

TEXTILE DESIGNERS, COPYRIGHT & THE INTERNET: UNRAVELLING SOME COMMON MYTHS

BY SHARON GIVONI

“... [T]he most innovative and progressive space we’ve seen – the Internet – has been the place where intellectual property has been least respected”

LAWRENCE LESSIG

For textile designers and businesses that sell fabrics, the internet can open doors to potentially endless exposure around the world. The downside of posting your work online is that it also exposes your textile designs to an increased risk of being copied.

Fashion lawyer Sharon Givoni provides ten useful tips about copyright on the internet by dispelling some of the common myths.

MYTH #1: IF IT IS ONLINE, IT IS FREE TO USE

Publishing your textile designs on the internet is not an invitation for someone else to use them in any way they please.

Provided they are original enough, designs on two-dimensional fabrics will attract copyright protection. This means that the owner of those designs has the exclusive rights to:

- **reproduce the work** (eg. reproducing the patterns on fabric or bags);
- **Communicate the work to the public** (eg. posting it on a blog).

_ CASE STUDY ONE: RIPPED OFF IN CYBERSPACE

Bronwyn Simmonds, owner of Melbourne-based graphic design agency, Beni Creative, is all too familiar with this issue. She cites an experience where she designed a logo for her client's online business.

By chance, she later discovered that the same logo was being used by an unrelated creative agency in India to promote its own business. She was able to resolve this issue by sending the creative agency a stern email, resulting in its removal.



__CASE STUDY TWO: T-SHIRT TORMENT

Melbourne fashion illustrator, Joanne Young, is also no stranger to this scenario. She has come across people who have posted her artwork on their own websites, claiming to be the artist.

One overseas business even went so far as to reproduce one of her fashion drawings on a T-shirt range. Examples of Joanne's popular images are pictured at left.

__ VIEW JOANNE YOUNG'S WORK AT WWW.JOANNEYOUNG.NET.

TIP: Monitor the marketplace! Although there is no 100% fool proof method to stop people from reproducing your work, copyright warnings and prominent watermarks can be used to help deter others from copying and reproducing designs.

MYTH #2: IF YOU PAY FOR A TEXTILE DESIGN TO BE CREATED, YOU "OWN IT"

This will not always be the case. If the textile designer is not your employee and is rather a contractor, you may not own the copyright in the design, unless you get the copyright "assigned" to you in writing.

TIP: If you engage or commission people to design textiles, and owning the copyright in those designs is important to you, it is best to ensure that you have the copyright formally transferred to you in writing. The document that does this is called a "deed of copyright assignment". The Copyright Act 1968 (Cth) sets out some formal requirements that need to be met for a document of this kind to be binding and effective. It is advisable to get the help of a lawyer to do this properly.

MYTH #3: COPYRIGHT NEEDS TO BE REGISTERED

There is no official copyright registration system in Australia. This means copyright protection is automatic and "springs to life" when a textile design is created (i.e. drawn, painted, made through the aid of a computer program etc.).

TIP: In some cases, it helps to display the © symbol on textiles, although in most cases this will not be practical. At the very least, businesses and textile designers should try to maintain records of the evolution of their textile designs. This means they can prove the designs were created at a certain point in time if someone alleges copying, or they want to say that someone else copied the designs.

MYTH #4: POSTING THE DRAWING TO YOURSELF PROTECTS YOU

Textile designers that spend hours on creating patterns and drawings for use on fabric have been known to ask whether they should post their work to themselves as proof of copyright ownership.

The theory behind this practice is that a dated stamp serves as proof of the creation of the work at a certain point in time. However, because of the ease at which seals can be tampered with, this method is generally considered to be ineffective in terms of proving that you own copyright in a design.

Better options may be to document the evolution of your textile designs by keeping draft sketches or a sketch book, or else saving the drawings at each stage of development. Keeping a journal with drawings, pictures or magazine clippings from which you have sourced your ideas can also help establish the progression and authenticity of your work.

MYTH #5: WHO OWNS COPYRIGHT IN IDEAS?

There is no body of law that protects concepts or ideas in their own right. This is a concept that people can find hard to grapple with on practical level.

The idea behind copyright law is that it protects someone's hard work, skill and endeavour. This is done by giving people copyright ownership in the expression of their idea (so long as it is reduced to some sort of tangible form), rather than the idea itself.

What this means is that you can create a design for fabric that utilises the same theme as another existing fabric, but be careful when doing this. If the design reproduces too many elements or essential features of the existing fabric design, this can amount to a copyright infringement.

It may be that your intention was not to replicate the design but just draw inspiration from it. There can be a fine line between how much is too much, and therefore, if you are unsure it is worth seeking legal advice.

To take an extreme example, it may be perfectly fine to copy the idea of producing motifs of butterflies and leaves on fabric but if you reproduce too many individual elements of someone else's design, such as the colours, composition, proportions and placement of objects, that may amount to a copyright infringement. Each case will depend on the facts and there are no black and white rules that can be applied.

MYTH #6: SAME, SAME, BUT DIFFERENT

Having stated the above, strange as it may sound, you can have two very similar textile designs that have been independently created and one is not a copy of another. This may come down to simple coincidence.

Copyright law allows coincidence; what it doesn't allow is copying someone else's work. Also note that if you claim that your textile design was drawn from scratch, but it can be proven that you actually had access to another textile design before you created yours, that could raise a presumption that you have copied.

Joanne Young's work

UNCONSCIOUS COPYING IS ALSO NOT ALLOWED

It often comes as a surprise to people that even if you have “unconsciously” copied something, this can still amount to copyright infringement. The copying does not need to be intentional.

So if someone has seen a fabric design somewhere and happens to remember the details of the design accurately, they can infringe copyright by recreating it later even if they do not have it as a reference source in front of them when designing the ‘new’ fabric.

Practically however, when it comes to taking legal action you need to know who to point that finger at, and this is not always clear. This very issue arose a few years ago when a legal dispute occurred between two competing fashion labels in Australia. The case was heard in one court and then appealed – all this, over a butterfly pattern.

CASE STUDY: A CASE OF DÉJÀ VU

In 2011, Ladakh Pty Ltd challenged its competitor, Quick Fashion Pty Ltd, over the use of a particular butterfly patterned fabric. Although the two prints looked remarkably similar, after looking at the evidence, the judge said that he could not find the “smoking gun” that would unequivocally prove that one fashion label had copied the textile design of another. Ladakh lost the case, and lost again when the decision was appealed.

TIP: If you discover a textile design in the marketplace that looks strikingly similar to yours or your fashion label, try to find out as much as you can first before blaming anyone for copyright infringement. You may also want to see a lawyer. The Copyright Act sets out a prohibition against making groundless threats of copyright infringement. For this reason, great caution needs to be taken before sending out letters or threats to others alleging that they have copied your textile designs.

MYTH #7: IF YOU COPY A TEXTILE DESIGN BUT CHANGE IT BY TEN PER CENT, LEGALLY SPEAKING, ARE YOU ‘OFF THE HOOK’?

Contrary to popular belief, there is no such thing as the ten per cent rule.

This is because the legal test for copyright infringement is not based upon a percentage of a work. Instead, what counts is both the quality and quantity of what has been “taken”. In legal speak the test for copyright infringement is whether a textile design has been “substantially reproduced”. The test is answered by reference to both the quality and quantity of what is taken and this can be a matter of fact and degree. Whether copyright has been infringed in any given circumstance will be determined on a case-by-case basis.

CASE STUDY: I LOVE THAT FABRIC – CAN YOU CREATE THE SAME?

A textile designer was asked by a client to design a similar textile design to a swatch of fabric the client had picked up overseas.

The designer was asked to ‘tweak it here and there’ so that the client could adapt it and use it for its own collections. Changing a design will not necessarily mean that you will escape potential liability for copyright infringement – it needs to be quite different.

TIP: If you are referencing another work when creating a new textile design, you may be at risk of infringing someone else’s copyright. It is best to start from scratch or seek legal advice. Another option is to get permission to use the design (eg getting a licence) but that may involve paying something to the copyright owner.

MYTH #8: IF IT’S ON THE INTERNET, IT’S IN THE “PUBLIC DOMAIN”

Many people think because images are on the Internet this puts them in the “public domain” and makes them suddenly “free for the taking”.

THIS IS A COMMON MISCONCEPTION.

The words public domain are used in relation to works whose copyright has expired because the author has been deceased for 70 years, such as Da Vinci’s Mona Lisa. So, if you were to reproduce elements of the Mona Lisa painting onto a textile print, on the face of it, that would be okay. On the other hand, if you were to reproduce someone else’s modern interpretation of the Mona Lisa on a piece of fabric (such as a cartoon or stylised reinterpretation) that could infringe the copyright in relation to that new image unless you had permission from the artist to do so.

In Australia, copyright protection protects a piece of work for the life of the author plus 70 years. When this period of time has elapsed, it falls into the public domain and anyone can use it.

TIP: Don’t fall into the trap of believing that because images appear on the Internet you can incorporate them into your own textile designs. Getting permission may still be necessary.

MYTH #9: THERE IS NO SUCH THING AS AN ORIGINAL TEXTILE DESIGN – IT HAS ALL BEEN DONE BEFORE

Not quite.

In the world of fashion, although trends are constantly followed and built upon, there is nonetheless an expectation that people apply a certain level of originality to the designs and garments they create. Most textile designs are protected under copyright law as artistic works so it is against the law to copy them.

Sydney-based, Gifts and home wares label, Polli, prides itself in its unique textile designs, created exclusively for its clothing and jewellery range.

Below are some examples of unique designs by Polli:-



MYTH #10: I CAME UP WITH A DESIGN DURING MY JOB – BUT IT’S STILL MY WORK SO I MUST OWN IT

This is not necessarily true. Whether or not you own the copyright to a design created in response to an employer’s request to create it, will usually depend on the terms of your employment contract.

For example, your employer may have specifically stated in your terms of employment that designs created by all employees whether in the course of their employment or not are owned by the employer. If you are unsure, it is best to seek legal advice. Even if no such clause exists, the law may still imply that the employer owns the works.

TIP: Read over the terms of your employment contract. Remember that if the design is applicable to performing your duties at work, or can be considered to be within the scope of your employment, the employer will generally own the copyright to your designs under the Copyright Act.

CONCLUSION

This article aims to provide some useful tips for both textile designers and fashion labels alike about copyright, textile designs and the law.

The law does not provide rules in absolute terms and there are always exceptions to the general rules so don’t take the above as “set in stone”.

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

ABOUT THE WRITER

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

Sharon can be contacted by email (sharon@iplegal.com.au) or called on 0410 557 907 or 03 9527 1334. Her website is located at www.sharongivoni.com.au.



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.