

RIPT

The following information was compiled by RIPT's legal team to help clear up some common questions about what is acceptable and legally sound to submit to RIPT Apparel for a potential print.

Following case studies are provided to help relate any current design to the potential legal problems its sale could cause.

- The RIPT Staff

Many of our artists have been asking why some designs have not been selected for sale even when they are extremely popular with the RIPT community, attain high praise, and get quite a bit of attention. Hopefully, this information will help more thoroughly explain the legal process we must go through prior to approving any design for printing and sale.

Approval for designs will turn on whether or not we believe the design infringes upon intellectual property rights of others. We look at the work's underlying copyright and trademark references. We also look at whether the design incorporates any person's image or likeness. If we believe a design may qualify as a fair use of the underlying copyright or trademark referenced, the design is more likely to get approved for sale.

The following information explains intellectual property laws and what constitutes "fair use" in order to help the RIPT community create designs that are more likely to receive approval. Consider the following explanations and examples when submitting a design to RIPT. Please note that it is quite difficult to find good examples actually decided by a court because many of the lawsuits brought for intellectual property infringement settle confidentially and for undisclosed amounts of money.

COPYRIGHT

Free speech and copyright interests can conflict, even though the Constitution seeks to safeguard both interests. (As a reminder, only the copyright owner has an exclusive right to create derivative works, reproduce, adapt, distribute, perform and display his work.) When a conflict arises between free speech and copyright laws, the courts have to balance the right of the copyright owner against the rights of the individual seeking to use that copyright for a different work. Each situation is fact specific, must be researched, and individually evaluated.

About Fair Use:

Fair use is a provision in the U.S. Copyright Act that creates exceptions to a copyright holder's exclusive rights. The fair use doctrine states that copyrighted works may be used for purposes such as criticism, comment, parody, news reporting, teaching, scholarship or research. To determine whether use of an underlying work is "fair use" or not, courts consider:

(1) the purpose and character of the use, including whether the use is of a commercial nature (to make money) or for non-profit purposes and whether it is transformative in nature;

- (2) the nature of the underlying work;
- (3) the amount and substantiality of the portion used in relation to the underlying work as a whole; and
- (4) the effect of the use upon the potential market for or value of the underlying work.

Approval for RIPT designs will take into consideration each factor of the fair use doctrine. RIPT will be more likely to approve designs that take only the minimum amount of the underlying work's details necessary to successfully comment, criticize, joke or parody the original work, and designs that are sufficiently transformative in nature. Repurposing a work to mock the work itself or to comment upon the underlying principles the work represents, serves a "new" purpose, and is thus transformative.

More About Parody:

Many of the RIPT designs include parodies. Parody, as a legal term, is applicable when the new work calls to mind the original, underlying work and criticizes or comments on that original work. While parody can be deemed a fair use in certain situations, sometimes the other factors in the fair use analysis will outweigh the mere fact that a design may be considered a parody. This is a complicated area of law and many courts interpret the fair use factors differently. Therefore, it is difficult to provide a definitive answer when asked if something constitutes a parody or not. We have provided some examples below to illustrate the concept.

EXAMPLES OF FAIR USE (COPYRIGHT):

Paramount Pictures used a naked photo of pregnant Demi Moore onto which it superimposed the head of actor Leslie Nielsen. The photo was a parody using similar lighting and body positioning of a famous photograph taken by Annie Leibovitz of the actress Demi Moore for the cover of Vanity Fair magazine. The court decided this was a parody. The movie company's use was transformative because it imitated the photographer's style for comic effect or ridicule.



Similarly in Universal City Studios v. T-Shirt Gallery, Ltd., the court found that t-shirts mocking Miami Vice, the TV show, with Miami Mice constituted a parody, and thus fair use. The court said that the “‘Miami Mice’ t-shirts lightheartedly focus on two comical mice who do not at all resemble the detectives in ‘Miami Vice’ and who do not evoke the themes of crime and violence.

Moreover, the t-shirts' mouse-like characters, coupled with the title "Miami Mice," clearly parody the serious, highly stylized nature of the television series.”



Derivative Works:

On the other-hand, works that are merely derivative will not qualify for fair use protection. Derivative works are new creations that include the major, copyright-protected elements of an underlying work. An example of a derivative work could be the sequel to a previously drafted novel, or in the case of fan-fiction, the extension of a storyline, or creation of a fictitious business within the original fiction’s universe. The right to create and distribute a derivative work is an exclusive right belonging to the copyright owner. For example, J.D. Salinger, author of Catcher in the Rye, successfully sued an author that wrote an unauthorized sequel titled 60 Years Later: Coming Through the Rye. You can read the [New York Times article here](#). Below are more examples of derivative works.

EXAMPLE OF DERIVATIVE WORK/NOT FAIR USE (COPYRIGHT):

A man created videos of his cat playing the keyboard and uploaded them to YouTube. The video has received over 22 million views. The creator of the video sued Threadless alleging copyright infringement over a t-shirt created based upon his videos.



In another example, an artist created a stamp design (right) based on the Korean War Veteran's Memorial on the left. When the memorial's artist sued for infringement, the appellate court found that the stamp was not a fair use. It was not enough to simply transfer the work from three dimensions to two dimensions (despite the creative use of photography and snow in conjunction with the photos).



In yet another example, the Associated Press sued artist Shepard Fairey for copyright infringement. AP owns the rights to the photo of Obama on the left and Fairey clearly based his HOPE design off AP's photo. AP is arguing that Fairey's work is nothing more than a derivative work.



TRADEMARK

Any word, name, symbol or device which is used (or intended to be used) to identify specific goods, to distinguish those goods from items sold by others, and which indicates the source of the goods, is eligible for trademark protection.

A trademark owner has the exclusive right to use, or to license, the trademark to avoid customer confusion and to prevent others from profiting off the owner's mark. For example, you can't market "Star Wars ray guns" because LucasFilm owns the right to the name "Star Wars", and customers may be confused into thinking that LucasFilm somehow sponsors your ray gun. If a fan fiction artist draws an image involving Star Wars characters with "Star Wars" in the design, RIPT could be liable for trademark infringement since "Star Wars" is a mark owned and registered by LucasFilms.

The main question in a case of alleged trademark infringement is whether the use of the mark would cause a likelihood of confusion for customers. Some facts considered include: similarity in appearance between the marks; similarity of sound; similarity of meaning; similarity of purchasers, similarity of marketing channels, sophistication of purchasers, evidence of actual confusion; manner of presenting the mark; strength of the mark; and similarity of products.

Another type of trademark infringement, often associated with fan art, is called trademark dilution. Under this doctrine, the owner of a famous mark is entitled to stop you from commercial use of a mark or trade name, if your use somehow harms its distinctive quality. For example, Walt Disney has used this concept to stop pornographers from using Snow White or Sleeping Beauty as characters in their porno films.

EXAMPLES OF FAIR USE (TRADEMARKS):

Trademark defenses are similar to those for copyright, including a fair use analysis and parody defense. Fair use occurs when a descriptive mark is used for its primary, rather than its secondary meaning, since no consumer confusion is likely to occur. For example, a cereal manufacturer may be able describe its cereal as consisting of "all bran," without infringing upon Kelloggs' rights in the trademark "All Bran." Parody, is another fair use defense to a claim for trademark infringement. For example, changing the name of the search engine Yahoo! to Yapoo!, drawing a pile of poop next to the new logo and writing "The Crappiest Search Engine" is an example of parody or criticism for purposes of fair use in a trademark infringement action.



In the following example, an activist created a series of parodies using Wal-Mart's logos and slogans, in which he likened the retail giant to Al-Qaeda and the Nazis. He posted these parodies on his websites and sold CafePress t-shirts and other merchandise containing the designs. The court held the designs were successful parodies of Wal-Mart's trademarks, that there was no likelihood of confusion between his websites or goods and Wal-Mart's.



School memorabilia was found to be a parody. Using one school mascot to “strangle the competition” was a fair use defense to trademark infringement.



EXAMPLE OF TRADEMARK INFRINGEMENT—NO FAIR USE DEFENSE:

The “Hells Angel” motorcycle gang, is not only a gang but also a trademark and a brand. There is arguably no parody or commentary here, the t-shirt company is being sued by Hells Angel motorcycle club.



RIGHT OF PUBLICITY & CELEBRITIES

Every individual has the right to control the commercial use of his or her name, image, likeness or other clear aspect of his identity. Often RIPT artists want to incorporate images of celebrities or actors in their designs, but RIPT cannot legally sell a t-shirt that uses another person's image or likeness without permission. If a design utilizes a "character," a right of publicity issue may arise. For example, a design including a clearly identifiable drawing of Ron Swanson from the show "Parks & Recreation" may raise a right of publicity claim. Nick Offerman (the actor who plays Ron Swanson) could bring the claim since Offerman's image is so closely tied to the Ron Swanson character. Another example includes using a slogan or saying inextricably tied to an individual (See the example below re. Mike "The Situation" Sorrentino's lawsuit against Abercrombie & Fitch.) If your design incorporates a person's image that is easily identifiable, RIPT could get sued for selling the design and thus it is unlikely to be selected for printing.

EXAMPLES OF RIGHT OF PUBLICITY VIOLATIONS:

Mike "The Situation" Sorrentino has filed a lawsuit against the retailer in Florida, claiming that Abercrombie infringed on his trademarks with their T-shirts and marketing gimmicks. Sorrentino's lawyers claim Abercrombie & Fitch "obviously intended to create a false association" with the reality star.



Samsung created a TV advertisement that clearly invoked the likeness of Vanna White from Wheel of Fortune. The court held that Samsung hoped to profit from White's fame without paying her for it. Because White did not consent to such appropriation, Samsung was found liable.



SO, WHAT ARE “GOOD DESIGNS”?

When considering submitting a design, you should ask yourself the following questions:

1. What is the underlying work that is used in your design or that your design is based off of?
2. Does your new design use as little from the underlying work as possible? It should only be enough to make the reference
3. Does your new design criticize or comment on the underlying work's message? What is your criticism or comment?
4. Does your new design force the audience to think about the underlying work in a new or unique way?

If the new work is merely funny but does not comment on the message of the original work, it will probably not be considered a parody.