



The **®** Rights Stuff

When you work with others, who ultimately owns the make-up looks?

By Chris Kozak



When it comes to copyrighting your make-up looks, legal precedents are hard to find.

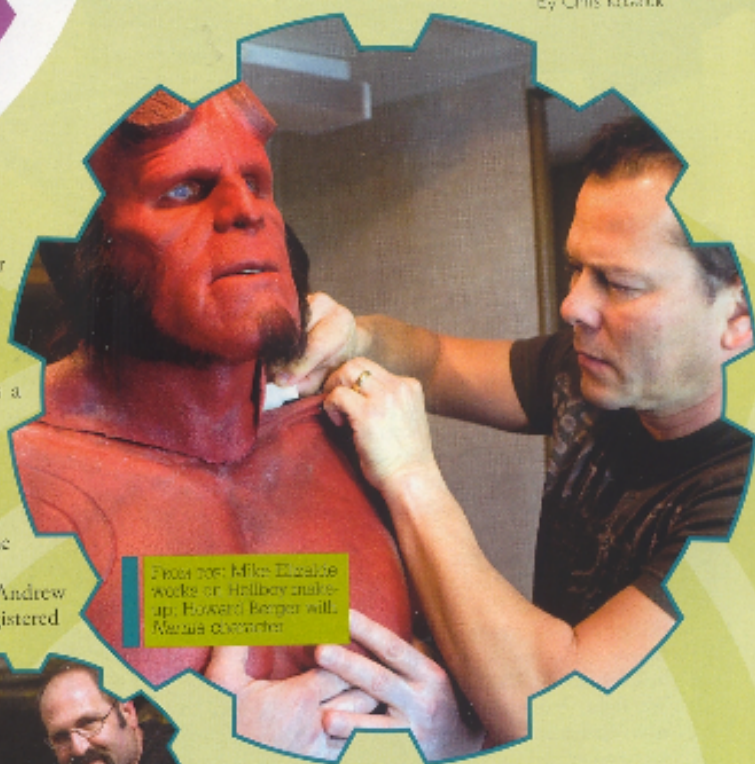
Take Candace Carell, who created make-up designs for *Cats* in 1982, in conjunction with set and costume designer John Napier. Once *Cats* was a hit, Carell decided to copyright her work. Though there was a signed contract, it contained no stipulations regarding make-up ownership. In 1991, the U.S. Copyright Office granted a Certificate of Registration for the *Cats* make-up solely to Carell. She drafted proposals for three books featuring the make-up designs.

But in 1992, Carell received a letter warning that Andrew Lloyd Webber's Really Useful Group, Ltd. had registered the drawings and designs of the *Cats*' faces for copyright. It petitioned the Copyright Office to cancel Carell's ownership, arguing Napier had created the designs. The request was denied. But for the next few years, *Cats* merchandise featuring the make-up designs—including a coloring book and a do-it-yourself make-up kit—was sold. The make-up artist decided to sue. In 2000, a judge ruled that the lawsuit could go to trial.

And that's when the case goes cold.

"It doesn't look like it ever went to trial. The judge denied a motion to dismiss and after that, there's nothing more. And that would suggest that that case eventually settled," says professor Thomas F. Cotter, who specializes in intellectual property law at the University of Minnesota Law School.

Cotter wrote about the *Cats* case in a research paper.



From top: Mike Elizalde works on Hellboy make-up; Howard Berger will. Marcus Costello



"Written on the Body: Intellectual Property Rights in Tattoos, Makeup and Other Body Art," co-authored in 2003 with Angela M. Mirabolo. *Cats* was the only court case he could find where make-up ownership was tested.



Make-up, Movies and Merchandising

Anyone who's ever worked on films or in television knows that whoever signs the checks wants to own what's created—including the make-up.

"There's a very clear understanding between us and the studios as to what they are paying for and what we relin-



quish," says Mike Elizalde, owner of Los Angeles-based effects house Spectral Motion.

"We don't own the rights to anything," agrees KNB EFX Group partner Howard Berger. "We can't say, 'Let's do a *Kill Bill* play set.' Miramax holds the rights."

Berger brings up an obvious reason why ownership is so important: merchandising. In its annual survey, the International Licensing Industry Merchandisers' Association estimated that character-related merchandise accounted for \$2.55 billion in royalties in 2012. And the studios want to keep as much of it as possible.

"We always ask for merchandising, and that's always the first thing to go," says Berger. "The studios hold on to everything. We fight, but rarely win. And we've just accepted it."

There are occasional exceptions: For the 2010 film *Predators*, KNB partner Greg Nicotero landed a deal with Sideshow Collectibles. KNB designed, sculpted, molded and painted the figures. "It feels really great—but it's a rarity," says Berger.

Elizalde secured a piece of the action on 2013's *Knights of Badassdom* by signing on as one of the film's executive producers. "If you're close to the producers, and you've developed something for them in the past, you can say, 'Hey guys, what if I pull my budget back this far and you move some points onto the back end for us?' We can negotiate things like that," says Elizalde, who also

has a royalty deal with Sideshow Collectibles for his *Hellboy* characters.

At the height of the *Star Trek* TV boom in the early '90s, Rubie's Costumes offered a line of make-up kits based on the characters. Each featured make-up supervisor Michael Westmore's signature. Copyright for these kits belongs to both Westmore and Paramount. "Rubie's came to me and asked me to do it," Westmore says. "Paramount had no problem with it as long as they got their cut."

As president of Entertainment Management, Helen Cohen is the business manager of talent including Neville Page and Greg Cannom. It took her a minute to remember the last time she secured a royalty deal for one of her clients.

"It's been at least 10, 12 years," says Cohen, naming the '90s TV series *Earth 2* as an example of a royalty deal she secured for Cannom. "The budgets have changed and the studios are wanting more and more for themselves. Unless it's a *Transformer* kind of film or something else that's big box office, it's not going to happen."

Berger admits it's a kick to see something he's created on a toy shelf. "And then you go, 'Yeah, and those guys are getting rich off it.' There's nothing you can do about it," he adds.

"We're still employees," agrees Westmore. "Anybody who demands too much up front won't get the job. It's a deal breaker. The studio is just going to find someone else."

But artists aren't coming up totally empty-handed. The studio may retain the copyright, but make-up artists keep all the physical materials they created.

"Nine times out of 10 we end up holding onto that," says Elizalde. "The studio has moved on to 10 pictures down the road. They don't really want that stuff. They don't know how to take care of it, so we hold custodianship. That's typically how it works."

KNB learned the advantages of keeping physical materials during the 1989 Disney comedy *Gross Anatomy*. The team did the film for far less than the going rate, with the understanding that it would own its creations, including some autopsy bodies Berger describes as "beautiful."

But when it came time to retrieve the bodies, the producers protested. Reluctant to challenge the issue, KNB didn't argue. "Later on, we started to see those bodies," remembers



FROM TOP: *Predators*, *Kill Bill* and *Knights of Badassdom*

The two main points are **compensation and credit**. An artist should know how his or her work will be used and bill accordingly.



Berger. "Disney was renting them out and we were losing work because of our own work. It even came to the point where some of them got damaged and Disney came to us to repair them."

KNB doesn't make that mistake anymore. Physical ownership is clearly spelled out in every contract. "At the end of the show, they ask, 'What's ours?' and I go, 'Nothing is yours. You guys own the image on film. We have everything else,'" says Berger, adding that they always make the material available for reshoots and promotions.

Holding on to items such as molds and mechanicals saves both time and money—especially if there's a sequel. Some artists request the right to be involved if there's a Part II.

"First refusal is part of the negotiation," says Cohen. "Studios will negotiate that if they know you are part of, shall we say, the A list. But sometimes they will say, 'Absolutely not,' because they want full control of who they pick. And maybe they only have five cents for the sequel."

Arguably, the biggest benefit lies in keeping devices and processes shops create.

"They really are scientists and inventors," says Cohen about her top artists. "They've created proprietary elements and technological know-how, whether it's the process of how they do a mold, or in Greg Cannom's case, the special modified silicone material for make-up application. He won an Academy [of Motion Picture Arts and Sciences] Technical Achievement Award with Wesley Wofford for that."

Perhaps the best example of such an innovation is Tinsley Transfers. Created by one of Cohen's other clients, Christien Tinsley, they have become an industry standard for such 2-D make-up effects as tattoos and bruises, and 3-D prosthetics from small wounds to entire torsos. The transfers won him the Technical Achievement Award in 2008. Anyone can purchase the transfers at Tinsley Transfers, Inc.

Because of the unique technologies it has created, Spectral

Motion has gained a reputation in the area of puppetry and animatronics.

"These amazing methods to control our characters gives us a very fluid, very organic quality," says Elizalde. "And it's proprietary, because the software that's written to run these devices is done in-house."

Elizalde believes his shop couldn't have created such characters as the Angel of Death in *Hellboy II: The Golden Army* or Edward from *Hansel & Gretel: Witch Hunters* without them.

Because of the complicated nature of these technologies, there are no plans to resell them to other companies. Elizalde admits they haven't even been named. Instead, he says, Spectral Motion would rather be the go-to house for this kind of effect. "Larger companies come to us, wanting to explore opportunities and avenues by which we can collaborate to improve their product," he explains. "That's all very important to us."



FROM TOP: Edward creation from *Hansel & Gretel: Witch Hunters*; Spectral Motion's Angel of Death build



The Beauty of the Deal Memo

The story isn't that different for beauty make-up artists. Any cosmetics company that commissions a project will own the images. If you are hired by a photographer or videographer, they'll control the images.

That's not to say that make-up artists should go in blindly. Cloutier Remix agency owner Madeline Leonard always makes sure there's a deal memo for anyone she reps. She encourages all artists to have one. "It's the only protection I can think of that an artist has," she says.

The two main points are compensation and credit. An artist should know how his or her work will be used and bill accordingly. If the work is done on spec as a favor to a friend or to build a résumé, compensation terms should be spelled out in writing if the image is sold. Make sure it's stated what happens if the terms change.

"It's not common, but it does come up," says Leonard. "If someone does something for an editorial rate and sees later that image used for advertising, there should be additional

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—Howard Berger

compensation. It's very hard for a make-up artist, even in a scenario like that, to get it, but if they have a deal memo, then they at least have a leg to stand on."

The deal memo should also require that the make-up artist's credit be included every time that image is used. Photo shoots are often syndicated, so it's important that people know whose work it is.

"You should do everything in your power to ensure that your credit follows the picture," emphasizes Leonard. "And that's important to do at the initial booking."



Take Your Best Shot

There are some definite do's and don'ts when it comes to using images a photographer has taken at a photo shoot for your own purposes. Most of the time, it's not a problem if you want to feature a photo in your book or website as long as you wait. "If it's an image that has been published, it's usually OK," says Leonard.

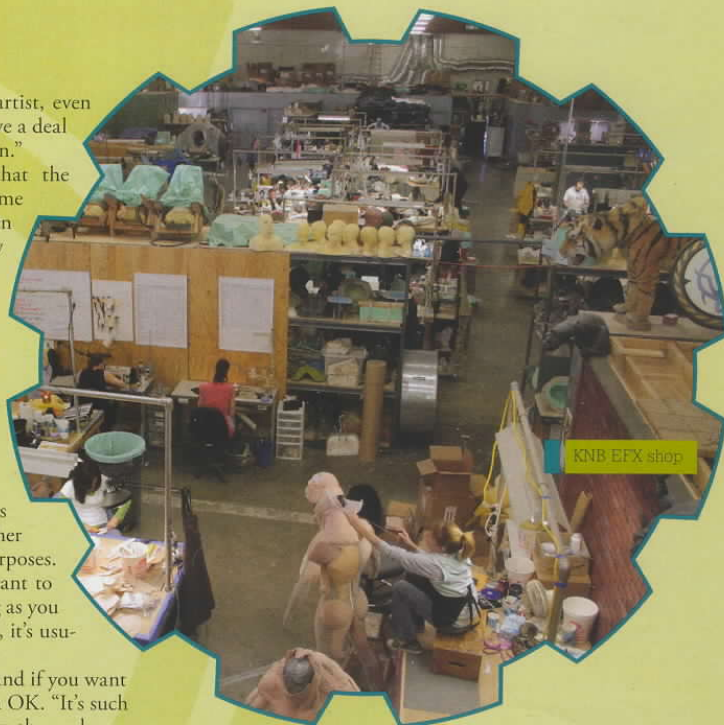
Of course, reselling the image is a no-no. And if you want to share it with a magazine, it's best to have an OK. "It's such a gray area," Leonard says. "We might supply the make-up artist's work to the magazine, but we always tell the magazine to get whatever permission might be necessary."

Film and television are similar. Studios rarely have a problem if artists want behind-the-scenes photos that the unit photographer has shot, as long as it's after the movie hits theaters. "Producers will come down heavy—dragon breath—if somebody leaks out a design before the American theatrical release," says Cohen.

It's common for film make-up artists to shoot digital video and/or photos of their work on set for promotional purposes. This is where make-up teams get their Oscar-consideration footage. Studios often want to approve the material, but they're more likely to cooperate if it's not leaked too early and is respectful of the talent.

"I've not had an issue with that," says Berger. "I pick photos that do not compromise the actor. I know make-up artists that didn't get approval, and they got into trouble because they were not great photos of the actors."

But fashion shoots are another matter. Make-up artists don't have the right to take photos on set and reuse them. Whoever commissioned the shoot has a signed release from the talent that approves the use of his or her image—the make-up artist doesn't. It's unlikely that there would be any legal ramifications, but piss off the wrong person and forget any future gigs.



There is one area where artists are successfully asserting ownership rights: body art and tattoos. Wrote Professor Cotter, when his study was published, "It seems virtually inevitable that more people will begin asserting intellectual property rights in their work of body art or against the unauthorized use of their intellectual property in others' body art."

To date, there have been a few legal battles regarding tattoo copyright. The most notable is artist S. Victor Whitmill's 2012 suit against Warner Bros. when the tattoo design he created for Mike Tyson showed up on Ed Helms' face in *The Hangover Part II* without his consent. The studio settled out of court.

Cotter wonders if it's worth the time and expense to register every possible design. Even if you do, it doesn't necessarily mean you'll be protected.

"If the make-up or tattoo artist has an original work of authorship—an original design—and it is copied without permission, that would at least, on its face, appear to be copyright infringement," says Cotter. "There would still be questions whether the defendant is copying the copyrighted elements or merely elements in the public domain. There's a lot of ambiguity and that makes copyright litigation difficult to predict and expensive to pursue." **MA**