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Help! I've Been Ripped Off!

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Designers have intellectual property rights and you should think twice about infringement. But artists also find that pursuing those rights can be time-consuming, difficult, and expensive.

Few things disturb artists more than finding someone is “ripping off” their designs—copying the pieces and selling the work. In the 21st century, the Internet and globalization have contributed to the speed and spread of the misuse and theft of intellectual property (IP). Intellectual property is defined by the World Intellectual Property Organization, an agency of the United Nations, as “creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.” IP theft may be innocent: a student sells jewelry made from a pattern you provided in a class; someone asks a jeweler to copy your design (which they’ve seen on the Internet) so she can have the piece set with her stones. It is not innocent, however, when the jeweler who should and often does know better, take the job. There are countless tales of designers whose work was molded, cast and sold—sometimes in mass quantities—and always without permission or payment.

As painful as the lost income is a poorly done copy, which reflects badly on the original creator. Especially bad is when pieces that are meant to be hand crafted, such as Michael Good’s anticlastically formed pieces, are molded and cast by copycats “We’ve seen our work cast and it’s horribly ugly,” says Karen Good, President of Michael Good Designs, Inc.

Can you prevent rip-offs?

In all honesty, you can’t, says Sarah Feingold, Esq., General Counsel for Etsy.com, and author of *Copyright for Artists: Quick and Easy Copyright Protection*. “If you’re a maker, people can copy and sell your work no matter what you do.” But you can take steps that enable you to fight back.

First, register your copyright. Copyright (the type of IP that covers the visual arts) in the US is a type of inalienable right: copyright in your original (“original” is the key word) creation is yours once it is in fixed and tangible format. (You can’t copyright an idea that is still in your head.) *Technically*, you don’t have to prove copyright ownership. But in case of infringement—the illegal use of your work without your permission—you will have to prove your work was the original and others are copies. Registration helps you do that.

Copyright registration is simple—fill out the application online, send in photos of the work (a gallery show catalog works nicely), and the fee—and very inexpensive. After a few months (more than a year if file by paper the old-fashioned way), you’ll receive your certified registration. (For complete information, see the Copyright Office’s website: www.copyright.gov.) Copyright is yours for your lifetime plus 70 years; it is not renewable. After that, the design goes into the public domain and anyone can copy it. (You won’t be around so, no worries.)

If your creation incorporates a unique mechanical element—an innovative hinge or catch—you might seek a design patent. The patenting process requires a search of existing patents. You can do it yourself or hire a patent attorney. Patents and trademarks have shorter shelf lives than copyrights: a design patent is good for 14 years before it

goes into the public domain; trademarks must be renewed every 10 years. (For more information, see the US Patent and Trademark Office website: www.uspto.gov.)

In addition to giving you proof your work was created first, copyright registration gives you access to statutory damages—sums determined by law for cases in which it may be difficult to prove the amount of actual financial damages and losses. Statutory damages can be huge, ranging from \$750 to \$30,000 per infringement; for willful infringement, fines go as high as \$150,000; for accidental infringement, they may be as low as \$200. And, depending on the court's decision, you are more likely to be awarded attorney's fees. (For a full description of damages, see Chapter 5 of the US Copyright Law <http://www.copyright.gov/title17/92chap5.html>).

To cover your work for damages, it must be registered before infringement occurs or within three months of "publication." One of the peculiarities of the copyright law is its wording, better suited to literary works than to visual arts. According to Linda Joy Kattwinkel, Esq., a San Francisco attorney who specializes in copyright and arts law (and a visual artist herself), a "published" visual work must have copies available to the public: your production line is "published." One-of-a-kind pieces, for a client, for example, are registered as "unpublished" works. Good news is you can group one-of-a-kind works together under a title like "new work for 2009" and pay only one fee for the group.

If your work is not registered at the time of infringement, you can sue only for the actual amount damages. You have to determine how many copies have been made, and how much the infringer has earned from the copies sold, says San Francisco mediation attorney and visual artist Marc Paisin, Esq., who has specialized in art law. This can be difficult to do. And the court will probably not award you attorney's fees.

However....

1.) Damage awards are not automatic. You don't just file a complaint with the Copyright Office and wait for the check. "The legal burden [of proof of infringement] is on the copyright owner," says Avi Good, General Manager of Michael Good Designs, Inc. This means hiring an attorney and proving your claim in federal court—an expensive proposition.

2.) In court, you are at the mercy of the judge, who may not understand the issues. Michael Good Designs, Inc., has pursued infringement issues three times: one win, one loss, one draw. The difference between the win and the loss, says Karen Good, was the judges. One judge was "visually savvy," and understood the arguments; she found for the Goods. The other judge, Good feels was uneducated in the arts and did not understand the points they were trying to make. As a result, he decided against the Goods. "It was a very expensive and frustrating experience," says Karen Good. "If someone is going to be handling those kinds of cases for any art form, and maybe for jewelry in particular, they have to have a visual education. If they have no visual education, you might as well conduct the whole thing in a foreign language."

"Artistic savvy" in lawyer and judge is especially important quality if someone is not making exact copies of a piece but is copying the "look and feel" of your work.

What does that mean?

"If you make a cola drink and you put it in a bottle with the same shape as a Coke bottle, and the same style of lettering as Coke," explains Paisin, "then it may not say Coke, but it has the same look and feel as Coke." If someone brings you (or another jeweler) a poorly made copy that isn't yours but the customer thinks it is, or someone advertises a piece as yours on a secondary market, such as eBay, you may be able to show the infringing work confuses customers and is costing you revenue and damages your reputation.

3.) “Even if you win, what do you win?” asks Karen Good. “If the person you’re pursuing has no resources, you’re just throwing money away.” Although the suit may stop the manufacture of work specified in the suit, the manufacturer may then imitate your other work, forcing you to sue again.

4.) US citizens are only protected in the US. To pursue copyright infringement in other countries, you must have your hallmark/trademark registered in those countries along with your copyright. You can, though prevent copies made overseas from coming back into the US. First, do your research and find out who’s bringing it into the country, says Paisin. The third time Michael Good Designs, Inc., pursued infringement, a Turkish company was importing copies of their work into the US. The Goods were able to stop the imports and have the copies destroyed. However, the manufacturer could still make and sell the work overseas.

“The only way to protect yourself is first to register, then to police your work,” says Paisin. That means finding out where the wearer or seller got the copy, then working back through the distributor to find the maker. “Then write a cease and desist letter, which says I own the copyright, and you are in breach of copyright. You have to stop any further manufacture and distribution, and give a full and accurate accounting of what has been sold.” The way to sweeten the C&D letter, says Paisin, might be to say, “if you give me a full and honest accounting, we may come to terms without me going into court.” You don’t have to talk about talk about licensing or royalties, he says, but depending on quality of the work and the amicability of your contact with the copier, you may end up negotiating a licensing fee. Everyone agreed that this personal approach is best if you can make it work. “If you go to an attorney, it’s very expensive because it’s federal court work,” says Paisin.

Once you start copyright enforcement, you must remain vigilant, explains Avi Good. “Once you let it slide,” she says, “it is more difficult from a legal perspective to pursue it later. If someone has proof you haven’t pursued one imitator, it makes it more difficult to pursue someone else.”

To police your work, an Internet search of your own name may turn up pieces that have the “look and feel” of your work but are not. Boris Bally, a Providence, Rhode Island artist who specializes in work made from discarded traffic signs, also searches the Internet by his unique materials. More often, though, customers, gallery owners, and museum curators are most likely to turn up copyright infringement. One year Bally exhibited his work at the Kendall School of Art. He wanted students to see the entire design process—from drawings to paper models, to prototypes. “I even put up the design patent.”

A year later, the curator of that show sent him a photocopy of a solo show invitation she had received. At first, Bally was confused. The image on the photocopy appeared to be his work. Then he saw the back of the invitation. “It was another guy’s name. I was floored. After the first five minutes of my initial shock, I hired an attorney and we came up with a plan.” A friend agreed to purchase one of the objects before the show opened. Once they had the piece, they served papers on the gallery and on the artist to cease and desist. “We had him remove his work on opening day.”

The best defense, as they say, is a good offense. In addition to registering your copyright and policing it vigilantly, attorneys and artists alike say the best way to protect yourself and your livelihood is to do what you do best: continue to design, innovate, and stay ahead of the copy cats. Says Avi Good: “If you’re doing something that is easy to copy, then that may tell you something.”

1.) Make work that is very difficult to duplicate. Ronda Coryell incorporates 3000-year-old bronze bracelets into some of her modern bracelets. The quality, texture, and

patina of the ancient bronze are unique to each bracelet making them impossible to copy. Harriete Estel Berman's work with tin is so time intensive and complex, few imitators want to try it. "In my opinion, the best defense is creating such a unique aesthetic and innovating and developing new ideas so quickly, that it would be difficult for anyone to copy you."

2.) Think about what work is best to protect. When Bally developed his idea for a chair from traffic signs, "I thought that if there was any way for me to make this chair out of traffic signs, I'd figure out the easiest and most logical way to do it and that would be the design I would protect." If others want to make chairs out of traffic signs, they must get his permission or develop other—and probably more complex and expensive—means to do so.

3.) Promote your work widely. "I saturate the market with publicity so my name is bound to the material as the originator of traffic sign works," says Bally. "I've tried to get my work into as many public exhibitions as possible." Lectures and website provide collectors with the history and the background of his use of the material. "What I try to do is equate the material with Boris Bally, so anyone who wants to collect the work would rather collect mine [than anyone else's]."

4.) Use a hallmark. Hallmarked work not only proves it's yours, as your reputation grows, it adds value to the work. All Michael Good's work is stamped with the company's hallmark. When auction houses get Michael Good look-alikes with no hallmark, "they have no value," says Karen Good. "Hallmarked pieces retain their value in an artistic sense."

5.) Do your own work. If you buy ready-made patterns, molds, wax patterns, and findings, and set caliber cut stones, how can you claim originality? "You put yourself at a disadvantage," says Berman, "because you've purchased what someone else can and they can copy whatever you make. Unless you start making your own patterns and making them completely original from the time you pick up the first tool, it will be very hard to protect your work."

Finally, keep your eye on the prize. Why do you make jewelry in the first place? "If your motivations are pure," says Avi Good--in other words you are making art because you love to create and you can't stop yourself--"then frankly, the issue of someone copying you is not your primary concern. It only becomes a concern if it starts crippling you, having a negative impact on your business and what you're doing."

For more information on intellectual property, copyright and patent information: The World Intellectual Property Organization (WIPO) www.wipo.int has booklets and information on what copyright and patent are and how they are viewed in the international United Nations community; The US Copyright Office www.copyright.gov for the text of copyright law and registration; the US Patent and Trademark Office www.uspto.gov; and Harriete Estel Berman's website, www.harriete-estel-berman.info or her blog at www.askharriete.typepad.com. For more information about Sarah Feingold, Esq., see www.sarahfeingold.com. Her book, *Copyright for Artists: Quick and Easy Copyright Protection*, is available on Etsy.com. To contact Linda Joy Kattwinkel and see her art portfolio, go to www.owe.com/ljk.htm; for more information about Marc Paisin, Esq., see www.paisinmediations.com. The website for Volunteer Lawyers for the Arts www.vlany.org is an excellent source of information.

If You Think Someone Is Copying Your Work...

...the first thing to do is breathe, says Sarah Feingold, Esq., General Counsel for Etsy.com. "Take a closer look at all the work, not just one piece. Perhaps only one work is like yours; the artist might have come to it through a series of logical extensions of the rest

of the work.” Avi Good, General Manager of Michael Good Designs, Inc., knows two artists who produced very similar pendant designs. Each pendant fits logically into the artist’s lines, although the rest of their work is very different from each other.

Second, try communicating politely first. “You don’t have to go in with guns blazing or threatening a lawsuit,” says Feingold, a jewelry maker herself. “They may not realize what they’re doing. Be polite and you can probably resolve the question amicably.”

When colleagues let Boris Bally know that someone was doing very much the same work, Bally, knowing what a lawsuit would cost, had a “heart to heart” with the other metalworker, encouraging him to find his own area of specialty. “He took it to heart,” says Bally. And though the other artist still works with recycled traffic signs, he uses them to make a different line of products.

Third, if communication fails, send a cease and desist letter citing your copyright registration. “This usually makes it go away,” says Karen Good, President of Michael Good Designs, Inc. You can do this yourself, but if you think the situation deserves “ramping up,” have an attorney write it. An attorneys’ letter threatening lawsuit and spelling out the cost of infringement—which can be thousands if not tens of thousands of dollars in addition to legal fees—might give the copycat pause.

Fourth, if the copycat is still not responding, or responding belligerently, take another deep breath and decide whether a lawsuit is worth the time and expense. Will the damages you may be awarded (and the operative word is “may”—you may lose) outweigh the costs of the suit? Would it be clear to your galleries and collectors that there is a quality and design esthetic difference between the works? Is the design one that has about done all it can for you? Are you moving on in other directions? Can you bury the copycat in promotion for your own product? Is there another way you can compete and beat the copycat at his or her own game?

Finally, if you’re still smoking, your livelihood is on the line, you registered your copyright in a timely manner, and you think you can present a strong defense, head to court and may the copyright gods be with you.

Using Trademarked Material

Harriete Estel Berman has made a career out of using cast-off materials previously used for commercial purposes—and this often includes using trade names, UPC codes, and tag lines. So why is this not a violation of copyright law, we asked? This was her answer.

First: Transformation: The images and words are integrated into a work that is transformed so significantly, that her voice and artistic vision are very clear. “The less it looks like the copyrighted work, the better,” she writes.

Second: No confusion. No one can confuse Berman’s work with the original product. The Hershey’s brand name as incorporated into her chocolate pot cannot be confused with any Hershey’s product. “Counterfeit copies that take revenue away from the copyright owner are absolutely illegal,” she says.

Third: Commentary or Parody. If the work is used to make a social or political commentary, or to parody social or political trends or situations—either positively or critically--then it is clear that the work is not competing with the original trademarked material. (Again, the artwork must transform the trademarked material completely.)

Fourth: No Commercial Intent. The artwork is not intended to compete for revenue with the original use of the trademarked material. The Hershey name in Berman’s chocolate pot is not intended to sell chocolate; it’s used, in conjunction with other brand names, to make a social commentary.

Fifth: No Sponsorship. The artwork, writes Berman, “should make no suggestion that the copyright owner endorses or sponsors the artwork.”

For more information on these issues, visit Berman’s blog at www.askharriete.typepad.com.