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Etsy's crafty balance: Fans vs. trademark holders

by [Caroline McCarthy](#)

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A bottle cap pendant--they're all over Etsy--depicting pop singer Justin Bieber.

(Credit: [Etsy seller misskitty61881](#))

BROOKLYN, N.Y.--It's a languid, late-summer Wednesday afternoon at the offices of online handmade-goods marketplace [Etsy](#), and Chief Technology Officer Chad Dickerson is sitting at a table in a conference room decorated to look like a cartoonish version of the interior of a Mercury-era space capsule.

Surrounded by fake panic-button consoles, plush jet packs, and quilts depicting outer-space views of moons and planets, Dickerson is peering at his laptop screen to report a particularly important number that he's just been asked to look up: "We've got 263 search results for 'Justin Bieber.'"

That's 263 listings at this precise moment in time by Etsy sellers hawking homemade shoelaces, tapestries, pendants, and pillows (to name a few) featuring the visage of the sugary pop singer. Bieber is hardly alone on Etsy; poke through its listings, and you'll find necklaces in the shape of the "Golden Snitch" winged orb from the "Harry Potter" series, cuff links painted to look like the head of "Star Wars" robot R2-D2, and bottle cap pendants featuring the bronzed face of "Jersey Shore" star "DJ Pauly D."

Fan creations are a funny thing. For well more than a decade, the Web has provided an unprecedented gathering space for loyal and zealous followers of literary, cinematic, and televised franchises who might not otherwise ever interact, allowing many phenomena that were once cult hits to achieve mainstream, mass-market success and often phenomenal profitability. Sometimes, as with the sale of unofficial DJ Pauly D pendants and Star Wars cuff links, the fans stand a chance of profiting, too. And the trademark and copyright holders aren't always happy about it.



Necklaces shaped like the 'Golden Snitch' from the 'Harry Potter' novels and films are a big hit on Etsy.

(Credit: [Etsy seller birdsNbeez](#))

At Etsy's sunny loft offices near the foot of the Brooklyn Bridge, it's easy to fall under the impression that the company exists outside all norms and restrictions of corporate New York. Walk into the front door, and you're greeted by a tangle of employees' bicycles, bold Etsy seller-created artwork, and an imposing 9-foot-tall owl made out of cardboard.

(The owl, named "Mr. Grit," is the subject of a handful of Paul Bunyan-like creation myths. There's a rumor that he had been present in Etsy's office when the company moved in because the space's previous occupant, an artist, had built the hefty strigiform inside and then couldn't get him out the door. Other Etsy employees dispute this narrative.)

But a giant owl, however wise, won't keep Etsy's marketplace free from the concerns of copyright and trademark lawyers. That's the job of Sarah Feingold, Etsy's in-house lawyer, who authors [a column on the company blog](#) in which she explains the ins and outs of intellectual property--like the attempts on behalf of DJ Pauly D's co-star on "Jersey Shore," Michael Sorrentino, to [trademark his famous nickname](#), "The Situation."

"What Etsy's take is, we try to educate a little. I'd feel bad if people were taking these risks without even realizing it," Feingold told CNET in an interview. "That's why we try to put up the educational resources, but at the same time, I can't really step into the shoes of an intellectual-property holder or their attorney, and determine what is or is not fair use, what is risk of confusion, and what is amazing fan art done by someone who loves the brand--and is free advertising."

And those brands' opinions, of course, vary. "A very popular brand contacted me once about a couple of items. I called because I had a question," Feingold related to CNET, "and the attorney said, 'Listen, I know there's a ton of fan art on your site, and for the most part, my client loves it. However, if the licensor complains, then we're going to ask you to take it down, and if it's pornographic, we'll ask you to take it down.'"

One of the biggest entertainment franchises in the world, for example, is almost completely absent from Etsy: the Twilight teen-vampire book and movie series. There are items that describe themselves as "Twilight inspired," but [posts in Web forums by Etsy sellers](#) who have had Twilight-related items removed from the e-commerce site indicate that Summit Entertainment, the movie studio that owns the trademark to the Twilight franchise, has been policing Etsy for more obvious infringements.

For legal reasons, Etsy's Feingold declined to comment on these reports or on which specific

brands' trademark holders have called up the company with takedown notices, and Summit representatives did not respond to a request for comment. But considering Summit's history of filing suit against [unofficial Twilight media](#), it's not surprising.

One of the reasons why this is so complicated is because trademark holders are required to enforce their property or risk losing the trademark altogether.

"They are required to protect their trademarks, if they are to continue to have them, so that it doesn't fall into the public domain," explained David Foox, a onetime patent litigator who is now [an artist](#). Foox said he's experienced these complications from both sides. "If you have a trademark, and you registered it, it means you have carved out a part of this idea that has been developed into a brand."

Foox said that as an artist, he sees fan creations, including those where the fans aim to profit, as a measure of success, but that as an attorney, he recognizes the legal requirement to protect trademarks. He ran headlong into this friction a few years ago with one of his side hobbies, the tabletop game Warhammer, which pits armies of miniature elves and dwarves and vampires (and so forth) against one another on complex boards of "terrain."

Foox and one of his fellow Warhammer aficionados, disappointed with the terrain that parent company Games Workshop was selling, decided to make their own.

"We would use balsa wood and cut things to spec, and it would all match the size and spec of the 28-millimeter figures," he told CNET, "all handpainted so it looked very real, and very much Warhammer, and offered them for sale on eBay for other people who were really into the game and wanted more terrain."

Games Workshop was not happy. "We got so many takedown notices and a horrible notice from their IP [intellectual property] department, and it really sucked, and it really made me kind of not as into the game anymore," Foox said. And, sure enough, Games Workshop began selling more complex Warhammer terrains within a few years. "Warhammer, they're not that friendly to fans. Even fan pages--they shut things down real quick."

This brings up another major complication in the debate: Fan followings are, of course, built by fans. IP enforcement, if it's particularly aggressive or if it's inconsistent, can really tick them off and hurt brand perception.

"We can't step in and decide who's right and who's wrong," Etsy's Sarah Feingold said. "It's ultimately up for a court to decide, and it's sometimes a shame. I'll sometimes see things and think, 'Oh, they're being bullies,' and sometimes I'll see things online and wonder why the copyright or trademark people aren't going after them."

With digital media stirring up real debate about the need for copyright and trademark law to

evolve--from family home videos on YouTube getting takedown notices because of a [song playing in the background](#), to the complications involving TwitPic photos of professional sports games--even experts and those deeply involved in the space aren't sure where things will go. "This is something that I feel like is building towards a crescendo, and I think, believe it or not, large entertainment industries are going to have to come to terms with it, not the fans," Foox said.

At Etsy, there have been signs that some trademark holders want to capitalize on fan creations, rather than simply police them. Early this month, it [finally launched a long-awaited contest in partnership with NASA](#), in which Etsy crafters are challenged to concoct their own NASA fan art. The winning artwork will be flown into space.

"They're granting our sellers a limited license to use the mark," Sarah Feingold explained of the NASA contest and how sellers are not just permitted, but encouraged, to use its emblem. That kind of promotion--in which a brand invites its trademark to be used in Etsy tribute art--has never come to the handmade-goods marketplace before. But, should this one go successfully and bring positive press to the space agency in turn, more companies could potentially approach Etsy with similar partnerships.

"I think if lawyers and if intellectual-property holders start to have more of an open mind, and start to see this as beneficial to their brand, there could be even more art out there," Feingold said. "It's a shame when I have to do these takedowns, when it's clear that the fan art was made with a lot of love."

Mr. Grit the 9-foot-tall owl likely gets sad, too.



Caroline McCarthy

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Caroline McCarthy, a CNET News staff writer, is a downtown Manhattanite happily addicted to social-media tools and restaurant blogs. Her pre-CNET resume includes interning at an IT security firm and brewing cappuccinos.

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