

## ► Copyright Basics

### Destination Dallas 2018

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- **Mary Waldsmith** is a retired federal attorney and current owner of Owl Stitchery. She has taught her original designs at EGA chapter meetings and seminars and writes stitch guides for designers and a local needlepoint shop.
- **What We Will Discuss Today**
- Copyright and trademark basics generally.
- Specific issues for the needlework industry, both wholesale and retail.
- Note: all graphics used in this presentation are either in the public domain, used based on express permission to republish, or were purchased via a license.
- **What We Won't Discuss**
- We cannot and will not give specific legal or business advice. Copyright and trademark laws are complex.
- If you have a question concerning your business, we encourage you to seek legal advice.
- We will not mention or discuss names of designers, distributors, or shops, in relation to potential copyright or trademark infringement.
- We do not know who may have a license agreement to produce or sell a particular copyrighted or trademarked design.
- **Why Is This Important to Our Industry?**
- We do not work for free. We must be able to make reasonable profits from our creative endeavors and businesses.
- Designers and teachers put a lot of unpaid time into their creations. They depend on multiple and/or continuing sales, to recoup their up front costs.
- Infringing works reduce designer and teacher income.
- If designers and teachers cannot make a living, they will stop producing.
- Without legal products, ethical wholesalers, distributors, and stores will become unprofitable.
- The Bottom Line – law versus ethics
- **What is a copyright?**
- The right of an author or designer to control how their creative work is used, and to take legal action for copying it without permission.
- Copyright protects an original work, created independently by a person, with a minimal degree of creativity.
- The work must be “fixed” – captured in a medium allowing it to be seen, reproduced or communicated for more than a short time.
- Copyright exists automatically from the moment the work qualifies for protection.
- Examples of works entitled to copyright protection: books, charts, and original canvas designs.
- **What is a trademark?**
- A trademark protects a name, logo, or slogan used to identify and distinguish a product or service in the marketplace.
- It can be a word, phrase, symbol, image, sound, device, or even color.

- Examples include the Nike “swoosh”, the NBC three-toned chime, and the distinctive shape of a Coca-Cola bottle.
- **Copyright and Trademark Together**
- A copyright and a trademark could apply to the same item.
- An example is the Barbie doll by Mattel.
- Barbie’s creative design – how the doll looks – is copyrighted.
- Mattel has registered the name “Barbie” as a trademark.
- If Barbie is copied without permission, it would violate the copyright.
- If the copied Barbie item was advertised or labeled as “Barbie,” it would violate the trademark.
- **What cannot be copyrighted?**
- Ideas. For example stitches cannot be copyrighted. The representation of the stitch - a graph published in a book, chart, or stitch guide – is covered by the copyright applicable to the publication itself.
- Titles, names, short phrases, and slogans – but some can be trademarked.
- Typeface, fonts, and lettering, with limited exceptions.
- **Celebrity Names and Likenesses**
- Celebrities “own” their names and likenesses and can sue for damages based on the “right of publicity” and misappropriation.
- Even if the celebrity is deceased, the right of publicity survives in most states. It is an asset belonging to the estate.
- **The “life” of a copyright**
- Created on or after January 1, 1978 – life of the author plus 70 years after the author’s death.
- Created before January 1, 1978 – depends if the work was published or registered before that date.
- - If it was published or registered, the copyright was valid for 28 years after publication with a copyright notice or registration. It could have been renewed for another 67 years (total 95 years).
- - If it was not published or registered, it is treated the same as if created on or after January 1, 1978 – life of the author plus 70 years after author’s death.
- **Penalty for copyright violation**
- “Willful” violation – prison up to 5 years and a fine of \$250,000 per offense.
- “Willfulness” is a complicated legal concept.
- If the violator knew or should have known they were illegally copying something, and they did it for financial gain, it may be labeled as “willful.”
- The defense “I didn’t know” is not likely to be successful where the copying was for commercial profit.
- If the copyright owner files an infringement suit, remedies include impounding infringing articles and obtaining copies of all records documenting the copying and sale of infringing items.
- Statutory damages are \$750 to \$150,000, or actual damages.
- **Distributor or Reseller Infringement**
- When a copyright or trademark owner files an infringement suit, they are entitled to all records concerning the copying and sale of the items or trademarks they own.
- This is how a distributor or retailer could be identified in an infringement suit, and added to the suit.
- If the court finds the actions of a distributor or reseller to be “willful,” the same penalties applicable to the original infringer could be applied.

- If you are distributing or selling items that are, or could be, subject to copyright or trademark, your best defense is the existence of a license agreement.
- **License Agreement**
- A license agreement is a written contract between the owner of a copyright or trademark, allowing another person or business to use the item.
- License agreements are usually specific to an item to be produced.
- If the licensee (the one granted the license) produces an item not covered by the agreement, they are in violation.
- An example is a sports team logo. These are frequently licensed to multiple parties for manufacturing different items for sale – one company may have the rights to clothing, while another may have the rights to items like mugs and keychains.
- **License Agreements**
- Some needlework companies have license agreements to produce and sell copyrighted works.
- Needlepoint examples include canvases produced based on designs by Charley Harper and Debbie Mumm.
- A cross stitch example is “Precious Moments” charts by Gloria and Pat.
- Many distributors have license agreements allowing them to produce, display, and wholesale designs, where the copyrights are owned by the original canvas designers.
- **Myth – “Fair Use”**
- Myth: It’s ok to use part of a design because it’s “fair use.”
- Myth: If I change a certain percentage of a design, it becomes my work and it’s not a copyright violation.
- “Fair use” is often quoted incorrectly to justify copying portions of a protected design.
- An adaptation uses original material, with the addition of new material. Although the new material may qualify for copyright, the original material still belongs to the owner.
- Adaptions can violate copyright law if the original material is used without permission.
- **Fact – “Fair Use”**
- The “fair use” doctrine allows anyone to use limited portions of a work, including quotes, for commentary, criticism, news reporting, and scholarly reports.
- This does not include using a portion of a work for commercial sale.
- There is no set percentage of change that converts a copyrighted item into a new work.
- If a work is changed without owner permission for commercial purposes, it’s unlikely to be determined in court to be “fair use.”
- **Myth: It’s Old So It’s OK**
- Myth: It’s so old it must be out of copyright.
- Fact: Copyrights can exist for almost 100 years. During the active copyright period they can be passed down through estates after the death of the author.
- A copyright symbol is not required to protect a work.
- The only way to ensure against a copyright violation on something that is “old” is to research it thoroughly before using it.
- **Myth – Big Companies Don’t Care**
- This myth applies to both copyrights and trademarks.
- Some think that large companies will overlook “small” violations because it’s not worth the time and effort to pursue them.
- Some big companies do track and pursue all violators.

- Not only do they want to stop infringement, they have a duty to protect those who have valid licenses to use their copyrights and trademarks.
- These include Disney, Scholastic (Harry Potter), movie studios, comic book companies, owners of valuable trademarks for things like retail products and luxury goods, colleges, and national sports organizations and teams.
- **Myth – It’s on the Internet, It’s Public**
- The internet is a new and wild frontier for copyright and trademark violations.
- Technology has created new infringement opportunities.
- An example is Napster, a free “peer to peer” file sharing system where users could upload music, for other users to download.
- Napster argued they were simply a platform for file exchange, and it was up to users to respect applicable copyrights.
- The court held Napster responsible for ensuring that infringing material was not traded on its website.
- **The Internet and Needlework**
- Some designers, teachers, and book authors, have seen their works reproduced on websites such as Pinterest.
- Copies of charts, stitch guides, and canvases, are being sold on ebay and online “stores.”
- Cross stitch charts are being reproduced and uploaded to file sharing sites for download by site members.
- On Facebook these groups are usually private. New members are vetted. On at least one of these pages, members are allegedly coached on how to upload and download infringing materials.
- Reproduction and sale by infringers overseas is a serious problem.
- **Retail Customers**
- Copyright issues can arise when customers:
  - - Ask to copy a page from a book “for just one stitch.”
  - - Photograph a chart, book page, or canvas.
  - - Bring in a chart or canvas that is an obvious copyright or trademark infringement.
  - - Openly discuss with other customers how to infringe on copyrighted material.
- **Materials Created By Employees**
- When employees create things like stitch guides, who owns the copyright?
- This is a legal concept called “work for hire.” It is complicated.
- If the employee is within a defined “employer-employee relationship,” the item belongs to the employer.
- If the person is an independent contractor, and there is no written agreement as to who owns the guide, the independent contractor holds the copyright.
- For a more complete explanation of this concept, see Circular 30 at [www.copyright.gov](http://www.copyright.gov)
- **Resources**
- Copyright – [www.copyright.gov](http://www.copyright.gov)
  - - There are multiple Circulars on this website that provide basic information on many copyright issues.
- Trademark – [www.uspto.gov](http://www.uspto.gov)
  - - This is the U.S. Patent and Trademark Office. You can research trademarks here.
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