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Infringement of Intellectual Property

By [Bryan Friedman](#), Shareholder, Friedman Stroffe & Gerard, P.C.



In the new era of internet, YouTube, social media, scanners, copiers and other technical devices the ability to infringe on other peoples intellectual property is incredibly easy. Getting caught at it, sometimes with severe financial implications is even easier. It is also important for the creative people in the industry to understand the boundaries of fair interpretation, and not infringe on other people’s intellectual property. In recent years the following infringements have given rise to numerous claims and large financial liability!

TRADEMARKS

A trademark is a word, symbol or device that may be used to identify the source or origin of goods or services, guaranteeing the quality of the goods bearing the mark and distinguishing those goods from others. The trademark can be a word, a design (logo), look, color or even smell. The distinctive stitching on denim pockets can also be a trademark and Levi’s very aggressively protects there arch design.

Before attempting to launch a new trademark or using a name as a “style name,” extensive research should be conducted to ascertain whether there is any danger of the proposed usage infringing a third party trademark, which could be registered or obtained by prior usage.

The first and simplest check is to Google the name. If this shows usage in the product category probably better to try again. Even if the Google search is negative, search US Patent and Trademark Office. If the name does not come up on either search you should consult with an attorney to confirm your findings. Choosing an impaired name can be disastrous.

Often style name use of another’s mark does not constitute infringement. However getting called on use and dealing with it is an expense not needed.

COPYRIGHT

Copyright protects original works of authorship. Copyright arises automatically whenever a creative work is fixed in any tangible medium. A creative work is a manifestation of creative effort such as artwork, literature, music, paintings, and software. The standard for copyright infringement is whether the infringing work bears a SUBSTANTIAL SIMILARITY to the protected portion of the copyrighted work. This is obviously a very subjective test in practice, substantial similarity is usually obvious.

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In recent years there have been a number of copyright infringement cases brought against retailers and manufacturers arising from the use of copyrighted prints. Changing a few details of the original design is no guaranty against an infringement. There is no magical “10% rule” as is commonly believed. Last year, Target Corporation and the vendor which sold Target the garment were ordered to pay EKB Textiles more than \$389,000 and attorneys’ fees arising from Target selling a garment purchased from a vendor, incorporating a floral/paisley print. The colors, layout and the composition remained the same but a few details were changed.

Whether the print is internally created, if there is substantial similarity and the infringer is liable often to disgorge profits and pay attorney’s fees. If purchased there may be a right of indemnity which is of little use if they are a small time vendor with no resources to indemnify with! If purchasing a print, either probe as to the origin or change the print substantially. There is no “good faith” exception. Defending these cases is costly, win or lose.

PERSONAL LIKENESS

Living people (and in some cases dead people) have the commercial right to exploit their own image. Any use of the likeness, name, image, or even distinctive voice of a living (or in some cases dead) person could be a violation of that persons rights, and entitles them to damages.

The person doesn’t have to be a celebrity or even be clearly identifiable in the picture. They only need to be recognizable by a small number of people.

You MUST obtain that person’s written consent (usually accompanied by payment) before use – this includes athletes, models, employees or anybody involved in a photo shoot. Have your attorney prepare a standard template release for signature in each instance. If acquiring from freelance photographer or artist, make sure he supplies appropriate releases.

Another misconception that prevails is that stopping or making changes after receiving a cease and desist letter will suffice. This is not always the case. Plaintiff’s attorneys will assess profits on prior sales and if the amount is worth chasing they will not accept an apology and undertaking to stop the infringement.

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