HOW TO ANSWER: "I'D LIKE THE COMPUTER FILES"

Clients asking for computer (job) files is one of the most common situations faced by today's creative firms. Should you give them up? Do you have to? How should you respond to a client's request?

THE LEGAL ISSUES

It is the commercial norm that the tools used to produce work remain the property of the producer unless sold separately. Simply, customers purchase an end product, not the means by which it was produced.

By and large, the courts have held that films, plates, artwork, computer files, etc., are considered tools of production. Thus, a customer purchasing a print from a photographer is not automatically entitled to the negative. When customers purchase printed material from a printer, they are not normally entitled to the films or plates used in manufacture. In the days when design was done on paper, mechanical art was not normally included in the purchase. And today, computer files are also considered tools of production. That is, they remain the legal property of the creative firm.

This said, it should be noted that all legal precedents are constantly being challenged and evolving as new situations arise. It could be argued, for example, that under certain conditions preparatory materials do rightfully belong to the client. To withhold them may reduce a client's commercial options and is, therefore, restraint of trade. Or that a purchaser has ownership rights to anything specifically identified in an invoice. Or in the case of an electronic end product (e.g., web projects) they are not really preparatory material at all, but the actual product itself.

THE BUSINESS ISSUES

Whatever the legal situation, the reality is that most clients consider that they own "their" computer files. In their minds it is nothing less than work they have paid for and have legitimate rights to. If they want them, they expect you to deliver them.

Another reality is that many clients have legal staff who may threaten to sue to obtain the files. Even in the likely event you'd win in court the cost of defending your position could make it an expensive victory.

Given these realities, *Creative Business* strongly recommends preventative action. Specifically, that every proposal or estimate contain the following paragraphs or their equivalent, and that it be signed-off by the client:

"This proposal is for the purchase of one creative approach (concept) to be selected by (client) and executed by (creative firm). All other ideas, concepts, or designs described or exhibited remain the property of (creative firm). All materials used in the execution of this project—including artwork and computer-generated instructions and formats—remain the property of (creative firm)."

Such provisions will answer the questions of many clients before they're asked. For others, they'll provide a basis upon which to transfer ownership. And they will provide protection against unwarranted law suits.

In addition to the above proposal language, we also recommend contacting every service bureau, printer, or web developer you work with and have them agree, in writing if warranted, that your electronic files will never be copied or provided to anyone without your written permission.

HOW TO RESPOND

Your position on giving up ownership of electronic files can change as conditions warrant.

What should never be provided. Regardless of your desire to cooperate with a client, the following should never be provided because to do so might make you party to copyright infringement:

Type fonts and applications programs (software)—in most cases your usage licenses are non-transferrable. Clients must buy their own. *Photos and illustrations*—permission for additional reproduction or modification must be obtained from the copyright owner.

When and how to say "no problem." It should be common sense not to debate ownership with good, ongoing clients. In most cases, provide the requested files with a smile and without charge. Any future loss of revenue from revisions, printing, etc., will more than likely be made up by the additional business that comes from good will. Consider any small cost incurred as an account service expense.

It is wise, however, to discuss with the client the possible ramifications of trying to work with your files, especially if they are relatively unskilled. You don't want a good relationship to be endangered should problems arise later.

It's also usually good business to give up a file when a steady client wants a part of it for a job you aren't directly involved with. For example, asking for a graphic you've developed to use in their next annual report.

In cases involving substantial time (e.g., cleaning up and copying a complicated file), you might want to levy a service and media charge. You might also want to bill for any substantial problem-solving time that the client requires later.

When and how to say "maybe." Not every ongoing client provides the experiences or volume that makes doing favors appropriate. Others are one-time (no opportunity) clients. In these cases, cooperate but not at your expense.

Treat requests for your electronic files on this basis: "We don't normally do this, but I don't see why we can't make an exception in your case. There will, however, be a charge for the time involved as well as the media." (See "How to set a price" below.) The reason for the service charge? Accessing the files, stripping out proprietary data, and cleaning them for easy use by others involve more than simple copying.

If it is a client you'd like to keep and they are asking for the files to economize on future work (taking the project in-house, for example), also inform them of the trade offs in doing so. You created the files around your creative idiosyncrasies and procedures, so the more complex they are, the less likely it is that the client will be able to work with them as efficiently as you can. Plus, you'll also have to charge if the client needs help sorting things out, or for correcting any future mistakes. And they might also have to purchase fonts, or even software.

When this is added up—service charge, reduced efficiency, software costs, and future help—it might turn out to be wiser to keep you doing the work.

When and how to say "no way." When dealing with clients whom you'll never work with again it is still important to handle every inquiry diplomatically. A well-reasoned explanation why you can't provide files is far less likely to provoke an angry client reaction, or end up in a costly legal wrangle. Here's what to say:

"Our files contain propriety information. Working out creative solutions, then preparing grids, templates and style sheets is challenging, detailed, and complex work. It involves many proprietary 'tricks of the trade,' combinations of talent, training, and experience that lead to fast and efficient ways of working.

"As a service business, these procedures are our company's competitive edge. They are not only part of what makes us unique, they are also an integral part of every job. To allow them to fall into the hands of others is to risk losing the very secrets upon which the success of our business has been built.

"So as much as I'd like to cooperate, I'm afraid I can't."

WHAT TO NEVER SAY

"I'll lose money." When producing items with a long life you might be in the habit of charging less than you should, relying instead on repeat business for profits. Similarly, you might be in the habit of charging proportionately more for work on the back end of a project (e.g., printing) than on the front end.

The rationale in the first situation is that low-balling the price the first time around allows you to be more competitive. In the second situation, it is usually because it takes more skill to justify the high cost of mostly intangible creative work than it does more tangible items such as printing. In both situations the expectation is that you will make up on the back end what you feel uncomfortable charging for on the front end.

Today, more and more clients expect the flexibility of shopping around for follow-on revisions and reprints. Others want to hire one individual or firm for creative input, while bringing production work in-house, or giving it to someone with lower prices. For these reasons, it is increasingly important that pricing procedures be uniform.

The hourly rate for most clients and functions should be the same. Job pricing should be based on estimated hours work times hourly labor rate. By adhering to this procedure, most work—big job or small—will be more or less equally profitable. And there will be one less reason not to give up your electronic files willingly.

"You'll mess it up." No, you probably wouldn't come right out and say this, but you may be thinking it. But is your ego overruling business sense? Your name probably doesn't appear on the piece, so what difference does it make?

What if they botch things up, then call you to fix them? Treat it as a separate project. Charge on your normal hourly basis, and count every minute. When only a small amount of work is involved you may also want to consider a minimum fee. (Typically, a half day's work.)

HOW TO SET A PRICE

There are two ways to set prices for giving up your computer files, depending on your willingness and feeling toward the client.

Your conversion time and costs. The file(s) will have to be located, reviewed, cleaned and/or modified, isolated, and copied. This will involve several hours of labor. In addition, there's the cost of the media. Set a minimum fee, rounding up the hours to the next half day.

The value to the client. How much a client will willingly pay for electronic files depends on how much it will cost to recreate them from scratch. Your service fee should probably not exceed 25% to 50% of the original creative fee. If it is more, chances are the client will go elsewhere out of spite. CB