# *Art Underfoot*

## *Interviewing* Leonard DuBoff on Copyright Law for Rug Makers: **The Final Question**

by
Cathy Comins

*Note: This is an account of the third, and last, telephone interview with copyright lawyer Leonard DuBoff. It is not representative of, nor a substitute for, legal advice. If you have questions concerning copyright law, consult an attorney and/or contact a Copyright Information Specialist by calling the U.S. Copyright Office, Library of Congress, Washington, DC 20559 (202)479-0700. Anyone who answers the line will be able to assist you.*

A practicing attorney in Portland, Oregon, Leonard DuBoff is Professor of Law at Lewis and Clark, Northwestern School of Law (and teaches a 15-week class on copyright law), writes the highly informative monthly legal column in *The Crafts Report*, and is the chair of *The Crafts Report* editorial advisory board. He is the author of numerous books on art law, including an about-to-be-published thirty-page treatise on copyright law. His highly-acclaimed and invaluable book, *The Law (in Plain English) for* Craftspeople, is available *through The Crafts Report*, 1-800-777-7098.

**About the Author**

Cathy Comins is president of Art Underfoot, Inc.™, Handcrafted Rugs for the Floor and Walls, managing sales and publicity for more than 100 textile artists throughout America. She is also president of the Montclair (NJ) Crafters' Guild, with over 1,000 members throughout the mid-Atlantic area, and exhibition director of the juried annual Montclair Craft Show with 95 exhibitors and 3,500 attendees.

### The Most Important Question about Copyright Law for Rug Hookers

Cathy Comins: Designs for traditionally hooked rugs may be divided into four categories:

First, there are commercial patterns printed on burlap, cotton, or linen indicating the outline of the design with no coloration. Usually the color planning and dye formulas are suggested by the rug hooking teacher or provided by the rug hooker, herself or himself.

Second, there are publicly distributed patterns, such as designs offered in magazines. Again, these are just the outline of the designs.

The third category includes adaptations derived from sources such as originally designed antique hooked rugs, commercial patterns, notecards, quilt patterns, magazine illustrations, etc., whose colors are obviously already selected and many of which are already copyrighted material.

Fourth, and last, is originally designed work.

At the heart of rug hooking and copyright law is the need to know at what point may one claim original authorship for a design.

**Leonard DuBoff:** That's actually a fairly complex question. The *simple* part of it is that the work which is in the public domain, the historical work, is public domain and, thus, freely copiable. Nobody can claim protection in it and anybody can copy it.

**C:** So that means that antique patterns are free and anyone can copy them. If a rug-hooking designer makes antique patterns part of a collection of rug hooking patterns, may another rug-hooking patternmaker take that same design?

**L:** Absolutely. It's free.

**C:** No one can copyright that antique pattern?

**L:** Correct. It's not protectable. It's what is referred to as "public domain" and available for anybody to use.

**C:** Even if someone were to have a copyrighted collection of patterns, the public domain pattern could not be considered one of the copyrighted patterns.

**L:** Right. The copyright would apply to any original works in that collection, but not to public domain works. However, were someone to make an adaptation of that public domain historical pattern, the adaptation, the changes

themselves, would be copyrightable by the person who made the adaptation, but not the underlying public domain pattern.

For example, if you modified a design such as a traditional feather pattern by taking a part of the feather pattern and adding, for example, some of your own innovative design work, that innovative design work would be protected; however, the underlying public domain work would not.

**C:** So if you began with the familiar colonial pineapple design and added a couple of birds around it, the birds would be copyrightable, but the pineapple would not.

**L:** Correct. If you take someone else's copyrighted work and make an adaptation of it—your third category of design—then you're an infringer, because a copyright protects the original and any substantial copy of the original. It also gives the copyright owner the exclusive right to make derivative works, which would include adaptation.

For example, if you were to take my copyrighted design and try to make your adaptation of it, you would either have to get a license from me, that is, permission from me, which under copyright law must be in writing, or you would be an infringer and you could be liable to me for damages.

### Fair Use—The Infringer's Defense

As an infringer, you might have a defense called the "fair-use defense." In what otherwise would be considered an actionable infringement (that is, you can be sued), one may have a defense if the use is what is called "fair use."

"Fair use" is a doctrine that was created by the courts a long time ago. It stated that for certain equitable reasons, a use that might otherwise be considered an infringement, and thus render the user liable, will be considered a fair use if it is for certain beneficial purposes—benefit to show to society as a whole or certain specific groups and so on.

The doctrine has evolved and was codified in the copyright revision act of 1976 so that today, in order to determine whether it is a fair use, one has to consider at least four criteria. The four criteria are the nature of the work, nature of the use, extent of copying, and the effect the copying would have on the copyright owner's market (the economic factor).

Some works, by their nature, can never be copied and be considered "fair use." For example, you can never copy a workbook, which is consummable, and call that copying fair use, because every copying will deprive the owner of a sale.

Other works, by their nature are intended to be copied, for example, designs in a pattern book. That will more likely be a fair use.

Second, the nature of the use. If the use is what we call a "productive use," it is more likely to be a fair use. Productive use is something that contributes to the ultimate work. An example of productive use is taking extensive quotes out of a book for purposes of writing a book review. That would be a productive use because you are creating something productive from the copied parts. On the other hand, if your purpose is to avoid having to buy a book, or avoid having to buy a pattern, that would likely not be a productive use and that would likely not be fair use.

Under the old law, use for nonprofit education was automatically a fair use. Today, that's only one of the factors to be considered, namely, nature of the use. We represent a number of nonprofit educational institutions that have, indeed, been threatened with copyright litigation if they did not buy a license.

As to the extent of copying, if you copy only a part, as distinguished from the whole thing, it is more likely to be fair use; however, in the famous Sony-BetaMax case, they copied the whole thing and it was considered fair use. In that case, the consumers copied copyrighted movies, in total, off the air using video machines. In that case, the Supreme Court said that the noncommercial home use of these copyright programs would be considered a fair use. Most of us in the copyright business never thought the Supreme Court would do that; they went pretty far, but that's probably the high-water mark. More commonly, if you copy the whole thing, it's not fair use; if you copy only a part of it, it's more likely a fair use.

Finally, the economic effect. If a copyright owner can show that you are depriving him or her of a sale, the likelihood is that it's *not* going to be fair use.

**C:** Now it's up to rug hookers who use copyrighted patterns to determine whether or not it's fair use.

**L:** Fair use is a doctrine that is still evolving over time. In fact, when Congress promulgated the guidelines in 1976, it was understood that these are by no means the complete list. These are suggested, and other factors may continue to determine whether the use is a "fair use."

**C:** How can someone adapt a pattern that is copyrighted and avoid any possibility of being considered an infringer?

**L:** When copying a pattern, contact the copyright proprietor and request permission to make a copy, what is called "a license." The license is merely permission. This does not have to be very formal or complex. It can be as simple as "I, the owner of the design, hereby grant you, the rug hooker, permission to use my copyrighted design named *design name*)." I recommend that the copyright proprietor limit the quantity to perhaps one rug and if I were the designer and a rug hooker asked me for permission, I would add, ". . . with the express understanding that this rug will not be commercially exploited by you (or not be sold by you)."

Once you get this in writing and you have your written permission, you're not an infringer. Note, once again, that the copyright statute expressly says it must be in writing.

I frequently write for permission, for example, with materials that I'm going to use in the books that I write. I will come across something that I really feel is an excellent contribution to something and is said so well, or at least has a significant part of what I want to accomplish, that I would like to quote it, or copy it, and so I write for permission.

**C:** Do you always get it?

**L:** Sometimes I'll get it for free; other times, I'm charged a small license fee. In some cases, they have wanted such inordinately high license fees that I've decided to forego the opportunity to use it.

**C:** How is copyright law related to the purchase of commercial patterns?

**L:** If you buy a commercial pattern, then you certainly have permission to use that pattern.

**C:** And that use pertains just to making the rug?

**L:** Yes. If the copyright notice appears on the pattern, you probably could not reproduce the pattern itself and then sell the pattern. You could not substitute your pattern for that of the publisher of those patterns and thus deprive him or her of a sale, but you probably could use that pattern to make a rug.

**C:** Could you then sell that rug?

**L:** I would think so, unless the pattern has a restriction on its use. I was involved in a really interesting case over this issue. An author of a pattern book with glass designs and glass patterns published a book. Obviously, this is a book of patterns, so it is more likely intended to be copied; that's why one buys a pattern book, after all. A company bought the book, saw one of the designs, and appropriated one of the patterns as its logo.

The author of the book claimed that he intended his book to be used by glass artists to do glass work. That's just fine. But he never intended a company to appropriate the design and make it into its logo. "Ah," said the person who appropriated the design, "that may be so, but you didn't restrict its use in the pattern book. It's freely copiable and I should have the right to copy it."

The battle lines were therefore drawn. The pattern artist said, "I expected to have glass artists use my patterns for their glasswork, but not to have someone commercially exploit my pattern as a logo." The company retorted, "You published your pattern book with the clear intent of having people use it. We're using it—no restriction—we're not infringing."

Unfortunately, the case was settled [out of court], so we don't have a good answer on a judicial ruling; however, I think the issue is clear. If I represented the patternmaker who was publishing a book, I would certainly advise him or her to include a legend which stated, "This book is intended to be used by rug hookers for the creation of their rugs, and not by rug hookers for commercial exploitation," where rugs are going to be for sale, or something to that effect.

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