

PRINT & PATTERN PROTECTION

Copyright protection of prints and textile patterns: Cotton On, City Beach and Quick Fashion under the spotlight, but what's all the fuss?

SHARON GIVONI INVESTIGATES

Copyright protection in Australia doesn't apply to the overall appearance of garments themselves. Sometimes copyright can protect one-off garments as "works of artistic craftsmanship", but this is the exception rather than the rule. (Garments are generally protected by design protection once they are mass produced).

Copyright can be used to protect prints and textile designs (section 31(b) of the Copyright Act 1968(Cth) protects these as "artistic works" and gives the copyright owner the exclusive rights to reproduce the work, publish the work and communicate the work to the public), as demonstrated in this article.

COPYWRITER INFRINGEMENT

Copyright law is a confusing area for many in the fashion industry and while the basic rule to remember is simply "do not copy", what will amount to copying in any given situation can vary on the case." This article explores the topic in light of some recent cases on point.

How do I get copyright?

For copyright to subsist, it is not necessary to pay any fees or register your work. If what you want to protect can be classified as an artistic work (i.e. prints) or a "work of artistic craftsmanship", copyright in the work arises automatically upon its creation in physical form.

While the copyright "©" symbol is not legally necessary, it is helpful in notifying others about the existence of copyright in a pattern. There is no harm in including it on your fabric design followed by your name and the date that the work was created. Once copyright is established, it generally lasts for the life of the creator, plus 70 years.

When has something been copied?

In basic terms, copyright can be infringed if you "substantially reproduce" someone else's works. There are a variety of works that are protected, including two dimensional designs for t-shirts and textiles (characterised as "artistic works"). Section 14(1)(a) of the Copyright Act states that if you reproduce a substantial part of a copyright work, that can amount to infringement

Even if you have only copied a small part, if it is a significant aspect of a print or textile design, liability could arise. Some people think that if a person changes someone else's design by ten per cent they are legally "off the hook", but this is a misconception. What really counts in the eyes of the law is the quality and quantity of what is taken.

"There's a line that should never be crossed, and that's when your "inspiration" is so close to the real thing that you are mistaken for the real thing!"

MARIA BROPHY, *An Open Letter to Jeremy Scott – Did you Rip Off Artist Jim Phillips?*
(<http://mariabrophy.com/>)

It is worth mentioning that even if you reproduce designs from overseas, liability can still arise. This is because by virtue of the various intellectual property agreements Australia has with other countries such as the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Australian works are automatically protected by copyright in over 160 countries. Similarly, as a result of these agreements, textile designs or garments produced overseas will also usually be protected under Australia's copyright laws.

The following cases involving major fashion labels serve as a reminder that if you are inspired by someone else's t-shirt print or textile design, care should be taken in order to avoid legal action being taken against you. Needless to say, legal proceedings could end up being a costly, time consuming and embarrassing exercise if you lose.

T-SHIRT DESIGNS

There is a fundamental rule that copyright protects the expression of an idea, rather than the idea itself.

For example, the concept of designing a textile print featuring butterflies is simply an idea. If you ask two people to create a butterfly design without reference to each other, they can come up with two completely different and original designs. So in this example, the idea alone of designing a textile print featuring butterflies is not protected by copyright – but the expression of the idea, in the actual original design created by each person, is protected.

Remember, it is the expression of artistic skill, effort and ingenuity in material form that copyright law protects.

In practice however, there may be situations where there is a fine line between an idea and its expression. The following real life case study highlights this in the context of t-shirt designs. Let's take a look.

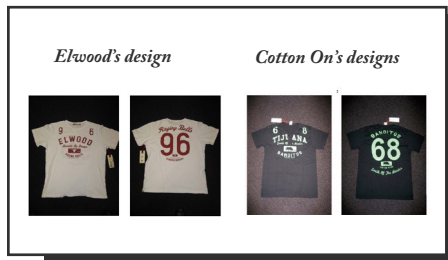
Case study:

ELWOOD PTY LTD VS COTTON ON PTY LTD

In 2008, a dispute arose between two Australian clothing companies, Elwood Pty Ltd (Elwood) and Cotton On Pty Ltd (Cotton On), regarding Elwood's New Deal t-shirt design and Vintage Sport Swing Tag design. Elwood alleged that Cotton On had copied its patterns in a range of formats.

On appeal, the Full Federal Court took the view that Cotton On had reproduced too many components of Elwood's design on their own t-shirts, taking into account that:

- *While the numbers on each design were different, their size and location were similar.*
- *The arching of the text around the central logo was the same.*
- *The V-shapes of the respective necklines were similar.*
- *The layout and location of an animal graphic were the same.*
- *The fonts of each design were different, but the arrangement of the text, size and elements and their ordering were the same.*



Source: These images above are reproduced from the annexures of the case.

Even though the specific numbers, images and fonts used were different, by reproducing the layout, arrangement and style of Elwood's design, Cotton On had recreated the "look and feel" of the t-shirt to the extent that it had infringed Elwood's copyright.

Same, same, but different

Cotton On employees admitted they had used to the Elwood designs as a reference point, but had tried to make them sufficiently different.

COPYCAT TEXTILE DESIGNS

So we now know that if you reproduce someone else's t-shirt design too closely, legally speaking, it could land you in hot water. Copying flat textile designs too closely can also infringe copyright as the following case, relating to swimwear patterns, demonstrates.

Case study:

SEAFOLLY VICTORY OVER COPYCAT TEXTILE DESIGNS

On 1 April 2014, fashion label, Seafolly Pty Ltd won a case in the Federal Court of Australia against an online retailer, Fewstone Pty Ltd (known as City Beach) for infringing copyright in Seafolly's fabric designs.

This resulted in City Beach having to pay over \$250,000 in damages and having to hand over all remaining stock to Seafolly.

City Beach had aimed to create swimwear garments with the same look and overall feel as Seafolly's. The evidence revealed that photographs of the Seafolly prints had been sent as "references" to City Beach's design company. At one point, the City Beach bikini was even referred to internally as a "Seafolly knock off".

The judge described City Beach's actions as "tantamount to an instruction to copy".

Images of the textile designs compared side by side are featured below as they appeared in the case:

Seafolly's design



The English Rose artwork on white



The English Rose artwork on black



The Covent Garden artwork on white



The Covent Garden artwork on black



The Covent Garden artwork on black

City Beach's designs



Paper representations of fabric bearing City Beach's Rosette print on white



Paper representations of fabric bearing City Beach's Rosette print on white



Paper representations of City Beach's Sienna print on white



Paper representations of City Beach's Sienna print on black



City Beach's Richelle embroidery, appearing on its bandeau-shaped garment.

USING READY-MADE TEXTILES

Fashion designers sometimes source ready-made fabrics. In this situation, if the fabric you use is so similar to another designer's style that people get confused as to whose is whose, legal issues may arise.

In 2011, a dispute arose between clothing labels when one business, Ladakh Pty Ltd (Ladakh) designed a butterfly print for its garments in-house and sent the image files to its Chinese manufacturer.

Ladakh vs Quick Fashion

Ladakh discovered that an Australian company, Quick Fashion Pty Ltd (Quick Fashion), was selling dresses in Australia featuring a strikingly similar fabric design. It commenced legal proceedings in the Federal Court of Australia for copyright infringement. Quick Fashion claimed it had not set out to copy at all. It had simply been shown a fabric sample from an overseas manufacturer and chose to use it in its own collection.

While the judge conceded that the two fabric prints were remarkably similar, he couldn't find what he alluded to as the "smoking gun" that would prove Quick Fashion had actually copied. For this reason, Quick Fashion could not be held to have infringed copyright. Ladakh appealed the case to a higher court, but the original decision was upheld.

CONCLUSION

This article aims to provide some useful tips about copyright in relation to textile designs and t-shirt prints. It's a difficult area to navigate and the above is just a snapshot of a very complex area. Further, in the field of copyright, nothing is absolute as each case usually turns on its facts.

If a copyright issue arises that affects you or your business, it is always best to seek tailored legal advice.

About the writer



Sharon Givoni is a Melbourne-based intellectual property lawyer with clients in the textile and fashion industry. She recently presented at the Virgin Australia Melbourne Fashion Festival held in March this year.

Sharon can be contacted by email (sharon@ipectel.com.au) or called on 0410 557 907 or 03 9527 1334.

Her website is located at www.sharongivoni.com.au.

A side-by-side comparison of Seafolly's (left) and City Beach's (right) designs. Images reproduced from the court case.

City Beach also tried to argue that Seafolly had lost its copyright in the textiles because they should have been considered as designs instead. This defence was unsuccessful and as the overlap between copyright and design law is a complex one, seeking legal advice is recommended.

One sure-fire way to avoid infringing copyright is to ensure that your fabric and textile designs are created from scratch. Care should be taken if you use external designers and always check where they got their inspiration from because ultimately, if they copy, your business may be liable.

Discovery

When a matter goes to court, there is a process known as "discovery", which requires both parties to disclose to the other side all documents relevant to the proceedings, even if they are scathing, embarrassing and

disadvantageous to their own case. If someone hints or instructs another to replicate a design, whether in an email, letter or marketing plan, it may end up being "discovered" and used as evidence against them in a court of law.

This translates to one thing: be careful what you put in writing and how you instruct people to do things. For example, asking someone to copy a textile design or refer too closely to it can all come out later should you be legally challenged. Bear in mind, it is also illegal to destroy or not disclose evidence during litigation proceedings, even if it is damaging to your case.

Tip:

Maintain records of your designs
To prove originality, keep records of the creative process that led to the design creation. Encourage your staff and independent contractors to do the same.

IMPORTANT DISCLAIMER:

This article is of a general nature only and must not be relied upon as a substitute for tailored legal advice from a qualified professional.