HOW TO AVOID HAVING YOUR IDEAS RIPPED OFF:

BE PROACTIVE, NOT REACTIVE

Imagine that you have designed a new fabric pattern, sleeker than the smoothest operating roller blind. You are getting ready to release it to the market.
You know it will be a great seller but what you don't know is how to stop others fron copying it.
Having an understanding of the different types of intellectual property really helps here as you will know when and how to get your products protected.
The answer is to use Australia's copyright, patent and design laws to your advantage and do it early. By taking a proactive and preventative approach now, you can avoid disappointment later from not applying for your patents or designs in time.
In this article we will be walking through these three pillars of intellectual property law by explaining what fits where; and giving you some industry examples along the way.

PATENTS
Patents are one of the "strongest" intellectual property rights you can obtain. Patents are essentially rights granted by the government that say because you have created a new piece of technology, only you can use and sell it for a period of time.
You can get patents for devices, process, mechanisms or other unique inventions that have some kind of useful purpose or function.
Given that a patent gives you a broad range of rights, they are not easy to get. Generally speaking, to obtain a standard patent in Australia the product must be:
• New – the invention cannot be something already available, that has been publicly shared, disclosed or even shown to potential investors prior to application;
• Inventive – it has to function in a way that's unique and not obvious compared to other competing products on the market; and
• Useful – this is not "useful" in the usual sense (i.e. whether or not someone needs it or not) but "useful" in the sense that if someone else were to look at your patent application, they would be able to make the invention.

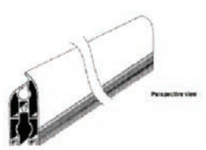
HOW DO YOU GET A PATENT FOR YOUR INVENTION?
Patents are issued by IP Australia. It can take quite a while for IP Australia to look at your application and see whether or not they will grant the patent.
The most important thing to remember is that the date you file your patent application is your "priority date". This means you need to ensure that you don't demonstrate, sell or discuss your invention before you get your application in.
If you do need to discuss it with select people such as potential business partners or investors, ensure they sign a confidentiality agreement beforehand (also known as NDAs which stands for non-disclosure agreement).

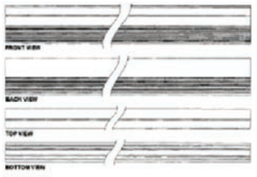
Example:
Adelaide based company Slidetrack proudly produces locally manufactured blinds and window accessories. Slidetrack founder, Brian Zwar, has lodged many patent, trade mark and design applications over the years, from a tillage tool in the 1980's, a bridging system used now in commercial building and other products developed by Slidetrack. Slidetrack have a number of registered designs, as well as patent protection (registered patent number 2011201877) for their track guided blind system, pictured below:

"Taking out IP protection wherever possible is always prudent", Brian said. "As an Australian manufacturer we need to ensure our developments are protected from imported imitations."

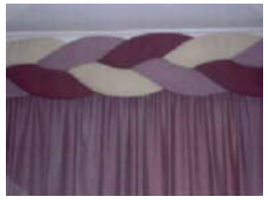
LOOKS COUNT
Not all products meet the threshold of being innovative or inventive, but they may have a particular new design aesthetic that you want to protect. Registering and certifying your product as a "design" will let you claim exclusive rights to its shape, configuration, ornamentation or pattern. A design registration does not protect the way the product works; it protects its appearance.
Design registration is a monopoly right that lasts for five years, with an option to renew for a further five afterwards.
Registered designs potentially include patterns that are woven into or embedded in a curtain, slide rail ends, or blind pelmets.
To be registered as a design, a product must be:
• New – the design cannot have been previously sold or made public anywhere in the world; and
• Distinctive – the design must be unique - i.e. it cannot be substantially similar to any other designs.
Again the key thing with registering a design is that ensure you file your design application quickly before it goes to market. Furthermore, anyone that you deal with beforehand should ideally sign a confidentiality agreement.

Examples:
For example, this design for "Bottom bar for blinds, awnings and shutters" is currently registered:





This design for a "curtain pelmet" was registered (although currently not in force):



COPYRIGHT
Copyright law is essentially a bunch of rights in certain creative works such as text, artistic works, music, computer programs, sound recordings and films. It is most relevant in the window furnishings industry when it comes to items such as a blind or a curtain that has an artistic work printed on its surface.
Unlike patents and designs, there is no need to register copyright in Australia for it to be protected. It arises automatically once the work is created. Better still, copyright survives for the lifetime of its creator plus seventy years, making it one of the longer lasting IP rights.
The catch is, not everything is protected by copyright. In order for copyright to exist, a work needs to be expressed or embodied in a fixed or tangible form. So copyright can be used to protect products like drawings, patterns, a plans or photographs, but it does not protect things like ideas, concepts or trade secrets.
To be protected by copyright, a work also has to be original. Original does not mean new or unique (so in that respect is different from patents or designs), it just means that the work was created independently of other sources, i.e. not copied. A work may be original even if by chance it resembles something else in the market. It is most relevant to two dimensional designs that feature on fabric. Photographs also belong in the area of copyright law. They can come to life on textiles with the aid of digital printing. The key is: regardless of how creative or attractive a photo or artwork is, it will be protected by copyright. Even graffiti is protected by copyright law so if you print images of graffiti on a curtain you need to get permission from the graffiti artist.

TIP – You can be inspired by what came before but make sure you have your own twist to it – your own take so that no one will say you have copied another design.

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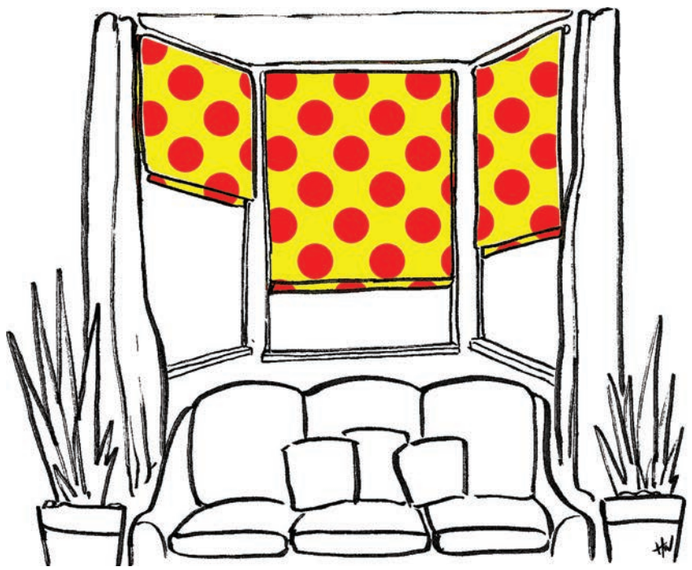
>
> Sharon Givoni

These two images of curtains are based on photographs of flowers. Copyright is owned in the photographs even if they are digitally manipulated. Illustration by Harley Ng. Photograph by Sharon Givoni.



Here we can see a red and yellow spotted pattern on a curtain – however this would not be original enough to attract copyright; it's very commonplace. Illustration by Harley Ng

CAN YOU PROTECT A STYLE?

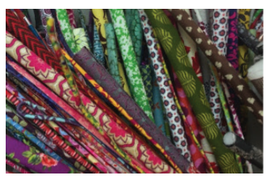
Now there is a challenging question that as lawyers we get asked all the time. An example of an on trend curtain pattern is the technique of paint splatter or painterly brush strokes. You can create your own design in this theme, no problem. However, you cannot copy someone else's actual artwork. There can be a fine line between the two. Other laws also come into play, such as consumer laws that try and prevent people from getting confused as to what brand it is, but that is a discussion for another day.

Tip - Copyright only protects you from someone else reproducing one of your actual artworks or curtain designs, not from someone else coming up with their own work in the same style.

IS IT AN ARTISTIC WORK OR A DESIGN, OR BOTH?

Things get complicated when a product could potentially be protected by copyright or by designs law. For example, a 2D drawing of a flower pattern can be woven into the fabric of a curtain, creating a 3D textured reproduction of the original pattern.

The trick is that if the design is woven, impressed or worked into a curtain, blind or shutter, then it can be considered to be a 'corresponding design' and you really should consider registering it as a design, rather than relying on copyright protection. This is because it is considered to be a design for industrial use; it has a 3D aspect to it and is no longer protected under copyright law.



Patterns woven into fabric can be protected by copyright and design registration. Photographs by Sharon Givoni

Example:

Laura Blythman is a talented Melbourne based illustrator who produced a portfolio of vibrant, textured and colourful work for a range of products.

Her illustrations are a perfect example of when you should stop and think about whether something is 2D or 3D. In the image to the right, her illustration is essentially made up of a "collage" and looks 3D, because it is not woven, impressed or worked into a fabric, but is actually two-dimensional, it would still be protected by copyright. If this pattern were to be printed flat onto a curtain, then copyright would still protect the image.

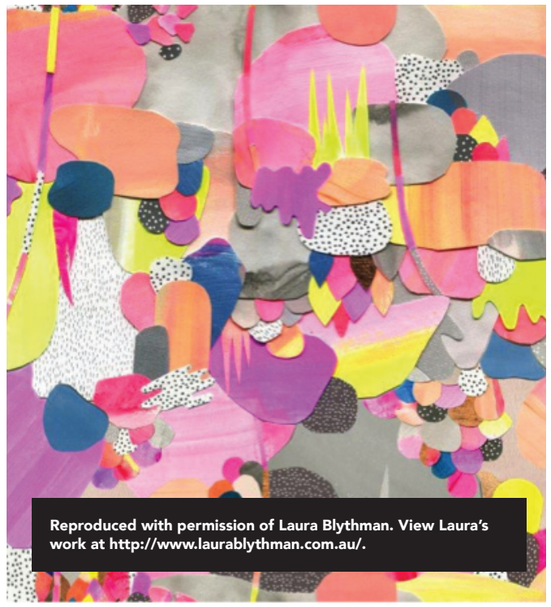
However, if it was somehow woven into the fabric (rather than printed), copyright could potentially be lost. The distinction is confusing and when in doubt, it's always best to ask.

WHAT CAN YOU MAKE OF ALL THIS?

Copyright, design and patent registrations can offer more than just a right to stop someone from copying your product. Once infringement has been established, that is, if you can actually prove that someone else copied you and made money out of it, it is quite possible to seek an account of the profits received from the sale of the imitation products and/or claim monetary compensation. Accounts of profits are where the person who copied the product needs to pay you the profits made, but this is mostly done after you go to court if the court orders it.

However, many failures of businesses to protect their intellectual property adequately come from going to market too soon.

Remember with patents or designs it is essential that you register your applications with IP Australia before you show it in public. If you do need to show it to anyone before you apply, ensure that they sign a confidentiality agreement. While copyright is a great form of protection in some situations, always check to ensure that copyright will save you and you are not in the trap of the copyright/design overlap.



Reproduced with permission of Laura Blythman. View Laura's work at http://www.laurablythman.com.au/.

So, the next time you are about to lift the curtain on your new pattern, blind roller or innovative shutters to the market, stop and think whether there is anything which may need to be registered as a patent or a design.

Last but not least, remember that there is no such thing as the 10 per cent rule. It's not as if you can change a printed design by 10 per cent and that means it will not be a copyright infringement. The real test is whether there has been a substantial reproduction and that is determined by reference to quality over quantity. It comes down to questions such as: has one design been copied from another? If so, has too much been taken? What has been taken – is it the idea, style or technique or the way it has been expressed?

In a way, what it boils down to is that intellectual property is a bundle of economic rights and economic rights that give you the right to earn money from your creative work or business innovations. You can also take legal action if your rights have been breached; however the first step is to check that you have done all you can to protect them in the first place. And that is what this article has been all about.

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ABOUT THE WRITER

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'Owning It: A Creative's Guide to Copyright, Contracts and the Law'

If you found this article helpful, you may be interested in Sharon Givoni', 'Owning It: A Creative's Guide to Copyright, Contracts and the Law'. Packed with case studies, the book aims to demystify the law for creatives and small business owners regarding the protection of designs, trade marks, copyright, reputation, confidential information and other intellectual property. For more information about Owning It, visit www.creativemindshq.com/owningit or www.sharongivoni.com.au/.