

## TRADEMARK FAIR USE

Most Frogpedals.com projects are adaptations of the circuits of commercial pedals. While many of the original circuits have been discontinued, some may be commercially available.

If we published a schematic that looks like your schematic, or accidentally named a guitar effect the same as your trademarked device please let us know. (Contact Mark Price at : mark@frogpedals.com)

**Frogpedals.com is a reasonable company, and and will work with you to find a viable solution.**

However, since the first thought is often toward legal remedy, we have to first offer some legal perspective before we get into the broader discussion of ethics.

### **Comparative use of trademarks**

We generally try to include the name of the commercial product that one of our projects is based on, (give credit to the things that inspired our creation) and many of those company or product names may be trademarked. In using trademarked names to compare our circuit, it falls squarely under fair use and is fully allowable under United States trademark law with regard to comparative advertising, as the Frogpedals.com product does compare to the commercial pedal in the ways that we claim.

We do not in any way represent our products (printed circuit boards and electronic components) as a replica or imitation of a fully assembled and working pedal, and we do not use copyrighted logos or artwork anywhere except in photographs of the original pedal. There is no chance that anyone would mistake our product as being endorsed by the commercial entity whose name we mention for comparative purposes, and we are in no way attempting to pass it off as such. We disclaim any and all affiliations with commercial entities unless otherwise noted.

### **Intellectual property**

At times, there have been claims that a schematic or printed circuit board layout (even if it is re-drawn) is intellectual property. Legally speaking, “intellectual property” is just an umbrella term for its subsets: 1) patents, 2) copyrights, 3) trademarks, and 4) trade secrets. Therefore, any legal claim of an intellectual property violation must more specifically invoke one of the subsets. “Intellectual property” has no legal meaning on its own.

### **Schematics**

Speaking broadly, a schematic—the representation of electronic connections between components—cannot be copyrighted or trademarked, and it is not a trade secret if the circuit

was independently reverse-engineered. Patents are the only avenue, by which someone may have a claim against what we do here, but they are extremely rare in analog electronics today and very few are issued. We are aware of most of the active patents that apply to analog guitar effects pedals and we do our best to avoid them. Many of the schematics have variations, tweaks, and improvements that make it an original work with only a passing resemblance of the original schematic.

The only way a schematic can violate copyright is if it was a copy of the original artwork, e.g. a factory schematic that was drawn by the company who manufactured the pedal. Schematics that are re-drawn by Frogpedals.com are copyrighted by Frogpedals.com, irrespective of the circuit that they represent.

While we do host some factory schematics for archival purposes, these are almost exclusively from the 1980s or earlier and have been widely distributed for many years. Many of the original companies no longer exist. However, if you are the copyright owner of a document we host on this site, you may contact us to request we take it down. Please include proof of copyright ownership.

### **Printed circuit board layouts**

The PCB layout itself is another aspect of a pedal that can potentially be covered under copyright. However, some have misunderstood this to again refer to the connections between the components, when it's actually only covering the layout as a work of art.

All of our PCB layouts are original designs and copyrighted by Frogpedals.com. We do not produce replicas of circuit boards, vintage or otherwise, and no part of the original PCB layout is reused in our work. Therefore, as with a re-drawn schematic, the PCB itself is not subject to any copyright claims.

### **Circuit names**

All of our projects have their own names, e.g. **BluesMaster** or **RockMaster**. We research each potential name for originality before assigning it to a project. However, due to the number of commercial pedals out there and the prevalence of small builders, with many new products entering the market every week, we sometimes miss the fact that someone else has used the name within the industry.

If one of our project names is in violation of your copyright or trademark and you'd like us to change it, please **contact us** and let us know. Please include proof of prior commercial use, e.g. a sales record that predates the release of our project.

### **DMCA takedown notices**

We work hard to ensure that nothing on this site infringes any copyrights. With that said, we have carefully chosen a web host who doesn't play games with DMCA intimidation. We are informed and experienced in the legal process behind DMCA notices, and we have a DMCA counter-notice template ready to go in case it is necessary.

In addition, be aware that frivolous DMCA notices can backfire on the copyright owner. See *Lenz v. Universal Music Corp.* 572 F.Supp.2d 1150 (N.D. Cal. 2008) where a district court ruled that because fair use was not considered, the claimant failed to act in good faith.

## **Conclusion**

Legally speaking, nothing we do is in violation of trademarks, copyrights, patents, or trade secrets as they related to United States law, and any attempt to intimidate or threaten frivolous legal action will be understood for what it is.

## **With that out of the way...**

We understand that this circuit may be the product of a great deal of research on your end. However, this is just one of the risks of entering the market and having a good product. Every single pedal manufacturer out there is subject to the same possibility of having their work traced and publicized. It's not piracy, it's not unethical, and it's most certainly not illegal.

We develop new circuits as well, and have been doing so for years. We understand that by putting them out there for other people to use, there's a chance that someone else could build off our work and even make money from it.

These are the table stakes for getting into the analog pedal business. Regardless of the amount of development time that was spent initially in getting it to market, if your product is something that can be traced out in a matter of a few hours, and a comparable version built using off-the-shelf parts ordered from electronic component distributors, then it's not something that you can protect or prevent people from analyzing.

Here's how we see it: Having your circuit traced is a badge of honor, and if anything, it raises the profile of the product. Having the schematic publicized will confirm to people that it is in fact what it claims to be. If your pedal bears the marks of hard work and thoughtful design, you have nothing to worry about.

Though we sell completed products based on our circuit designs most of which are modified from the original circuits, we sell unpopulated PCBs to people who know how to build their own pedals, and people who build their own pedals generally do not buy new ones. To buy our handmade products, they tend to cost more than a used or new pedal. We aren't dissuading potential customers from buying your pedal. Rather, several thousand more people (people in the DIY community) are aware of the pedal, and due to the amount of spillover between the

DIY communities and commercial gear communities, it's bound to result in good word-of-mouth.

### **Some more "Legalese" : Trademark Law Permits "Fair Use" of Another's Mark**

However, use of another's trademark is permissible if it qualifies as fair use. The fair use doctrine, consistent with the First Amendment, allows a person to use another's trademark either in its non-trademark, descriptive sense to describe the user's own products (classic, or descriptive, fair use) or in its trademark sense to refer to the trademark owner or its product (nominative fair use). The Lanham Act expressly protects fair use from liability for trademark infringement, dilution and cyberpiracy.

#### ***Descriptive Fair Use is a Defense to Infringement***

The Lanham Act specifies that good faith, *descriptive* fair use is an affirmative defense to an infringement claim. Before the affirmative defense is ever reached, however, the plaintiff must first show, as part of its prima facie case, evidence of likelihood of confusion from the defendant's allegedly descriptive use of the trademark.

The U.S. Supreme Court addressed the fair use defense in a 2004 decision that did not involve online trademark use, but which should be instructive to online use. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004). The owner of an "incontestable" federal registration of a trademark that included the words "Micro Colors" sued a competitor that used the term "micro color" in its ads marketing permanent cosmetic makeup. The court did not decide whether the ads' use of "micro color" was a fair, non-trademark use of the words to describe the makeup. Rather, the court addressed the relationship of the fair use defense to the plaintiff's burden to establish likelihood of confusion. As the court explained, the defendant claiming fair use does not have the burden to show that confusion is unlikely. If the plaintiff establishes evidence of likelihood of confusion, the defendant may then present evidence that its use was a fair use. Interestingly, the court stated that it "does not rule out" the possibility that some degree of consumer confusion is compatible with fair use.