

“The Counterfeit Clothing Wars”

Dek: When fast fashion companies copy independently-made designs, Toronto’s independent artists find that fighting back is rarely an easy battle to win.

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During the last week of November 2018, Khloe Kardashian’s clothing brand, Good American, released a holiday collection that included a black crewneck with red lettering that read: “Santa is a woman.” When she saw it, Megan Campagnolo – a 29-year-old Toronto designer and owner of the independent brand Rosehound Apparel – was convinced Kardashian had ripped off her design. Campagnolo immediately posted photos of the copied crewneck on Rosehound’s Instagram account, comparing it to a design she released a week prior: a red crewneck with white lettering, and the exact same text. It was as a holiday edition of her “Satan is a woman” design. The post received hundreds of comments and re-posts from offended Rosehound fans, but the copycat crewneck has so far remained on Good American’s website, with no comment from Kardashian.

A number of alleged counterfeit cases involving independent artists started emerging in the media around 2011. According to social media and news coverage, it seems many Toronto artists have been increasingly involved in such matters in recent years. But due to factors such as costly litigation, Canada’s complex copyright laws, and having neither fame nor major-brand reputation to support them, independent artists are left with few, if any, practical options to protect their work. As a result, they are increasingly becoming easy targets for cunning fast-fashion companies who know these artists do not have the resources to fight back if their designs are poached.

Some of the following victims have had varying degrees of success in combatting the infringements:

Prashant Gopal, a 34-year-old artist from Toronto and owner of the independent brand Yo Sick, found his original pizza slice design reproduced on a t-shirt sold by American Eagle in August 2015. After Gopal contacted the company, the shirt was removed from American Eagle's website and store and never seen again. Although he had convinced American Eagle that it had violated his rights, Gopal received no compensation.

In 2016, Jody Edwards, who lives in St. Catharines, found her watercolour-painted feathers reproduced on a women's shirt sold at Winners, Marshalls, and Nordstrom Rack. She contacted the companies and was told the shirts would no longer be produced. She also contacted the supplier, who was responsible for the copies and wanted to negotiate a settlement.

In 2015, Burton Snowboards released no-slip children's mittens one year after ordering a similar product from the original Toronto designer, Anna-Maria Mountfort. In 2018, Burton stopped making the product, but would not compensate Mountfort nor admit to their mistake.

The Kardashian case was not Campagnolo's first and only experience with counterfeiting, nor was the American Eagle case Gopal's. Both artists have pursued cases of infringement with certain companies, ending in settlement. (Details about these cases are confidential.) Even though Campagnolo says she doesn't feel threatened by counterfeiting, it is still something that makes her upset and she says she wants her designs to be sold and attributed fairly. Besides, Rosehound Apparel has been her full-time job since its conception in 2013 as a fourth-year project in Ryerson's fashion program.

CAMPAGNOLO's cubicle-like studio is in a two-storey, poorly-lit building near the Annex in Toronto, which is constantly humming and smells like sawdust. Partitioned by five-foot walls and painted pretty pink Pantone #196, Campagnolo's corner of the shared room is adorned with assorted original products – enamel pins of young Leonardo DiCaprio's face, chenille cartoon cat patches, car air fresheners – jumbled in bins and boxes. Open cardboard boxes tightly packed with “Satan is a woman” crewnecks and the latest golden-yellow “All flash no cash” design line one wall. A coir doormat that reads “Go to hell” peeks out beneath them. Campagnolo is in her element among the sounds and smells, reclined in one of the mismatched wooden chairs at a long rectangular table in the middle of the room. The cuffs of her sweater meet tiny tattoos sprinkled over her fingers, just as dark brown bangs lead to her stone blue eyes and wispy eyelashes. She embodies the theme of Rosehound's brand – a classic, vintage character – but in the body of a millennial.

While Rosehound is very much about pastel tones, flowers, and girlhood, it has an equally gritty, rebellious side that Campagnolo also manifests. As soon as she finds someone has copied one of her designs, Campagnolo's first reaction is to post it on social media, reclaim her design, and expose the perpetrator's wrongdoing. This is exactly what she did in 2015 when she found out Forever 21 had copied Rosehound's compact mirror – matte pink and heart-shaped, with the words “Not Your Baby” written in gold Candice typeface on the outside. Coincidentally, Forever 21 used the same manufacturer as Rosehound, and a contact from the factory notified Campagnolo of a similar design in production about a year after the original was released. The only noticeable alteration on the copy was the text, “Not Ur Baby,” written in a substantially similar font. When challenged, the company claimed it did not know about the

copied designs. Forever 21's version of the product was never released in stores, however, which meant Campagnolo couldn't pursue a case against it.

The classic cliché says, "Imitation is the sincerest form of flattery," but the line between imitation and blatant stealing is thinning. Gopal says he instantly recognized the line work on American Eagle's copy of his pizza design and had no doubt it was a replica.

Both he and Campagnolo believe their work is discovered when fast fashion companies comb through social media for marketable designs and search popular hashtags for trends. Fast fashion – which fashion news outlets *The Good Trade* and *Fashionista* believe emerged in the early 2000s – is the quick mass-production of cheap garments inspired by runway styles. Social media and the Internet allow artists to share their work and connect with fans, but it also becomes the new "runway," making designs more accessible than ever. Campagnolo says many artists are aware of companies lurking online and have stopped using hashtags on posts because they were leading companies to their products. She and Gopal now make products that contrast mainstream trends; she doesn't think companies, for example, will copy designs featuring cigarettes and Satan.

But ethical conduct is not always a fast fashion company's first order of business. Copying an artist's design is both unethical and illegal, yet some companies still do it. Chris MacDonald – an associate professor who teaches business ethics and critical thinking at Ryerson University – says though there are times when ethics and the law overlap, some companies may be relying on the cynical approach that if they can get away with something then it's okay. Although American Eagle's code of ethics says, "You should never make unauthorized copies of material from books, magazines...websites, products, [etc.]..." it still stole Gopal's pizza design.

There could be many motives leading a company to infringe upon an artist's copyright, including the consideration for profits and power over property. Companies will rely on legal and financial resources to protect themselves, which is why many cases like these are referred to as a "David and Goliath" situation. (Forever 21 and American Eagle were contacted for comment on this article but neither company responded.)

Although it would be beneficial to society and artists to take these cases to court, expose fast fashion companies' business models, and create new case law in the process, it is rarely economically practical to take legal action. Shan Arora, an intellectual property lawyer at Shift Law in Toronto, says it is important to talk to a lawyer to get an honest assessment of the strength of your case before deciding to proceed with litigation.

Arora says a trial would typically cost no less than \$100,000. Just sending a demand letter, which is usually the first step in such a case, can cost between \$750 and \$2,500. According to the Ellyn Business Counsel, a business litigation and arbitration firm in Toronto, elements such as the complexity of the case, volume of documents, and number of motions could stretch a case out for about two years before reaching trial. Toronto-based entertainment and IP lawyer, Raquiya Austin, says artists are often encouraged to settle for reasons such as these. For someone like Campagnolo, who runs her business by herself and relies on her products as a sole source of income, options costing large amounts of time and money are far-fetched. Gopal agrees, saying it is best to pick and choose which battles you get into. "It's just not worth going after," he says. "I don't have the power to do this, I don't have the time, I don't have the dollars to do this, and [I don't know] what could possibly come out of it." Even if the designer wins, "Settlement negotiations can vary widely from a few thousand dollars to a few tens of thousands of dollars," Arora says.

Fast fashion companies are likely also reluctant to put time and money towards litigation. Arora says the examination for discovery in a case is a major deterrent that may lead either party to settle, as documents could possibly reveal evidence of access to or actual infringement of the work in question. Negotiating a settlement with a non-disclosure agreement could protect a company's image and provide damage control.

Unfortunately, turning to copyright law for a solution can also be an onerous task. Copyright is an area of intellectual property law that protects an author's right to produce, copy, or perform their own literary or artistic work. It is an infringement of copyright when someone else does something the Copyright Act grants only the original owner the right to do. When fashion is involved, copyright law becomes more complicated. Copyright cannot protect ideas, only the fixed expression of ideas. For example, a drawing can be protected, but not the idea for a drawing. The Copyright Act of Canada does not recognize useful articles – anything that serves a utilitarian function – as copyrightable work, which means clothing cannot be protected. The concept drawing for the design of a shirt can be protected, but the shirt itself, as a useful article, cannot.

Section 64 of the Copyright Act outlines exceptions related to useful articles that could be applied to these cases. For example, surface coverings, woven or knitted patterns, and graphics are all pieces that can be protected as long as they can be recognized as “art” apart from the clothing. Arora believes if an artist's original design is on an article of clothing, the design itself could be the subject of copyright. He says, “I think that *is* consistent with copyright law because you're saying the design has copyright. You're not saying that the design of the shirt [or] the shape of the shirt is the subject of copyright. But the design *on* the shirt can be taken out separately.”

However, it is because of these exceptions and complications that Roger Fisher – a York University professor specializing in the areas of music copyright and the history of copyright policy – believes copyright law and its purpose can be misunderstood. He says copyright law was originally a statute that protected intellectual works, like books, created by people of the aristocracy. “It’s not really designed to be the kind of remedy for local artists. It is available, but it’s still very cumbersome.” Arora says copyright law needs to be understood as a balance of interests. The purpose of copyright is meant to protect works and promote the creation of new works. “You want there to be enough protection that people are incentivized to create, but you also don’t want to stifle creativity.”

Both Campagnolo and Gopal acknowledge their designs are inspired by pre-existing concepts – the incentives to create. Rosehound Apparel takes inspiration from vintage books while Yo Sick plays with local advertisements and anthropomorphic food. These artists are not appropriating, but are injecting their own style into existing concepts to create new works. However, American Eagle could easily argue they were inspired by Gopal’s pizza drawing when they reproduced it on a shirt and added a heart design to make it “new.” It is when everyone is asserting copyright that problems arise, Fisher says.

If an artist truly believes their original work has been copied, whether or not they own copyright over it, the cheapest and most immediate response to counterfeiting is to expose the copy. This has become many artists’ first instinct when they find their work stolen, whether it is their own or that of a fellow artist. Campagnolo says exposing copies is the easiest thing you can do to fight back and get people on the artist’s side. And it works. Some cases make it to the news, like Mountfort and Edwards’ stories, which were reported on the CBC.

Maybe what artists want most when their work is stolen is credit. “That can be enough: letting people know. Maybe they’ll support the next thing you do a little bit more,” says Gopal. If companies don’t consider where their designs are coming from, neither will their customers. Campagnolo believes people appreciate designs more when they know it is made locally and not from a machine. “I have 80,000 Instagram followers but you don’t know who I am unless you come here and see [that] it’s just me here, packing up cardboard boxes,” she says. She does this two or three times a week, by herself, in the pink cubicle.