

## Copyright and Trademark Issues For Airbrush Artists

— Or —

### The Government is Here to Help, I Think

To avoid getting run over by bad karma, don't rip off people's art. For your own defense, know your options about copyright.

By Pete Johnson

#### Expected Disclaimer

This article is written regarding the laws of the United States. For information on other countries' copyright laws, contact an artists' association locally. Trademark examples and references in this article are purely for editorial exploration under fair use.

Of course, I'm not a lawyer and *Airbrush Action* magazine isn't a legal journal. If you've run into legal trouble as a visual artist, or need more background, there are some excellent resources available. An internet search on *legal assistance for artists* locates a lot of leads. One of the most well-known sources of information, for example, is Volunteer Lawyers for the Arts, at [www.vlany.org](http://www.vlany.org). Additionally, there are many local organizations that can provide assistance, depending on where you live.

#### More Resources

Tad Crawford's *Legal Guide for the Visual Artist* (Allworth Press, Fourth Edition, 1999) is an interesting and informative read. Crawford is a graduate of Columbia Law School in New York, and really knows his stuff. His book lists many national and state resources, and organizations with web sites can be located on the internet. Many of these local groups focus on prevention rather than crisis intervention; artists who are educated in copyright issues might head off problems before they happen.

Other professional organizations, such as the Graphic Artists Guild ([www.gag.org](http://www.gag.org)) and the American Society of Media Photographers ([www.asmp.org](http://www.asmp.org)), have been active in the artists' rights movement.

#### What is Copyright?

Copyright is the legal guarantee that you own what you create, and other people can't rip you off. Of course, like all things that are illegal, people sometimes do it anyway. Copyright theft is often a case of infringement, and our courts exist to resolve those disputes.

#### How is infringement determined?

Infringement usually means copying somebody else's art, without paying or even acknowledging the artist. And art is in the eye of the beholder, right? Well, so is

infringement. The law says that if a reasonable person (say, on a jury) thinks it's infringement, a blatant copy, against the law, then it is. That sounds pretty flaky, but if you think about it, how could you measure what a copy is and what it isn't? The law appeals to common sense.

Beware of opinions that you can alter an image by 10 percent, or 30 percent, or turn it upside down, or make it pink, or some other ridiculous claim, in order to skirt copyright issues. There is no such allowance as far as the law is concerned. The post-modernist term for this stealth theft is "appropriation." It's tempting to do. But when some miscreant "appropriates" *your* work, you'll call it stealing.

### **Digital Monkeybusiness**

Hair-splitting about percentages and rules-of-thumb regarding infringement is in part due to the sophistication of digital imaging. Flagship photo and graphic manipulation software like Adobe Photoshop make it possible to make the Mona Lisa look like your Aunt Margot, the circus performer, beard and all. You might get away with selling a thousand prints of it. But if the Mona Lisa was still copyrighted and a jury said, "Yeah, that looks too much like the original," you have problems.

Related digital lecture: Don't rip off images from somebody else's web site, say of custom-painted motorcycle tanks, post them on your web site, and say it's your work. If you don't believe people would do that, then believe it. There is a special place in artist hell for people who do that.

Let's explore redress in this scenario, because dealing with infringement often follows this pattern. First contact the violator. You can have an attorney craft a desist letter and send it registered mail, though as we all know, some web sites are hard to tie to a postal address. (Look up the domain name's "whois" with register.com or other internet resource and often you can find the domain owner's information.)

Often, a letter is all it takes. "Gee, I didn't know," sounds weak, but if the problem gets solved, move on. In one case, after a number of unsuccessful letters and contacts, an artist took the problem in her own hands and publicized the alleged violator's name and domain on the internet in a discussion group devoted to custom paint. The thief sheepishly took the images down from his web site. I don't advocate vigilante justice, but only mention the case to highlight the problem.

But...to strengthen your position, register your art with the United States Copyright office.

### **The U.S. Copyright Office and Form VA – as in Visual Arts**

The U.S. Copyright Office ([www.copyright.gov](http://www.copyright.gov) – how easy is that?) is staffed to assist you. Their web site is a no-brainer and has all the important forms. Get – and fill out – a

Form VA for your designs, or group of designs, and send in copies of your artwork. Then it's in the permanent record.

Along with Form VA, you mail in a filing fee as well. As of this writing, it's \$30 per form. Don't worry, you can send artwork printouts or copies in groups, listed on a single form, for your \$30. In the case of, say, a web site that you want to copyright, print the pages from an open browser, list them on the Form VA, and attach them together. Or, let's say you do a family of twelve cartoon characters. Send them all in as one batch, under one title on the form.

Then, go back and mark your designs or artwork with the Copyright symbol or the word Copyright, along with your name, and the year. Sometimes this is enough to make someone think twice about stealing your art, and it's your proof of ownership.

Get to know the website for the U.S. Copyright Office. There are many resources that you pay for every year with your tax dollars. So use them. For example, you can search for exiting copyrights by title or keyword listing to see what might be similar to your intended or existing works. The site's a goldmine of other forms, circulars, fact sheets, and so on that will provide hours of reading and clarification.

## **Trademarks**

The U.S. Patent and Trademark Office ([uspto.gov](http://uspto.gov)) handles related applications and protection for trademark items. When can you copy (and resell) examples of a trademark? The short answer is when the owner says you can, and in some cases under fair use, parody, and so on, as explained later in this article. But generally speaking, be careful. Corporations hire platoons of bored lawyers. Don't give them anything to do that involves you, or you could go broke fighting back.

Companies can go to some interesting extremes with trademarks. Starting in 1994, Harley-Davidson tried for six years to finalize patent and trademark protection for the sound of its engines. Other motorcycle manufacturers mounted legal opposition, and H-D finally gave up in the year 2000. Other unusual trademarks include the shape of the glass Coca-Cola bottle, the shape of Apple Computer's iPod, and certain advertising slogans.

However, for custom painters, motorcycle manufacturers are generally OK with you painting single logo treatments on gas tanks. Since they're normally one-of-a-kind items, they're regarded as art. The depiction can't mislead, confuse, or deceive the public. For example, and not that you would, but don't paint a logo from one brand of motorcycle on another one. Besides cosmic ignorance, I'm not sure what the point would be anyway, other than attempting a fraudulent sale of the machine, and that opens a whole different can of worms.

Also, one-off motorcycle paint jobs are normally at the request of the customer, so the customer won't be deceived. The main problem would be if the artist went from a one-of-

a-kind custom piece to making multiples of the logo on metal or other materials. Then it's pretty clear that it's a license violation.

And no, a large American motorcycle company isn't going to make you cut the tattoo of their logo off your arm. I asked them.

But if you have questions on policy, every manufacture has trademark officers to take your questions. For the bigger picture, see [www.uspto.gov](http://www.uspto.gov) for more references and information. Like the copyright site, there's a lot there.

### **When Can I Legally Use Somebody Else's Image?**

Like all answers that deal with weasely topics like law, it depends. But there are several issues that influence the answer.

#### **Fair Use**

Under the concept of Fair Use, art can be legally reproduced as part of an editorial publication. For example, each month, *Airbrush Action* publishes photos of art to illustrate articles. Fair Use can also involve images of public things, or people in public. Buildings, daily life, and sporting events are possible examples. However, reproducing an image of an individual can be a trickier thing. Model releases are useful when doing artwork of people. Sample model releases are available in the *Legal Guide for the Visual Artist* and through local artist organizations.

#### **Artistic Parody**

The law allows for parody, though it's been tested by a number of lawsuits. Famous logos, characters, even children's toys have been copied in fine art, and some in pretty bad taste. Often the law upholds the rights of the artist to do this. But making multiple copies of an image like this for profit is often what then gets the artist into trouble, with the trade- or servicemark holder of the image suing for infringement. For example, don't expect to paint an international softdrink product, with the logo visible, and sell prints without possibly getting (1) caught and (2) hammered.

#### **Understand Your, and Others', Moral Rights**

The Visual Artists Rights Act (VARA), which took effect June 1, 1991, addresses many usage topics, one of which is the artist's moral rights. If you create a work of art, the Visual Artists Rights Act restricts the abilities of others to change, modify, or otherwise re-do the work. Some states have laws that expand on this. In California, for example, for some categories of art on buildings, notice must be given to the artist in case the building owner wants to remove it. New York has laws that protect art in publications from being changed, or not credited to the artist. Curious? Research the laws for your own state. Knowledge is power.

## **“I only made one copy. Who’s going to know?”**

Penalties for infringements, should you get dragged into court and found guilty, can run as high as \$20,000 per infringement.

We’ve all seen the signs on copy machines that say reproducing copyrighted materials is prohibited. But it’s rarely enforced, either at the time or after the fact, because copy machines generally make a reproduction that won’t fool a buying public nor be mistaken for a well-executed original. Which is not to say it’s not illegal. Granted, copy technology gets better and better, to the point that the government changed certain denominations of money because people were sticking money in photocopiers, printing more, and running down to buy plasma TVs with the fakes.

But there are a million twists. Sure, you can’t photocopy an oil painting and expect it to look real. But some deviant can scan one, make some fine-looking prints, and sell them. And so on. So once again, copyright your work.

Anyway, let’s take an example that could be familiar to many readers.

It’s a slow summer day out airbrushing t-shirts on the pier. A nice kid asks for a couple of tees with the image of a well-known cartoon rodent with big ears and big yellow shoes. You think twice, but the kid looks harmless, the kid’s father is looking bored in his Bermuda shorts and sunglasses, so you paint the shirts. To make matters worse, you paint the rodent’s name in your best script. The father hands you twenty bucks with a slight smile and the family goes away.

Two weeks later, you receive a registered letter. Unknown to you, the kid’s dad is a lawyer. The Big Huge Corporation that owns the trademark on the rodent’s name and image has lots of lawyers on the payroll who need to stay busy. They want to see you before a judge. Your two tees now might cost you \$40,000, plus your legal costs, plus your lost business. Was it worth it?

Before you fly off the handle, begin ranting about corporate greed, and show up at anarchist rallies, here’s an alternate scenario.

Same scene on the pier. Instead of making the images of the Costly Illegal Rodent, you are inspired by who-knows-what to make a cute caterpillar named, say, Bob. You paint Bob the Caterpillar on two tees, dad hands you twenty bucks, and it’s a good day. In an hour, six kids show up with their parents. They have seen your cute character and want Bob shirts. You paint six tees, and sensing a wave cresting, up your fee and pocket twenty dollars per shirt, making another \$120. Nice work!

The next day more kids show up. You make a thousand dollars with your cute Bob character. Same thing happens three days in a row.

Then business falls off. You take a walk up the pier for lunch, and the three talentless losers doing tees up the pier are hawking knockoffs of...Bob the Caterpillar! You're livid. You tell them to stop, they refuse. You threaten to sue, and they say "Prove that you invented the character." Now your legal options are limited. (For the sake of this article, I'm factoring out illegal remedies like assault.) How do you prove that Bob was your character?

Register your work, if you think it's worth protecting. Intellectual property laws are there for everybody, including, yes, small-business, visual artists.

## **Conclusions**

My first-grade teacher, introduced me to the saying "Ignorance of the law is no excuse." Of course, when I was in the first grade, Abraham Lincoln was President. But it's still true. Study up, get involved, and understand the principles of copyright law. Keep current. And understand that copyright is for our benefit as artists. It's there to protect commerce, and protect our right to earn a living using our own native smarts and imagination.