

Copyright for Henna Artists

These notes are meant to help give a basic understanding of copyright so that we can spend class time discussing nuance, opinion, and specific questions.

Fundamentals:

- If you create a thing, it is yours from the moment of creation even if you do not take steps to register it.
- If you use an image that is not yours it is *your* responsibility to track down the origin and seek permission from the owner.
- Citation and permission are not the same thing.
- Copying is not the same as inspiration.
- Images turned up in a Google images search are NOT free to use.
- It's almost certain that Fair Use does not mean what you think it does.

Concepts In Depth:

Registration: You do not have to register a work in order for it to be yours. It is yours from the moment you create it. You automatically own all rights to the work and copies thereof.

Registration is sure proof that you own a work in case you have to prove it in court. Generally speaking images can be registered for \$35 in the US, \$50 in Canada, and £39 in the UK. Sure this is way too much for every image, but certainly worth the money when it comes to images that tie closely to the identity of your business.

Other Proof: Even without registration there are simple ways to prove you own an image. If your copy of the image was created *before* the stolen one, it proves your ownership. Digital cameras add data to your images to show the date they were created. Another way is to send a print image to yourself in the mail and don't open it when it comes. The sealed image in a postmarked envelope can show that you had the image before someone else.

Watermarks: Watermarks are a layer, sometimes subtle and sometimes obvious, superimposed over a photo with your name, business, logo, or copyright date. Watermarks make it obvious that you own a work. There's no opportunity for someone to claim they didn't know it was yours. It also means that should your image get out in the wild without your consent, that people who see it will at the very least be able to tell who actually did it.

Publisher's Responsibilities: It is a publisher's responsibility to make sure that works included in their publication belong to them, belong to someone who has given consent, or are a part of the public domain. (Works in the public domain are those whose intellectual property rights have expired, have been forfeited, or are inapplicable.) If a publisher finds a work it is their responsibility to track down its origin before they publish. Remember that to publish is to prepare a work for public distribution. Web sites, blogs, and even tweets and Facebook posts are publications!

Citation vs. consent: As a publisher you must get permission, or consent to publish a work that is not your own. Citing the creator by linking to them, naming them, or tagging them on social media does not substitute as consent.

Implied Consent in Social Media: Implied consent is when you don't affirmatively express consent verbally or in writing, but your behavior indicates your consent. This is a little tough so here are some examples. If you are choking and put your hands to your throat, you are implying consent to someone to give you the Heimlich. If you live in a place, you're implying consent to the local laws. If you see a sign on a building that says there is a surveillance camera and you walk in, you are implying consent to be taped. So what's that got to do with copyright? If you tweet something, you are implying consent to retweet. If you post on Facebook, you are implying consent to share, if you upload an image to Pinterest, you are implying consent to others to pin. That's what these venues are for. This does NOT mean that you're giving away your rights! People may NOT republish without your permission, that is to download and make new tweets or posts of your image. They may not make their own copies. They may not sell your work. They may not print your work. They may not use your work to make money.

Sharing vs Stealing: Social media is great, cheap advertisement. When its done right! Clicking the "share" link on a friends Facebook post helps her get more attention, and leads clickers back to her. Good stuff! What's not ok, is to download someone's photo, re-upload it to your own page, group, or timeline and publish it there. This is using someone else's photo to get YOU traffic and clicks. It does nothing to help the creator of the work. Even if you cite them, without their explicit permission, this is copyright theft. Remember posting to Facebook is implied consent to share, NOT the surrender of rights. This logic applies to all social media.

Ownership of collaborative images: A photographer owns any image they capture with their camera, unless something else has been contracted. If your clients take photos of your work, they belong to the client. If a professional photographer takes photos of your work, they own them. If a hired photographer takes photos of your work, you'll have to ask whether the photographer or their client owns the images. It will be in the contract between them. When you work on a collaborative project make sure to write up a contract about image rights with the photographer! If you want to use pro shots sent to you by a bride, for example, make sure to find out her agreement with the photographer to make sure you can publish the photos and how to cite the photographer.

Fair Use: This is not the free image umbrella that many people think it is. Fair use is called upon for educational purposes. These are the factors considered in determining fair use: the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. Remember all those elementary worksheets your teacher copied? How about all those images your kid found on google and put into his research report for Social Studies? That stuff is OK. Its also ok to use a photo or clip of a work for the purpose of review or critique IF (and this if is very important to us!) that image or clip is not the a substantial portion of the work as a whole! So no, its not OK because the watermark was cropped out, and no, its not ok, because its being used in a review or critique of your work, because the photo of your henna piece IS the substantiative part of the image. Also, if the photo is being used to generate profit (ads, traffic, click generation) fair use does not apply.

Taking Action:

Preventative actions:

- watermark, use low resolution images in photos that you put online, use a image hosting like Flickr that helps you control who can download your images.
- Finding your misused works: Thankfully this is a pretty close-knit community. It's very likely that if another henna artist sees your work somewhere they will recognize it and tell you!
- There is an app called TinEye that will backward search images for you very easily.

Stopping infringement:

- The first step is to simply make contact. Often people don't even know they've broken any rules and are glad to make the correction. If that doesn't do the trick, I'd suggest sending a bill next. How much is use of your images worth? Stock photography sells for anywhere from a few bucks to hundreds. Make sure that you choose a figure that gets attention! I usually request \$400 per image.
- Next go with a cease and desist letter. This looks a whole lot better if a lawyer does it for you, but if you don't have that option you can write it yourself. I would suggest buying a template to get you started so the legalese looks intimidating. If that doesn't work, try reporting. This can be done through their internet service provider, or through the social media website where the misuse is published. Many have systems in place to make this easy! When they don't send a DMCA take down notice. (link below with instructions.)
- The next step would be litigation. How much is that image worth to you? How much does your lawyer charge?

Issues with printed images: Most of the discussion above is about use of images on the internet, but there is confusion about print images as well. Use of published design books: Most design books will contain a statement about their intended and legal use. The usually allow you to print a certain number of copies for your use in hand copying designs. Yes, you can use them at festivals and appointments. No, you cannot put the images on t-shirts for sale. Make sure to read the copyright statement in each design book.

Issue with copyright of art on the body: There is very little legal precedence on the rights of artist and responsibilities of the person wearing the art. It is clear that tattoos are protected by copyright, but the logistics of enforcing ownership are awkward. Recent legal cases tend to center around on athletes when publicly sponsoring a brand, or when their tattoos are reproduced for sports video games, or in the famous Mike Tyson tattoo in the Hangover 2 movie. What they have in common is that they are all big money infringements and that they all settle out of court.

Use of other people's designs for inspiration: Yes, you can use someone's image from the internet and share your own recreations of the piece. The law is a little fuzzy here though. If you *copy* the design as opposed to using it for *inspiration*, you will end up with probative similarity (see below). Of course you would have taken a photo of the work, meaning that you own the image. See the circle of fog around this? (See below for the wikipedia article about the "Obama Hope Poster" for an inside out, and high profile, but similar case.) In my personal opinion in such cases, its a good idea to ask your inspirational artist if its ok. Better safe than sorry. At the VERY least credit them and be willing to remove the photo if they object. Yes, I have already said that citation is not the same as permission, but in this case the copyright for the new image is most likely considered the photographer of that image, and fair use exceptions, particularly whether the work is transformative, are likely to apply. On the other hand, if you make a collection of reproductions and try to sell it, you'll nullify the fair use exceptions and be prime for litigation. Make sense? Clear as mud? The moral of the story is be respectful and ask if you're in doubt!

Trivial Similarity: So what happens with that girls heart looks just like yours?! It's usually not a copyright infringement. There are only so many ways to draw a heart. That's what trivial similarity is. On the other hand, maybe the design is more complex. Maybe it has a trail of three flowers coming off the bottom and a leaf out the top. So does yours. Now you may have a claim. Double check Fair Use exceptions though. If this work is transformative, a non-substantive portion of your work, or transformative fair use will cover it.

Resources:

How to send a DMCA take down notice:

<http://rising.blackstar.com/how-to-send-a-dmca-takedown-notice.html>

Index of US copyright law

<http://www.copyright.gov/>

Are you using images legally?

<http://lifehacker.com/5992419/the-best-ways-to-be-sure-youre-legally-using-online-photos>

Copyright for Blogs. Includes stock photography discussion

<http://www.bloggingbasics101.com/2013/07/copyright-law-blog-and-facebook-images/>

Discussion of design book use and trial vs probative similarity

<http://www.hennapage.com/henna/encyclopedia/copyright/>

Must read discussion about how far to go to protect images

<http://jbhildebrand.com/2012/tutorials/image-theft-or-how-i-learned-to-stop-worrying-and-lovethe-internet/>

10 bogus excuses people use when they steal images

<http://petapixel.com/2013/08/03/10-bogus-excuses-people-use-when-they-steal-photos-fromthe-web/>

Obama Hope Poster wikipedia article

http://en.wikipedia.org/wiki/Barack_Obama_%22Hope%22_poster

Facebook Image Sharing and Copyright

<http://socialmediamarketingkelowna.com/facebook-image-sharing-and-copyright/>

Excellent article on tattoo and copyright

<http://www.coatsandbennett.com/images/pdf/the-copyright-implications-of-tattoos.pdf>

Class Notes: