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International - Drawing the line: use of trademarks in fan art

By Adam Smith

November 16 2010

From kids scrawling beloved cartoon characters on bedroom walls to grandmas affixing brand labels to handmade greetings cards, consumers have always co-opted their favourite brands. Thanks to the internet, fans have now turned this into a business. The nexus for rising sales of fan art is Brooklyn-based online sales platform Etsy. Here you can buy [Disney-character clothes](#) for your dolls or children, [earrings that bear the famous Nike swoosh](#) and [billfolds made from branded beer bottle labels](#).

For many brand owners, fan art is a growing problem. "We do cover fan art," notes Terri Mock, vice president of marketing at OpSec, a company that offers anti-counterfeiting and related services for brand owners. "Clients don't single it out as a huge problem or one they focus on, although it does depend what kind of brand or product - counsel tend to base the importance of priority on the bottom line." So potential infringement of a particularly valuable brand may win the mark owner's close attention.

Fan art for sale on Etsy puts the company in a tricky situation. Like eBay and other online platforms, it is potentially liable for IP infringement lawsuits - a fact not necessarily tempered by [eBay's successful track record](#) at defending its business model. Etsy does not have the same resources as eBay (yet), so it is perhaps not as brazen. "We consider every issue," explains Sarah Feingold, Etsy's in-house counsel. "We think about our liability and then err on the side of caution. It's my job to protect Etsy and make sure to lower our liability as much as possible."

Feingold deals with complaints brought by trademark owners on a daily basis. However, Etsy believes that such complaints have nothing to do with the platform itself, which acts as a mere conduit. "It would be really nice if complainants didn't go through Etsy," comments Feingold. "But they find it easier to contact us than go directly to lots of sellers."

The company operates under a [stated procedure](#), which, more often than not in the case of a legitimate complaint, results in a takedown. Some brand owners request that Etsy remove any item where use of a mark does not constitute fair use, which can pose difficulties for the site. "I can't decide that," says Feingold. "We need certain details, as outlined in our [IP policy](#)."

That said, a soft approach is recommended. "I can see how some fan art could be problematic and raise a risk of confusion," Feingold explains. "But at the same time it's made by fans and people who love you, so a strong-handed move can make them less of a fan. You could end up protecting your brand to the detriment to your business."

Etsy takes its own mild-mannered approach to use of trademarks that come close to its own. Facebook recently received heavy criticism from its users for [attempting to enforce its rights against parody website Lamebook](#).

Knowing that there is little Etsy can do about parody websites such as the amusing [Regretsy](#) (which do add something to the brand in any case), the company sets out its own trademark use policy like any other responsible brand owner. "It's a very interesting time for these sorts of issues," Feingold told *WTR*. "The law existed way before the internet and we're trying to match it up with what's happening in the marketplace."

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