The factual matter of affiliating a designer and their design is clearly socially beneficial. There’s just no basis for a commissioner, absent from contractual language, to say ‘You may not reproduce this design in your portfolio.’ It just doesn’t make any sense.”

Furthermore, overly restrictive contracts can be challenged. “States vary in their willingness to enforce restrictive agreements,” says Wendy, “so it’s worth checking with a lawyer. Even if the agreement seems to sign your life’s work away forever, your lawyer might be able to tell you if a court is likely to interpret that narrowly or throw it out. In particular, many states put limits on contracts that hurt people’s ability to seek new employment in their field.”

One thing you shouldn’t do, however, is start to ask for permission to reproduce your designs unless you really have to, i.e. unless you have signed a contract giving away your rights or an NDA which prevents you from discussing your work.

“You don’t need to,” says Cory, “so any time that you ask permission and you don’t need it you’re wasting your time and theirs. If we asked permission for all of the things we don’t need permission for, like making links to websites, we eventually get into this crazy situation where I have to ask permission before I even email you. Everyone needs to be involved in promulgating good social norms around permission, where you ask permission only when permission is genuinely needed.

“And the worst part is that if they say no, then what do you do? If you have the right to that work, if you made it, if it’s yours to begin with and copyright lets you use it, what do you do if they say no? Are you going to fight it in court? Much better in those cases to beg forgiveness [afterwards].”

Taking on the Take Down Notices

Cease and Desist letters are not the only tactic used by companies who want to control your work. Increasingly common is the **Take Down Notice**, an artefact of the World Intellectual Property Organisation's 1996 Internet Treaty which says that ISPs aren't expected to figure out what infringes copyright and what doesn't. Instead, once they are told that there's infringing material on their servers, they have to take that material down. They then have the *option* of notifying the person whose material has been removed and giving them the chance to assert that the work isn't infringing. If that assertion is made, the ISP notifies the complainant that the material will be put back up unless they file a lawsuit within ten days.

"For a lot of ISPs, all the profit that they'll ever make from a customer is less than the cost of a lawyer sending one letter to them," says Cory, "so in practice what often happens is that stuff just disappears. You ring up your ISP and say 'Why is my stuff offline?' and they say 'Well, Sir, you're not our customer anymore. Go away.' and you never find out what it's about. This is a real problem with Notice and Take Downs because it really tilts the balance in favour of the people who make these kinds of complaints.

"If this does happen, you can just find another ISP and put the material back up. It's a good reason to own your own domain, because then you can move the domain over and after a couple of days interruption whilst the DNS refreshes you'll be back online."

"But," Wendy adds, "even if a former employer asks you to take work off the web, it would still likely be fair use to save PDFs or hard copies to include in a personal, offline portfolio. You might also ask the company whether their concern is search keywords and if it is, offer to replace with non-searchable PDFs or images."

The chilling effects of Cease and Desist

So what happens if you get a threatening Cease and Desist letter from a former client or employer asking you to remove work from your portfolio?

"First," advises Wendy, "look at the claims in the letter and any agreements you have signed with your employer. Do the two make sense together? In general, you will want to talk with a lawyer, but sometimes the claims will be so outlandish that a lawyer is overkill. For example if someone claims trademark infringement because you have (accurately) referred to a former client by name, or they claim copyright infringement for linking to a site that you worked on, that's absurd."

If you do feel you need to find a lawyer, you should contact your local bar association, local legal assistance groups or local law school. In the UK, contact the Citizen's Advice Bureau. You can also contact ChillingEffects.org, a website run by the Electronic Frontier Foundation and Harvard, Stanford, Berkeley and other law schools.

"Chilling Effects collects and analyses Take Down notices and Cease and Desist letters to help people understand what they mean," explains Cory, "and as we prepare to fight to have these Notice and Take Down regimes eliminated, it helps for us to have a body of evidence that illustrates the problem. So if you're interested in seeing that justice be done, and that in the future other people don't get the same sort of Take Down notice that's screwing up your life, send a copy to Chilling Effects and give them the opportunity to analyse it and add it to their growing collection."

Beyond the legalities and the social responsibilities, you also have to have to think about the practicalities of your situation. Even if you have a contract which explicitly protects your rights to your work, can you afford to defend a lawsuit? Is the threat of legal action credible? Only you can weigh the pros and cons of defending your position.

"But," says Cory, "if you have a contract in which either those rights are reserved to you or aren't mentioned, and you feel like either the threat is not serious or that you can defend yourself, then you should by all means tell them to get stuffed."

The bottom line is that, unless you have signed away your rights – something you should never do unless you get adequate recompense – the law is on your side, and most threats of legal action are just that. Threats.

Joining the Creative Commons

Of course, every designer works on personal or community projects where rights clearly lie with the designer and these are a rich source of examples for a portfolio.

So how do you license your own work? Most designers have been educated in a very conservative atmosphere, where the preferred licence – copyright – is an exclusive all rights reserved licence. But over recent years, copyright activists such as Professor Lawrence Lessig have created an alternative system called Creative Commons. This allows users to specify precisely what other people can and can't do with your work, covering areas like attribution, whether commercial use is allowed and how derivative work must be licensed. Although Creative Commons licences seem to fly in the face of traditional copyright, for many designers and developers they have become the de facto standard.

Tantek Çelik, Senior Technologist with Technorati, is a big supporter of Creative Commons licences, which he has used at Technorati and on his own CSS examples.

"There are numerous gains to be had [from using a Creative Commons Licence]" says Tantek. "Broader exposure is one, and more feedback is another – when you share with the community, you encourage the community to share with you."

Cory, a Creative Commons user himself, adds: "In the case of designers, allowing non-commercial use of designs or design elements that you've retained rights in is an easy and effective way to get more work. If your work forms bits and pieces of a million weblogs and little viral flash things

and personal websites, and if all of them – in keeping with the terms of the Creative Commons licence – bear a link back to you, then people can find and commission you.”

Dave Shea uses Creative Commons licences for his site, [CSS Zen Garden](#), but is not yet completely convinced that they are flexible enough.

“The CSS Zen Garden,” he explains, “is a collaborative gallery where graphic designers style a single, central HTML file any way they wish. Doing so is a creative challenge that allows them to demonstrate both the power of Cascading Style Sheets (css) and their design skills. Once they decide to submit their work, they retain full copyright control over their images, but it’s asked that the css be licensed under a Creative Commons license.

“The goal was to promote and share css, while offering some sort of protection for the design itself through copyrighting the images. What I was trying to avoid was creating a resource where people could re-use others’ work without compensation. The problem has been in defining the separation between the design and the css that creates the design. The code is seen as part of the final design, the code elements on their own aren’t significant or original enough to be copyrighted, but the final work is.

“I thought the easiest way to maintain control would be by retaining the images, which provide style and character that the css alone doesn’t. In many cases the designs fall apart without the images; but not in all. Some are incredibly similar to the original even without images.

“Ideally, there would be a way to tell people they’re allowed to study the css, and even re-use bits and pieces, but not re-use it as a starting point for a new design. That’s a subtle difference, which is impossible to convey with a Creative Commons license.”

Eventually, Dave came to a sanguine conclusion to his licensing problem. “I’ve since realized that the best option would be to build in a provision for the most egregious rip-offs, i.e. commercial re-use, and relax about the petty stuff that doesn’t really damage anyone beyond their ego. It’s really the best I could swing, and so far I’ve been more or less happy with the outcome.”

Learning by tinkering

But the sharing debate isn’t just about the potential for rip-offs and commercial re-use, it’s also about allowing people to learn from your work by tinkering, a point that Professor Lessig makes in his Creative Commons-licensed book, [Free Culture](#), available for free download from his site.

As Cory explains, “There’s a fine line [between stealing code and learning by tinkering]. I dare say that everyone who’s ever learnt how to write css or HTML learnt by nicking bits and pieces of other people’s code. It’s well understood that that’s how we learn – that’s why people who want to be classical painters spend years copying famous paintings.



“So you have to ask yourself, if I come up with a way of doing something, should I be able to say ‘Well, no one ever gets to use this again...’? What are you really after there? Acknowledgement? What’s your goal and is it reasonable? And how would you feel if other people applied that goal to you, especially when you were learning what you were doing?”

“And that’s a different consideration to when you find a commercial entity that’s taken your design, lifted it wholesale, built it as theirs and are charging money for it. That’s a completely different scenario, and too often I think we group them all together.”

Important distinctions

When it comes to copyright and ownership, what’s needed is the ability to discriminate between what are important considerations and what you can let go. A restrictive Work for Hire contract will have an impact beyond your immediate employment so it’s worth negotiating fairer terms, but if someone re-uses your work in some small backwater of the web, is it really worth anything more than a polite email asking them to not to?

“You accomplish a lot more,” says Cory, “by simply writing to someone and saying ‘Y’know, I designed this and I’m glad to see you using it, but I was hoping that you could do XYZ.’ If instead I respond by threatening to sue you, it wouldn’t do me any good.

“I get much more benefit by not being a jerk, and not being a jerk is better for your blood pressure.” →

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