

HOLOGRAM

COPYRIGHT

GUIDELINES

IHMA
INTERNATIONAL HOLOGRAM
MANUFACTURERS ASSOCIATION

International

Hologram

Manufacturers

Association

The International Hologram Manufacturers Association (IHMA) was founded in 1993 to represent and promote the interests of hologram manufacturers and the hologram industry world-wide. It is a not-for-profit membership organisation registered in the United Kingdom as a company limited by guarantee. Membership is open to all manufacturers of holograms, suppliers of equipment and materials for the manufacture of holograms, and hologram converters and finishers.

The IHMA Copyright Guidelines have been prepared with the assistance of Robbins Olivey, solicitors in the UK, and Finnegan Henderson Farabow Garret and Dunner, lawyers in the USA.

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H O L O G R A M

C O P Y R I G H T

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Introduction

"IHMA members will respect the intellectual property rights of their suppliers, sub-contractors and other members of the holography industry. Members undertake to operate within the Berne Convention and to make clear to customers and contractors who owns the designs, drawings, artwork, master and sub-master plates of any given hologram. The IHMA will publish guidelines to cover these matters."

IHMA Code of Practice, Clause 5,

(See the Code of Practice on page ten).

This booklet outlines international law on copyright as it affects holograms, artwork for holograms and the intermediate steps in making a hologram from artwork. It includes guidance from the International Hologram Manufacturers Association on the ownership and assignment of copyright in holograms.

The IHMA recommends that its members follow these guidelines so that common practices are used throughout the hologram industry.

Scope of the Guidelines

These guidelines cover the most common situations in commercial hologram production where the question of copyright ownership will arise:

- **Holograms custom-made for a customer to use in pursuance of the customer's trade or business, such as for promotion or product security;**
- **Holograms made to be published for sale, either by the manufacturer, the creator or a separate publisher.**

Hologram producers should incorporate the recommendations on copyright and the assignment of copyright into their standard contracts or other agreements with suppliers and customers.

The Berne Convention, international copyright and holograms

The Berne Convention is an international agreement, subscribed to by over 90 countries, which sets out minimum requirements on copyright law. Each member country's copyright laws are required to at least meet the standards set out in the Berne Convention.

There is no specific law governing the copyright of holograms, which are treated as copyrightable insofar as they are the result of one or more original creative works. Nor has there been any test in law of the copyright ownership of a hologram.

However, certain jurisdictions have attempted to address the identification of a hologram and the copyright on it. For example, the United Kingdom Copyright Designs and Patents Act 1988 is drafted to include holograms under references to photographs and/or films (*see footnote below*).

The USA is more typical of the situation in most countries which have not attempted to classify the new technology. US Copyright Law defines 'pictorial, graphic and sculptural works' as 'two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions ...'.

Holograms would be considered as photographs, but in the absence of specific reference to holograms or legal precedent IHMA is unable to give legally authoritative advice to members or their customers on copyright ownership. However, drawing on strong precedent and custom and practice in this and related industries, the IHMA has drawn up these guidelines for its members.

Footnote

In the United Kingdom clause 4 of the Copyright Designs and Patents Act 1988 defines a copyrightable 'artistic work' to include a graphic work such as paintings, drawings, diagrams, maps, charts etc, photographs, sculptures and collages. When replacing the 1956 definition of a photograph with a new definition for the purposes of the 1988 Act it was pointed out that the old definition did not incorporate new technology for reproducing images, such as holography. Section 4 (2) of the 1988 Act, therefore defines 'photograph' as follows:

'photograph' means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film.

Clearly, the intention of the legislators was that a hologram should be copyrightable in the same manner as a photograph. However, the definition excludes material which is part of a film. The definition of a 'film' in Section 5 of the Act is 'a recording on any medium from which a moving image may by any means be produced'. This definition could also extend to certain holograms.

Moral rights

Moral rights in copyright works have been recognised in Continental Europe since the 19th Century. Moral rights vest in the individual author or creator of the copyright work and are recognised as totally independent of the copyright itself. Thus, where an employee creates an original work in the course of his employment, the copyright will vest in the employer, but the moral rights will vest in the individual employee.

Whilst there is no universally accepted definition of a moral right, four rights have received general acceptance:

- **The right of paternity – the right of an author to attribution of his authorship.**
- **The right of integrity – the right of an author to prevent modifications to his work.**
- **The disclosure right – the right of an author to withhold his work from publication.**
- **The non-attribution right – the right of a person not to have attributed to his authorship a work of which he was not the author.**

Moral rights were incorporated into the Berne Convention by the Rome Act of 1928 and Berne now recognises the right of paternity and the right of integrity. The most recent version of the Berne Convention lays out the following main features of moral rights as being applicable to ratifying countries:

- **Moral rights are independent of economic rights.**
- **Moral rights continue to subsist after the author has transferred his economic rights.**
- **Moral rights are to be maintained at least until the expiry of economic rights.**
- **The manner in which moral rights are protected is to be determined by national law which need not, necessarily, be copyright law.**

Generally speaking, moral rights may not be assigned or otherwise alienated by the author or creator who holds them but that person can waive them. It is, therefore, important for contractors to ensure that their employees who are engaged in the creation of original copyright works waive their moral rights unless they are prepared to insist that their commissioning customers recognise their employees' rights in the work which is being created for them. It will be readily appreciated that this is usually not commercially acceptable to the commissioning customer who has no wish to take on the responsibility of ensuring that the author's rights of paternity and integrity are not infringed.

Moral Rights are not specifically recognised under US State or Federal law. Section 43(a) of the Lanham Act and certain provisions of the Copyright Law refer to derivative works. In 1990 the Visual Artists Rights Act was added to the Copyright Act, giving rights of attribution and integrity to the creators of 'works of visual art'. This Act confines rights to works that exist in only a single copy or editions of no more than 200 copies.

Employees and contractors

An important point to bear in mind when implementing these guidelines is that international copyright law is based on the premise that copyright automatically vests in the originator or creator of an original work (provided it is copyrightable – ie. of a type in which copyright is capable of subsisting). An exception to this occurs where the individual or individuals create the copyright work in the course of their employment. In most jurisdictions in such cases the copyright will vest in the employer. It is most important that this should be the case as contracts for the production of holograms are almost always undertaken by companies or other corporate bodies as part of their business and the individual employees will not be parties to those contracts. If a commissioning customer had to deal with individual employees in order to ensure that it received the copyright or the necessary rights to use the hologram, it would be an additional complication.

Commissioning companies and contractors should beware of the problems which may arise when engaging the services of independent contractors. Many companies engage the services of individuals on terms whereby the individual remains an independent contractor and not an employee. The difficulty which arises is that the copyright in the work undertaken by an individual independent contractor in the course of providing his services will not vest in the company which has engaged his services and will remain with him – he is not an employee. Thus, any company which engages the services of an individual on the basis that he will remain an independent contractor must ensure that the terms of engagement include a provision for the assignment of all copyright in works created in the course of providing those services.

Custom-made holograms

The IHMA recommendations on hologram copyrights follow. These should be incorporated in members' standard contracts as appropriate. It is essential that members seek their own legal advice on the copyright in the holograms they manufacture or publish, and where more than one party is involved in their creation and manufacture clear agreements be drawn up with and between each party as necessary. These agreements should set out each party's interest in the copyright, production and distribution of the hologram.

If a hologram is commissioned by a customer the question of whether the copyright is owned by the hologram originator or the customer arises. The same question applies to the artwork and the 'tools' that are used to create the hologram, some of which may be supplied to the hologram originator and some of which may be made for the customer's job by the hologram originator.

Compared to most graphic processes, a hologram is unusual in that two holograms made from the same artwork could be very different in terms of colour, depth, image placement relative to the image plane and other factors. Thus there will be specific copyright in the hologram even though it apparently reproduces, say, a customer's trademark. A simple analogy is that of a photograph taken of a painting. Although the painting is a copyright work, there is a quite separate copyright in the photograph of it.

There are usually several contributing components of the image in a hologram custom-designed for commercial use. It is possible that there will be separate copyright in each of these components, which are:

- **The customer's design or artwork, which may include a registered trademark, product, logo, design or brand name;**
- **The artwork from which the hologram is mastered, which may be 2D artwork, a model, cine film, video, slides, a computer sequence or a combination of any or all of these;**
- **If the hologram is a composite of different pieces of artwork the final composite artwork (eg a computer sequence comprising photographs, registered marks and specially-created designs) may exist as a separate entity;**
- **The laser-exposed hologram master or, in the case of a multiple image or multiple channel hologram the masters, from which the sub-master is exposed;**

- **The sub-master or transfer hologram from which production masters or shims will be made;**
- **The re-combined or ganged-up images on a production master or shim;**
- **The finished hologram.**

Discrete and separate copyright may exist on all stages except for the recombined images.

There may be several organisations or individuals involved in the creation of these stages – customer, designer, model-maker, graphic artist, contract holographer, and, of course, the manufacturer. It is of paramount importance that each participant knows clearly who owns the copyright in their contribution to the finished hologram. This is the responsibility of the IHMA member.

Contractual copyright arrangements

When a hologram is made exclusively for a customer there are three alternative model arrangements which the IHMA recommends to its members.

Assigning copyright

- **The customer is assigned all rights in the hologram and all contributing artwork stages in its creation.**

Where the customer is assigned copyright in the hologram it is common practice for the hologram originator or manufacturer to retain ownership of the 'tools' required to produce the hologram, ie the final artwork, masters, sub-masters, production masters and/or shims. The copyright holder (the customer) therefore has the right to request another manufacturer to make the hologram, negotiating use of the 'tools' with the first manufacturer, or alternatively re-originating to make a different hologram from the customer's designs, avoiding infringement of the first originator's copyright.

This is the model commonly used in commercial photography and printing.

Retaining copyright

- **The hologram originator retains copyright in the hologram and all contributing artwork stages in its creation.**

In this case the customer should normally be granted the exclusive right to order or buy production of the hologram. The manufacturer should undertake not to make any copies without the express written consent of the customer.

If the customer wishes to seek another supplier, whether as an alternative or replacement, the hologram would have to be re-originated from scratch such that it does not infringe the copyright of the first manufacturer. Alternatively, the first manufacturer could assign copyright or licence production rights to the second manufacturer.

In some situations the hologram manufacturer may wish to add the hologram to its inventory of images. This should be agreed with the customer at an early stage of negotiation and may affect the origination fee charged.

Splitting copyright

- **The hologram originator retains copyright in the hologram but awards copyright in the artwork made for the hologram to the customer.**

In this case, the customer will also require the exclusive right to order or buy production of the hologram. The customer is free to use the artwork as it wishes and can pass this to another manufacturer to use for the purposes of creating an alternative hologram but, otherwise, the position of the parties is largely as described in the previous paragraphs.

Agents

Where an agent or middleman is involved, they would normally be deemed to be an agent for the customer. An agent of the manufacturer would normally have no rights except the right to remuneration in line with their agreement with the manufacturer.

Holograms for publication

If a hologram is produced to be published as a hologram for sale, the copyright will normally be owned by the **creator/manufacturer** who made the first hologram from which the published edition is produced. The assignment of copyright between the creator/manufacturer and the publisher is a matter between them and this is dealt with below.

Where a creator/publisher is not the manufacturer, or where a manufacturing publisher contracts production to another manufacturer, that other manufacturer will normally have no copyright or other rights in the hologram.

Manufacturer-published holograms

The copyright in a hologram made and published by the same company lies (save as mentioned below) with the creator of the hologram. This creator may be:

- **an in-house creator (employee or employees) of the company;**
- **An outside contractor, commissioned to design and/or produce artwork from which the hologram is mastered, or commissioned to produce the master;**
- **An independent artist or designer who originates the concept and/or the artwork and/or the master for the hologram, which the company then wishes to publish.**

In-house concept and origination

In the first case, where the idea and hologram mastering is produced and undertaken by employees within the company, copyright lies with the company (unless specific alternative arrangements have been made, in which case they should be set down in writing). Beware individual self-employed consultants who are often considered to be employees.

Commissioned contractor

Where an outside contractor is commissioned to create or realise design, artwork or master from a concept or idea of the manufacturing/publishing company, copyright lies with the contractor company (unless specific alternative arrangements have been made, in which case they should be set down in writing).

In this case it is usual practice, and recommended by the IHMA within these guidelines, to pay a fee to the contractor and to do so under an agreement which specifies that the contractor has no interest in the copyright of the finished hologram. This agreement should also specify that the ownership of the work or object commissioned vests with the commissioning company and not the contractor. For the avoidance of doubt, it could further specify that the contractor will not offer the work or object to any other party for reproduction without the express permission and release of the commissioning company.

Artist's hologram

Where the design, artwork, master or sub-master of a hologram is originated by a person ('the artist') who then agrees that it may be replicated and published by a hologram publisher or manufacturer, the copyright in the hologram normally lies with the artist (unless the origination has been undertaken in the course of his employment or specific alternative arrangements have been made, in which case they should be set down in writing).

The IHMA recommends that the custom and practice common in fine-art publishing should be followed in the publishing of holograms. The artist grants a licence to the publisher to publish the hologram, with an agreement covering the following matters:

- **the artist's moral rights are recognised – he or she will be described as the creator of the work;**
- **the publisher will pay the artist an agreed royalty on all sales of the hologram(s) measured against invoice or book values** *(see footnote below)*;
- **the amount of any initial payment or advance against royalties;**
- **the scope of the licence (exclusive or restricted to specific territory, production substrates, applications);**
- **the royalty accounting period;**
- **the rights of the artist or his/her appointed auditors to inspect the publisher's books of account;**
- **the rights of the publisher to issue sub-licences to other publishers or manufacturers, with or without prior notification to and veto by the artist.**

An alternative practice is for the artist to assign the rights in the hologram to the publisher in return for a lump sum payment with or without royalties. If the rights are assigned then the artist has no further control over the use of the hologram except as agreed between the artist and the publisher.

Multi-authored holograms

Within the matrix of artist, holographer, manufacturer and publisher referred to above there can be any number of variations. Copyright agreements, assignments and licences can be written to cover all circumstances. The IHMA recommends that in all cases each party be given fair reward for the effort and contribution, and that the underlying principles of the Berne Convention – to reward creators/originators for their endeavours – be adhered to, in line with the IHMA's Code of Practice.

The IHMA has drawn up systems and protocols for member companies to make it easier for customers. These include a Code of Practice to ensure that members follow standard and ethical business practices. Member companies must abide by this code.

Footnote

The royalty will usually be calculated on the publisher's receipts, but sometimes it is calculated on the retail price; the problem with this is that the publisher cannot necessarily control the end price.

The IHMA

Code of Practice

- 1 Members of the International Hologram Manufacturers Association (IHMA) undertake to operate their business in a manner which enhances the reputation of the holography industry and the IHMA. In dealings with each other, with customers and suppliers, members will observe the highest standards of business integrity and business ethics
- 2 All IHMA members are bound by the IHMA's Articles of Association which oblige all members to follow this Code of Practice. A member in breach of this obligation, or otherwise operating in such a way as to bring the IHMA and the holography industry into disrepute, should be brought to the attention of the Board for notification to a General Meeting which is empowered to suspend the membership or expel from membership such companies
- 3 All members will issue standard conditions of contract which will be available to all customers or potential customers. In dealings with customers or potential customers members will not knowingly misrepresent the characteristics and functioning of their products or their capabilities. Members will use their best endeavours to ensure that orders are delivered to customers as specified and on time.
- 4 Where by reason of factors outside their control, such as fire, flood, industrial unrest, bankruptcy or other factors, a member is unable to meet the contractual obligations for quantity or date delivery, then by agreement with the customer the member will endeavour to place that work with another IHMA member and will co-operate fully with that member. If required or necessary, and in strictest confidence, the IHMA will undertake the finding of a member to complete the order.
- 5 IHMA members will respect the intellectual property rights of their suppliers, sub-contractors and other members of the holography industry. Members undertake to operate within the Berne Convention and to make clear to customers and contractors who owns and/or has the rights to use the designs, drawings, artwork, master and sub-master plates of any given hologram. The IHMA publishes guidelines to cover these matters.

- 6 Members undertake to use their best endeavours to protect their own, other hologram producers' and customers' intellectual property rights, which will include the investigation of customers where these are not previously known to the member, and investigation of the design of all commissions where the customer supplies artwork (in whatever form), to ensure that the proposed hologram does not infringe any IPR and that any registered or pre-existing designs, logos etc incorporated into the hologram are used with the permission of the rights holder. Members will use all resources available to them to this end including the Hologram Image Register and/or other copyright or hologram registers approved by the IHMA for this purpose.
- 7 Where appropriate, members undertake to pay a royalty or a royalty waiver fee and to honour all contractual obligations to an artist or hologram originator who has supplied holograms for reproduction.
- 8 IHMA members will operate within the environmental health and safety legislation that applies to them as a minimum standard of care and concern for the environment and the health and safety of their staff, customers and end users.
- 9 Every member of the IHMA accepts the responsibility of maintaining this Code of Practice and striving to enhance the reputation of the IHMA so that membership is seen to stand for quality and customer satisfaction.

IHMA

INTERNATIONAL HOLOGRAM
MANUFACTURERS ASSOCIATION

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