

## Copyrights and Copywrongs

**How do I protect my work? Is it legal to borrow elements from someone else's design? Intellectual property attorney Jack Munday addresses these and other common questions related to copyright law.**

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**Metalworking is an** art form that ranges from forging a nail to fabricating an abstract object for display in a gallery. Most metalworking falls in between these two extremes. The nail is almost exclusively functional and has no special ornate value, while an essentially ornate sculpture has no functionality. Sometimes the middle, gray area leads to problems. And problems lead to lawyers. Understanding some of the basics about copyright law may save you from any legal problems associated with it.

### What is a copyright?

The word “copyright” is almost a self-defining word. It means the right to copy. Copyright is defined by Title 17 of the United States Code. It is a federal matter, and therefore, the same in every state. Copyright protection is given for original works of authorship, fixed in any tangible medium of expression, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include writings, songs, and plays, pictorial, graphic, and sculptural works, such as those produced by a blacksmith.

Let's first redefine copyright as that which marks or protects from duplication any (1) original (2) works (3) which are fixed in a medium (4) we can perceive. This means if you create an original work, you can copyright it. More importantly, you have a copyright on it by the act of creation.

The first criteria of originality is an



essential element of creation. By definition, if you copy something, it is not original, though there are shades of meaning here. If you make a copy of a nail you pulled from an old building, you are copying. Therefore, it isn't original. If, alternatively, you draw out some iron in the shape of a nail, and flatten its head for the ease of driving it into wood, you have used sufficient originality to satisfy the law. For example, if live photographers each took a picture of a rose, each photograph would be original since none of them copied the work of the other. It may not be possible to differentiate the five photos, and the value would be negligible since anyone else could photograph the rose at their leisure. A photo-

graph has originality because the selection of what is photographed is independently done. Yet, you could give the picture to someone and they would not be able to copy it. A photograph of a photograph is a copy.

The second criteria is that the object you create must be a “work” as defined by the copyright law. What you produce at the forge using your creative skills is a work, a product of what you make. If the object is a nail, with solely functional characteristics, it may not be original. Thus, it may not have much protection, if any, under the law.

Whether a work meets the third criteria, fixed in a medium, and the fourth as well, being something that is perceivable, should be easy for metalworkers to determine. Iron is really fixed, and it's definitely readily perceived. When all four elements are present, one has a copyright.

### What rights does one get?

Section 106 of the Act says the owner has the exclusive right to do and authorize the making of copies, prepare derivative works based on the copyrighted work, distribute copies to the public by sale or other transfer

methods of ownership, or by rental, lease, or lending, and to display in public in the case of graphic or sculptural works.

### What About Patents?

One other area of the law addressed by these examples is patent law, where limited

### F.Y.I.

This article concludes our two-part series on copyright law. It was originally published in the July-August 2000 *Fabricator*, and is one of our most popular articles.

monopolies are given for inventions of new, useful, and not obvious products, processes, machines, and compositions. Patents cover functional aspects and relate exclusively to utilitarian concerns. The question of functionality comes into play here because the object one produces, such as a Samuel Yellen iron gate, may be a beautiful example of functional metalworking and would fall within the definition of a copyrightable work.

If a garden gate looks like every other gate in the neighborhood, it would be impossible to prevent others from making the same functional product for their garden. Moreover, the gate may be covered by a patent on the mechanical arrangements of hinges, pins, hooks, and so on. A patent is involved when you make something for its utility, like a nail or the first light bulb, etc. If a work has no use, it isn't covered by a patent. Nor would it be covered by a patent once the copyright expired, if, as in the case of the light bulb, the invention was made more than 20 years ago.

**What about infringement?**

Copyright protection in the United States goes back to the 1790s. Copyrights stumbled along throughout the 1800s with court decisions and patchwork laws until the act of 1909. This Act formed the basis of all copyrights from July 1, 1909 until January 1, 1978. Anything that happened before July 1, 1909 is ancient history, as the copyrights have expired. Between July 1, 1909 and January 1, 1978, a lot happened that is still important and relevant.

The Berne Convention Implementation Act became effective when the United States joined the international community at the Berne Convention in March 1989. Most copyright provisions remained the same. However, there were several major exceptions, like the release of the "©" marking requirements. Before 1978, publication of any work without proper copyright notice sent it into the public domain. Since 1978, publications without notice were correctable, and since March 1989, marking hasn't been required.

**“The Mona Lisa is in the public domain, which is why they won’t let you bring a camera into a museum—because anything in the public domain may be copied by one and all, freely, and without concern.”**

**What defines ‘public domain?’**

At this point I need to define another term. “Public Domain” is a word associated with art. It has legal meaning and makes up the body of copyrightable material that belongs to the public rather than to any private interests. Expired copyrights are in the public domain. The Mona Lisa is in the public domain, which is why they won't let you bring a camera into a museum—because anything in the public domain may be copied by one and all, freely, and without concern. Once something goes into the public domain, it stays there.

There are some famous and well-known artistic creations in the metalworking industry. Can we copy them? Yes, if the copyright has expired or was never perfected under the old law. No, if a valid copyright still exists on it. Can we copy nature? Yes, if we take our inspiration from nature and not from the work of another artisan who created a forged or cast rose, for example.

A common question is, can we use something we find in a home magazine or on the web? As always, the general rule applies: Copying is bad and originality is good. If you see something that suggests, for example, a garden gate with a forged rose vine, and you make one from the idea but use as your model an actual rosebush, you are fine. If you copy the object in the photograph, you are copying.

**Should I copyright my work?**

Why not, if it's an original work fixed in a medium we can perceive. How do I acquire a formal copyright? Just request an application and pay the

processing fee. For more info, visit: [www.loc.gov/copyright](http://www.loc.gov/copyright).

**Copyright law observations**

■ Registering a copyrighted work is a separate activity from creating a copyrighted work because copyright accrues in the creation. Registration is a formality that becomes necessary in legal situations. Said another way: the author owns the copyright by creating the work. You need proof of registration when you intend to bring suit against a copier or want to sell the ownership.

■ Selling the original work does not transfer ownership of the copyright any more than buying a book gives you the right to copy it.

■ Photographs of copyrighted works are copies and can be prohibited by the owner of the copyright.

■ The law no longer requires a copyright notice, such as the “©” symbol and the year of creation. However, it's still a good idea to mark your creations with your name, the “©” symbol, and the date, if it doesn't mess up the work. But it is not necessary.

■ Under the present law, copyrights are in force for the life of the author, (or fabricator), plus 75 years.

■ If you create something for someone in certain employment situations, the work may be considered a “work for hire,” and the owner of the copyright could be the employer.

■ No “work for hire” covers independent contractors, unless a written agreement is signed prior to the work.

■ If the work is a work for hire, an anonymous work, etc., its life is also 75 years, from the date of creation and not of registration.

■ If the work was created before 1909, and you have legitimate access to it, you can copy it at will.

■ If a work was created between 1909 and 1986, you have to check to see if it was covered by a copyright. The Library of Congress is one place to start.

■ Infringement of a copyright involves unauthorized copying. To prove this one needs to prove substantial similarity and actual access to the copyrighted work.