BUSINESS OF HOME

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All your questions about knockoffs, answered

By *Fred Nicolaus*

It's not a controversial statement to say that there are knockoffs everywhere in the design industry. Start trying to point them out, and things get more complicated. Whether it's fear of a libel lawsuit, an aversion to controversy, or the fact that sometimes it's simply hard to know for sure, copycat furniture and decor are often quietly grumbled about but rarely called out in public.

A few months ago, an anonymous Instagram account, @DesignWithinCopy, began lobbing Molotov cocktails at that delicate balance. At a steady clip, the person behind the account has been posting side-by-side comparisons that accuse designers of copying others' work. Some of the examples feel like moral victories, bringing the clarity of vigilante justice to small design studios whose work has been unscrupulously ripped off. Others are more nebulous, pointing out similarities that could be coincidental, or conflating historical references with outright intellectual theft. Whatever the context, @DesignWithinCopy has been unsparing about its targets, going after big names and boutique studios alike.

Reactions to the account have also run the gamut. Some have praised it for calling attention to the issue of intellectual theft. Others have critiqued its hit rate and expressed concern that public shaming is a cruel and somewhat blunt tool for such a complex phenomenon. Almost overnight, @DesignWithinCopy has become a kind of industry-wide Rorschach test.

However you feel about the account, there's no denying that it has started conversations. Here's another one. *Business of Home* reached out to a range of experts—design historians, licensing veterans and an intellectual

property lawyer—to seek perspective on the issue of knockoffs. The discussions confirmed that, even with serious expert firepower on hand, questions around creativity and originality rarely have simple answers. But they are very much worth asking.

THE LAW

Anger over knockoffs is often expressed in moral terms—but in some cases, copycatting is flat-out illegal. To get some clarity on when and how, BOH *spoke to* ***David Adler****, an attorney who specializes in intellectual property rights, with a focus on helping designers and creative professionals.*

There are three ways that design is protected by law: copyrights, trademarks and patents. Let's start with copyright. What is that exactly?
Copyright protects creative works of authorship, so there has to be a minimum level of creativity. The problem you run into with furniture is it's hard to be innovative; it's hard to create something that isn't somehow based on something that came before it. That doesn't mean it's impossible—it just means that you have to be more creative. You can't copyright the *idea* of a sofa or a chair, but maybe there are design elements to it [that you can].


David Adler Courtesy of Adler Law Group

Is it hard to get a copyright cleared?
In the last few years, I have seen the bar raised as to what constitutes minimum creativity. [However], the costs for obtaining copyright protection are relatively low, so copyright is a no-brainer to try and get. The filing fee is$65, and it doesn't take a terrible amount of time to complete and file a copyright application. Most of the time, it will be approved.

Not everything can be copyrighted, though, right?
It's complicated. I can give you an example: There's one case that involved a floor tile that is supposed to emulate the grain of maple. The [plaintiff was] able to get a copyright registration on that design, but the defendant challenged it, saying, "You can't copyright wood grain." In the trial, the copyright owner was able to persuade the court that in creating their particular wood grain look, they had actually exercised quite a bit of creativity. In this particular case, they were able to establish that they had true protectable creative authorship.

[But] I think that case is a bit of an outlier. If you've got a floral design, and I've got a floral design, and you say your floral design copies my design, I say, "Hey, I looked at the same plant you did. This is the design I came up with." When you get into elements of nature, it becomes more difficult to draw that line between what is in the public domain and what is protectable creative authorship.

A common thing I've heard is that once you design something original, you own the copyright, whether you register it or not. Is that true?
The law doesn't say you have to register your copyright to own the copyright, but a recent Supreme Court decision requires that you have a copyright registration certificate in hand when you file a copyright infringement lawsuit. So the de facto rule is, you really have to register your copyright.

How long does a copyright last?
For works created after January 1, 1978, it's the life of the author plus 70 years. There are different durations prior to 1978. [Editor's Note: Here's a guide to copyright duration.]

Let's move on to trademarks. What are those?
Trademark protection is a subset of trademark law called "trade dress" that protects the look and feel of something that identifies its source. One good example is the Coca-Cola bottle, which has a particular shape that people associate with the brand. There are also many examples in the furniture industry: the Emeco Navy chair is trademark-protected, and they've had some success protecting their chair against knockoffs.

What about the chair is protected by trademark—the silhouette?
It's not so much a specific design element as the overall shape and design that's recognized as coming from a particular source.

I tend to think of trademark only applying to companies that everyone knows, like Coca-Cola. But what about in the design industry? Let's say there's a fabric that every designer in America recognizes, but the general consumer might not. Could that be trademarked?
It's absolutely relevant, and it may vary depending on the context. In legal terminology, [trademarks protect what's] called "secondary meaning," or "acquired distinctiveness." If you're a well-known brand and you have a product out in the marketplace, you can create that acquired distinctiveness; you can create that secondary meaning through your advertising and your promotion and your sales. If your brand is well known amongst designers but may not be well known on Main Street, that's not necessarily going to defeat the argument that you have secondary meaning; it's really about the "relevant class of consumers." If your product isn't available at retail, if it is only available at wholesale or only available to the trade, then that's who your class of consumer is.

How hard is it to get a trademark registered?
You don't have to file anything to have a trademark. You get trademark rights as soon as you start using something and placing it into commerce, whether it's goods or services, advertisements or sales. But the problem with common law trademark rights is they're limited in scope to where you can show your trademark is known. The most protection comes from a federally registered trademark issued by the U.S. Patent and Trademark Office that goes through a lengthy, substantive review. That process can be a couple thousand dollars.

How long does a trademark last?
It lasts indefinitely, as long as it is in use.

Let's talk about patents.
When most people hear "patent," they think of a utility patent for new and useful things, inventions and gadgets. But furniture can qualify for design patent protection. The scope of protection and duration is a little bit less, but it gives you exclusivity over a particular design.

And how hard is it to get a design patent?
The design patent process is similar to the federal trademark process in terms of cost, time and what's involved. It's a more expensive, involved process.

How long do design patents last?
Fifteen years.

Given that there is clearly a framework for protecting original design, what are the roadblocks preventing people from defending their work through the legal system?
Just because you have a registration on a product or design doesn't mean that it is 100 percent bulletproof. There may be elements that are simply not protectable, and that's what the defendant is going to try and home in on and say, "We've only copied the nonprotectable parts." That's the typical defense for copyright cases. Not only do you have to show that there was copying—which isn't always easy, despite the fact that two things may look similar or identical—but you also have to prove that the copying was unauthorized, and that's a tough threshold to meet.

You also have to actually bring a lawsuit.
Correct. Many times, you have a small design company, and they simply don't have the same war chest as somebody like a national retailer, who can employ dozens of lawyers and spend tens if not hundreds of thousands of dollars defending themselves. It's very often a David versus Goliath type of fight. More often than not, even though you might legally be in the right, you simply don't have the war chest to fund litigation.

A situation that comes up a lot: An interior designer likes a piece of furniture but opts not to buy it—either because it doesn't come in the right finish or scale, or the client simply doesn't want to pay for it—so the designer goes to their workroom and makes a close copy. Is that illegal?.

That depends on whether what is copied is protectable. For example, if there is a design patent on the aesthetic features, then making a single copy violates the patent. If there is a copyright, making a single copy violates the copyright. If there is trade dress protection, there are both trademark infringement and unfair competition claims.

Do those kinds of cases often go to court?
From an enforcement standpoint, it is difficult to know about the one-offs unless you get a tip. It's usually only the large-scale infringers that get noticed.

Is there something specific to the home industry that leads to the prevalence of knockoffs?
[If you compare it to the fashion industry], I think that industry has been much better about educating the public about the need to protect original design and designers. The furniture and design industry, maybe a little less so, although there are big companies that are very outspoken about it.

The biggest problem I see is just general misinformation. I can't tell you how many people I see in the design industry—furniture, interiors, commercial, wholesale, retail design-—who are spouting off the wrong advice. Nine times out of 10, the articles that I read are flat-out wrong. People don't know.

THE LICENSING EXPERTS

It's one thing to copy an idea and put it on paper, but someone has to actually make the furniture. BOH *spoke to licensing experts to get a sense of how both designers and manufacturers think about copycatting and originality*. ***Laurie Salmore*** *is a licensing expert and the founder of consulting firm Salmore Partners,* ***Kate Verner*** *is a licensing expert and product designer and the founder of consulting firm Kate Verner + Associates, and* ***Robyn Malin*** *is a licensing agent and co-founder of the consulting firm Product Lounge*.

What's the vetting process for licensing agreements? Is it a standard aspect of licensing deals that designers have to certify their work is original?
Laurie Salmore: Yes. The designer in most contracts has to represent and warrant they are submitting and delivering original intellectual property, free of any potential claims, known or unknown.

Robyn Malin: We have a clause in our standard agreement addressing the originality of the designs and the fact that they need to be copyrighted.

Kate Verner: In my own contract, when I get hired by a designer to ink their designs, I have what we call "The Ivanka Trump Clause." A number of years ago, **Ivanka Trump** knocked off a shoe line, Aquazzura, and tried to blame her designer. Luckily, that designer had a clause in her contract that said, "No, you feed me and I'll draw things—I take no responsibility for it." I'm very careful. I shut some of our designers down when they send us things that are too close [to an inspiration]. I'll say, "Go back to the drawing board. I'm not going to draw that for you."

Kate Verner Courtesy of Kate Verner + Associates

How do knockoffs slip through the initial vetting process?
Malin: It's really easy to copyright something with such a minimal change that it's essentially the same product. So, design copyrights are pretty loosey-goosey.

Salmore: Manufacturers don't have the wherewithal to police it. Most companies don't have true creative directors who can identify [a historical piece] and say, "Hey, we can't accept this from you."

Verner: Sadly, a lot of the decorators or designers that engage in licensing don't really understand the laws of intellectual property. They think, "Oh, I bought it at a flea market; therefore, I own it." … In many cases, there are estates set up behind the Karl Springers and the Billy Baldwins of the world that will, in fact, come after a designer for infringement.

Malin: We do get involved at the merchandising [level] when the design process is beginning. We know a lot about design, and we like to pick licensees that are also really informed, because it helps everybody come up with original designs. … We won't let [clients bring a knockoff to market]. But do we know where every single one of their designs come from? Not always. We remind them when they sign the agreement that that's in there, but they might kind of forget that they copied it from somebody originally, or they've been using it a while, and it seems to become part of their vernacular.

Salmore: The designers, I would say, for the most part, aren't maliciously saying, "I'm going to rip this design off." I think it becomes a gray area. If they tweak it a little, they feel they satisfy their moral obligation, even if it probably doesn't pass the legal sniff test.

The flip side of this debate is that all design ideas have a precedent: Nothing comes from nowhere. How do you make the call about what's a fair reference versus a knockoff?
Verner: You can't copyright a stripe or a polka dot or a chevron. It's the same in furniture. There are a lot of designs out there that are considered common domain. A parsons table is just a parsons table. If a designer wants to bring that out and add a scalloped edge to it, it's OK.

Malin: There was one post [on @DesignWithinCopy] of a curved sofa. How many people have based their designs on **Vladimir Kagan**'s curved sofa? I mean, you can't stop that.

Verner: You can walk into the five biggest furniture showrooms [in High Point] and they all have the same six silhouettes, which all came from incredible designers in the 1930s and '40s. The history of those designs is not original either, so where do you draw the line?

There are lots of different kinds of knockoffs out there: big production runs and one-offs through workrooms. What's most egregious to you?
Verner: I think it's important that we don't co-mix those two concepts, because when a manufacturer engages a designer to license designs to them, then knowingly buys inventory and markets it for our world, that's a much bigger thing than a designer hiring their workroom to make a sofa because the sofa from such-and-such brand is $15,000 and their workroom's going to make it for $8,000. Which I'm not condoning. I'm just saying it's different.

Salmore: Even if it's one-offs for a client, you're still copying. I have a real hard time with that—you've just copied something because it's cheaper, but you're also infringing upon someone else's livelihood. [That's someone] who spent money and R&D and developed their craft.

What happens when things go wrong—when people make accusations or lawyers get involved?
Malin: These contracts are only as enforceable as the money you spend to enforce them.

Salmore: It can go the other way, too. We had a client who produced a mirror, and another more well-known designer said, "You copied my mirror." Rather than go to the mat, they backed down and removed it, but it was like someone saying, "I own the Greek key motif." You can't do that. There's a lot of pounding of the chest that goes on.

Robyn Malin Courtesy of Product Lounge

Verner: We're involved right now with [Italian designer] **Achille Salvagni**, who's represented through Maison Gerard, and we are right now trying to shut down a number of factories across seven different countries that are knocking off his product. An Achille Salvagni chandelier sells for [anywhere from] $86,000 to $360,000. The [knockoffs are] being sold for $800 to $1,100. We're working with an IP attorney to send out cease-and-desists, because it does affect Achille's business massively. Now, when you walk through a casino in Vegas, [copies of] his chandeliers are littered throughout. And not just one— there's 27 of them. It's upsetting to him. The blood, sweat, and tears that this man has put into developing his business on a worldwide scope, and it's being whittled away.

Malin: In these kinds of lawsuits, nobody really wins except for the lawyers. We have sent cease-and-desists, or we try to turn them into a licensee—that's the best of both worlds. We say, "If you love the design so much, why don't you license it?"

THE SCHOLARS

In the short term, issues of copycatting and originality play out in heated accusations and lawsuits. Historians get to step back and take a longer view. ***Mateo Kries*** *is the director of the Vitra Design Museum and one of the authors of Vitra's influential* Atlas of Furniture Design. ***Jana Scholze*** *is a curator specializing in contemporary design who has created exhibitions for England's Victoria and Albert Museum. Currently, she teaches at Kingston University London.*

Could you talk about the idea of originality itself? How do historians see it?
Mateo Kries: Many of the pieces in question today are just clear knockoffs. They are either anonymous knockoffs which pretend to be something that they aren't, or they even communicate actively that they look "like" a piece by a famous designer but that they are much cheaper. All these are practices which are completely against any ethos of artistic production.

But when you look at history, sometimes it's an interesting question and not an easy one to answer. There are a lot of pieces in design history where the evolution of a previous idea has been key but the result is not a knockoff; the result is an original design. It's a normal practice that a designer will look at what colleagues have done previously and this idea is taken further. It's not unusual.

How do you draw the line between what counts as a "reference" and what's a copy?
Kries: If you look at the evolution from the Rietveld Zig-Zag chair up to the Panton chair by **Verner Panton**, there are interesting steps in between. [**Gerrit**] **Rietveld** did it in wood, Panton in plastic. In between, Rietveld goes from joined wooden boards to molded wood, then Panton does it in molded wood and then he goes to plastic. There, you see how important it is sometimes to stay close to an original design, but in taking details further, you end up somewhere new.

Jana Scholze: Often, we come up with visual connections, saying, "Oh, because this is made of glass, [there's] a connection to [**Shiro**] **Kuramata**'s glass chair—but designers would say, "This is completely different, because at that point, getting glue to be transparent was an issue, and now we wouldn't use glue." So, whether their piece in the end looks similar, that is one of the many aspects that this chair has. [Relying just on a picture of the work] is such a shortening of a larger question.

Kries: There's another famous example of early-20th-century furniture design where there's a clear relation to previous models: **Le Corbusier**'s famous tubular steel pieces that he designed with **Charlotte Perriand**. Each of the pieces that [the duo] designed was based on a previous archetype of furniture—this was Le Corbusier's philosophy. He said, "It's not about inventing from scratch; it's about optimizing things that are already there and redesigning them with a new material or attitude." For his famous lounge chair, [he] collected brochures of existing ergonomically shaped furniture from the 19th century.

For the Siège à Dossier Basculant [an ergonomically designed armchair by Le Corbusier and Perriand], there are these colonial wooden chairs with leather seats, backs and armrests that were used in the colonies. Le Corbusier and Perriand basically rebuilt these in tubular steel and leather. It's absolutely based on the 19th-century colonial chair. As Le Corbusier redoes it in tubular steel, no one would say it's a knockoff, but you still see an absolute clear inspiration on an existing model. If design works like this, it's perfectly fine.

Scholze: Designers can sometimes have the same idea at the same time, independent of each other. I once judged a [competition] at Salone del Mobile in Milan, and there was a student who had a lamp that was very similar to a **Jasper Morrison** one that was [debuting] at the fair. You would absolutely have said it was a copy. But it couldn't have been a copy, because both pieces were new.

Kries: Sometimes it's awkward if you try to be completely new—sometimes it's better to improve an existing idea than force yourself to do something entirely different. There are so many designs in history where the designer would say, "This has *never* been seen," and you'd say, "Well, maybe it was better that way."

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