Fashion and textiles – for artists and designers

This information sheet covers the laws available to protect the interests of artists and designers (**Creators**) who are looking to commercialise their creative work in the fashion and textile industries. Intellectual property laws such as copyright, designs and trade mark laws protect the interests of such Creators. What sort of protection applies depends on the nature of your creative work and whether you intend to license your work to another person to market and manage production or to take this on yourself. Commercialising a work in the fashion and textile industries can range from licensing existing or commissioned artwork for printing on textiles to be manufactured for furnishings or a production run of a garment based on a newly designed style, to making limited editions of accessories like a hat or jewellery.

This information sheet introduces you to common issues and laws that apply to Creators involved in the fashion and textile industries. It covers matters such as registration of intellectual property (**IP**) rights related to your creative work, licensing and transfer of rights in such IP to others to commercialise your work, payment models and appropriate agreements to do these things.

Introduction

Creators look to make an income from their artwork or designs by applying their work to products manufactured on a commercial scale in the fashion and textile industries. They do this either by commercialising their work themselves, which involves engaging a manufacturer who can make their designs or products to which they have applied their artworks, for example designing swimwear and cover-ups or printing artwork on t-shirts. In other circumstances, Creators maybe approached by a product manufacturer to either create artwork or to license existing artwork for their products or textiles and are then required to license their artwork in return for payment of licence fees or a royalty. Examples include licensing artwork to a homeware brand for the production of digitally printed textiles to be used for interior design projects or bed linen or application to clothing as a decal.

Creators can also design fashion accessories which are more craft based works, such as bags, belts or jewellery where multiples will be made by their own business or they license production to a manufacturer on a commercial scale.

There are three possible streams of legal protection available for such creative work, depending on the nature of the work. The first stream applies to 2D artwork applied to the surface of another product. The artwork maybe a painting, drawing or photograph that is applied to the surface of product like a textile in a repeating pattern. Copyright provides the primary means of protecting a Creator's rights in this context. Design registration with IP Australia is also available for commercially applied 2D work that qualifies for registration. For more information see the Arts Law Information Sheets **Copyright** and **Protecting your designs.**

The second stream is the design of fashion items, that may have multiple protection through their design-production lifecycle. For example, a new design for clothing usually starts with sketches and illustrations showing the idea. Such drawings are initially protected by copyright as they are artistic works. A pattern based on the sketches may also be considered a drawing protected by copyright. The "sample", which is the first produced garment may be considered a work of artistic craftsmanship. If this garment is then industrially applied meaning manufactured on a commercial scale to make 50 items or more and sold), under the copyright regime in Australia, it can no longer be protected by copyright and must have been registered as a design to maintain IP protection and enforce rights against those who copy the garment design. For more information see the Arts Law Information Sheet **Protecting your designs.**

The third stream consists of fashion items that are the works of a designer-maker such as jewellery, hats, belts, hand-printed fabric scarves. These may be regarded as works of artistic craftsmanship and protected by copyright. While there is no specific definition of artistic craftsmanship, such a work is generally understood as requiring an aesthetic quality and craftsmanship (hand or machine). A Creator of a work of artistic craftsmanship can rely on copyright to protect their rights in their work but if they choose to register a design, which has benefits over copyright in some commercial contexts (see below,

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What are the benefits of registering a design over copyright protection?), they then lose their copyright protection. For more information see Arts Law Information Sheet **Protecting your designs.**.

This information sheet covers the laws that apply to these three streams of creative work when applied commercially in the fashion and textile industries, including marketing and promotion but does not cover the details of applying for protection. For more information on these areas of law refer to the Arts Law Information Sheets **Copyright**, **Protecting your designs.** and **Trade Marks**.

1. How do I protect my rights in my artwork or designs?

Copyright

All artwork or designs applied or used in the fashion or textile industries are generally protected at first instance by copyright as a design concept will be expressed as a drawing, graphic work or painting whether done by hand or digitally created. The *Copyright Act 1968* (Cth) (**Copyright Act**) protects artistic works that are defined to include drawings, paintings, photographs and works of artistic craftsmanship. The Copyright Act does not define what a work of artistic craftsmanship is but generally the work must have some aesthetic quality and mechanical manufacture of the work does not necessarily disqualify it from being a work of craftsmanship. For more information on works of artistic craftsmanship see the Arts Law Information Sheet**, Protecting your designs.**. In the design to production lifecycle for a product in the fashion and textile industries many works qualifying for copyright protection can be created in addition to the originating creative work, for example, artistic works like photographs and production drawings, literary works such as instruction text, descriptions of products and compilations (lists or collections of information) maybe generated in taking a design to production. Creators can rely on copyright to protect their rights to these works as an additional means of protecting their interests in their artwork or designs (see below, **How do I stop others from copying my artwork or designs?).**

How do you obtain copyright?

In Australia there is no formal registration process or costs to obtain copyright protection. Copyright automatically arises when a work is expressed in material form, provided it is an original work; meaning it was not copied and the Creator expended labour, judgement and independent skill and effort into the creation of the work. Where it is not possible to separate the contribution of individual creators, copyright may be jointly owned by the creators as tenants in common. This means the consent of all copyright co-owners is required to deal with the work (to license or transfer ownership). The creativity threshold for copyright protection is low so copyright would protect utility sketches required for production or manufacturing as much as the finished creative product, provided they meet the requirements for copyright protection. For more detailed information on copyright see the Arts Law Information Sheet, **Copyright**.

Designs

Designs can be registered to protect the visual features of pattern, shape, configuration or ornamentation of a product, and provide a way to protect artwork applied to garments or textiles or designs for clothing or accessories created and developed for the fashion industry. Design protection is obtained only in relation to the application of the design to a product. It will not protect the design or artwork in the abstract. Therefore, you could not register a painting as a design but you could register that artwork as a design for a product applied to bedlinen or fabric. Design protection also does not extend to the materials a product is made of, how it feels or its functionality. If the functionality of a design is of value you may need to consider applying for patent protection. For more information see Arts Law Information Sheet **Patents**.

For items that are designed to be products, for example sketches for a garment such as a tunic, the shape of a hat or a statement necklace, you could initially rely on copyright for protection of your rights but you will need to consider from a commercial perspective, whether registering a design gives you stronger and more appropriate protection for your rights in the design. In some instances copyright protection will be lost where a design is registered or industrially applied and sold, for

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more information see Arts Law Information Sheet **Protecting your designs.**

To register a design you need to make an application to IP Australia and there are costs involved such as legal, attorney and registration fees payable, expenses for drafting of an application to register the design and technical drawings or photographs required. It is important to maintain confidentiality prior to applying for registration of a design so you don't lose novelty and disqualify the design. Recent introduction of a grace period allows you to discuss the design with others before applying to register design if the application for registration is lodged within 12 months of the disclosure. Design protection is for 5 years but maybe extended for a maximum of 10 years. For more information see IP Australia's website https://www.ipaustralia.gov.au/designs.

What are the benefits of registering a design over copyright protection?

Copyright protection lasts longer than design protection, has no formal registration process and is free so is often the easiest to rely on. Particularly, where a creative work is 2D, for example, an illustration, image of a painting or photograph that will be applied as a design to a product such as fabric, you will continue to have copyright protection if you make multiples or choose to register a design and enjoy dual protection. In the case of works of artistic craftsmanship such as jewellery or a hand-dyed scarf you can rely on copyright protection even if you make multiple products but if you choose to register a design, copyright protection will no longer be available

In the case of designs that are applied to a 3D product such as drawings for a garment or shoe, copyright protection is lost when the design is industrially applied (this means the design is applied to 50 individual items or more) and sold. This means that you will be unable to rely on copyright for 3D products if this has happened and if you have not already applied to register a design, you will not have any IP protection for that design. For more information see Arts Law Information Sheet **Protecting your designs.**

Benefits of design registration include:

- Ensuring you have some protection of IP rights if copyright will be lost on commercialising the design.
- It is easier to prove infringement as you don't need to produce evidence of copying or a connection between your work and the allegedly infringing work.
- You also don't need to show that a substantial part of the work has been taken or used. To establish design infringement, you have to show that the design and allegedly infringing design are substantially similar in overall impression.

While registering a design could enable you to protect a 'signature' design that maybe repeated in future collections or prevent reverse engineering of a garment, it is also important to consider whether the short span of fashion trends overrides any registration benefits given the cost and administration involved in registering a design. Often in licensing arrangements in the fashion and textile industries, while a Creator may not register their artwork as a design themselves, if they license it to another party such as a manufacturer to use, they may be also granted the right to register the design in the licensing agreement and choose to do so.

It is also important to understand that IP regimes such as copyright and designs laws are national and some countries do not have a design registration system or require registration for copyright protection or enforcement. If your work will be commercialised overseas you may need to seek appropriate advice and protect your designs in countries that are likely to be your strongest market. For more information see the Arts Law Information Sheet **Protecting your designs.**

Collaborating with other Creators

Creators often collaborate with other creators and share their ideas or work to refine and improve designs or to apply an artwork to fabric or fashion items. In collaborations, if multiple persons have made a creative contribution to a design, they maybe regarded as joint owners of copyright in the creative work made together or co-designers that have a right to be registered as co-authors of the design with IP Australia. When collaborating it is important to agree on matters such as share of ownership of copyright in designs created or if the copyright will be owned by one party to avoid uncertainty around

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ownership or future disputes. If the contribution made by a collaborator is editorial and more about advice to improve a design, this may not be sufficient to claim a share of the copyright. But misunderstandings can be avoided and written agreements should be put in place in collaborative projects for creating designs, for more information see Arts Law Information Sheet**Copyright** andArts Law Contract **Collaboration Agreement – Fashion and Furnishing**).

Moral Rights

Moral rights are personal legal rights of Creators in respect of certain copyright material, including artistic works, that exist separately to the copyrights. They are rights which protect the creative reputation of certain artists, and unlike copyright they cannot be given away. Even if you have licensed or assigned your artwork for application to a product, you will still have the right to enforce your moral rights in relation to your work.

In Australia, there are three recognised moral rights. In relation to an artistic work they would be

- The right to be attributed as the author/artist of your work (i.e. to be acknowledged as the Creator).
- The right not to have your work, falsely attributed (i.e. someone else named on or suggested as author on packaging for a product bearing your design).
- The right of integrity also known as the right to prevent derogatory treatment of your work (i.e. alteration or modification of your work or context of use that would be prejudicial to your reputation as an artist).

For more information on moral rights, see the Arts Law Information Sheet **Moral Rights**.

ICIP

Indigenous Cultural and Intellectual Property (**ICIP**) refers to the rights that Indigenous people have, and want to have, to protect their traditional arts and culture. ICIP covers many forms of artwork and designs that carry or convey traditional culture and expression. When working with artwork and designs that would be considered ICIP it is important to respect acknowledged ICIP rights. For more information on ICIP rights, see Arts Law Information Sheet **Indigenous Cultural and Intellectual Property (ICIP)**.

Branding and trade marks

Brands are a valuable and critical asset to any fashion related business, particularly where you are commercialising your designs yourself or have a practice as a designer. Having a brand that is memorable and stands out is an important way to build a reputation and goodwill in your customer base. Building a brand will also assist you in developing and implementing your marketing strategy and support expansion of your business.

It is important to ensure the elements of your brand such as a trade mark or other marketing devices like slogans are protected and appropriately managed to maintain their integrity and value. A trade mark can be a name, sign, logo or other device that is used to show the trade origin of a product. A trade mark that is a logo is an artistic work and will also be protected by copyright. To register a trade mark, you need to make an application to IP Australia (https://www.ipaustralia.gov.au/trade-marks).Unregistered trade marks (devices like a slogan used to show the origin of goods or services that have not been registered) and their associated goodwill can be an important asset of a business. However, as the owner of a registered trade mark you will obtain additional benefits on registration including:

- Valuable IP in that trade mark that is an asset of your business.
- Exclusive use of the trade mark in relation to the goods or services you have registered it for;
- It will be easier to protect your trade mark from unauthorised use by another person as it is easier to prove infringement of a registered trade mark.
- You will be able to prevent competitors from registering a similar trade mark.
- Trade mark protection is national and not based on goodwill in a particular locality.

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For more information on trade marks refer to the Arts Law Information Sheet **Trade Marks**.

2. How do I protect my rights in my designs and commercialise my designs?

Rights of IP owners

Ownership of copyright in an artistic work confers on the owner the exclusive rights to reproduce, supply reproductions to the public for the first time or communicate the work to the public online. Successful design registration confers on the owner exclusive rights to produce the design such as to use, sell and license others to do this. This means you as the Creator have the exclusive right to commercialise your work either by making multiples and managing production and marketing yourself or licensing another person to do this. An owner of a registered trade mark has exclusive use of that trade mark in relation to the goods and services it is registered for.

By ensuring that you have protected your IP rights in your creative work, you are able to enforce your rights against anyone who exercises any of your exclusive rights without your permission and take legal action against them for infringement of your IP rights to stop the unauthorised activity and recover damages. For more information on infringement of IP rights see section below **How do I stop others from using my artwork and designs?**

Manufacturing agreements

If you are intending to commercialise your designs yourself and need to manufacture or produce on a commercial scale, you will need to enter into an agreement with a manufacturer who will mass produce your work. This situation differs from the designer/maker context where you may employ someone to produce your work in your business or contract the work to a skilled person such as a pattern maker, sample maker, printer or embroiderer. For more information on employees and on contractors see Arts Law Information Sheet **Employment Issues (NSW)** and guidance Arts Law contract **Employment Agreement Indigenous Art Centre** and **Contractor Agreement – general**.

Where you are engaging another person to manufacture your designs, it is important to have in place a formal, written contract setting out each party's rights and responsibilities. A manufacturer may offer their standard terms and conditions with an order form, quote or invoice and these documents form the contract with them. It is important to review terms and conditions to ensure that you are comfortable with the obligations and responsibilities imposed on you. You can always try to negotiate any terms that are not appropriate to your situation or unreasonable. A simple contract or confirming in writing by email each parties rights and obligations such as in relation to the provision of samples for approval, quality control requirements as well as payment terms will help to avoid misunderstandings and disputes.

Where higher volumes of goods are in production and there is greater risk to your business, it is strongly advisable to have a manufacturing agreement which covers matters such as:

- The brief or description of the scope of work.
- Provision of samples, quality control and approval process.
- Ownership of IP, including who will own any improvements, enhancements or modification to the designs being manufactured.
- Grant of a limited licence to manufacture and sublicence for this purpose.
- Payment terms (i.e. will there be payment at stages).
- How long the agreement is for and if it can be extended on similar terms.
- When ownership of products passes (i.e. on receipt of finished goods).
- Need for adequate insurance coverage.
- Consequences on termination or expiry of the agreement including return of material provided such as patterns, fabric, samples and return or destruction of stock.

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See Arts Law contracts**Copyright Licence – Manufacturing Agreement**, and**Copyright Licence Toolkit – Art Centres**.

3. How do I give others the right to use and commercialise my designs?

Creators commonly license the use of their artwork or designs to other persons who wish to apply these to a product for mass manufacture and have the resources and experience to do this. For example, an artwork can be licensed for reproduction on fabric as a repeat pattern and mass produced for products like bed or table linen or soft furnishings.

Licensing agreements

For a Creator licensing is the preferred position when entering into an agreement with another person who wants to manufacture products their artwork or designs have been applied to. When you license you still retain ownership of your IP asset. An exclusive licence in effect can give a licensee the same rights as the owner to commercialise the licensed artwork or designs. An exclusive licence needs to be in writing and signed by or on behalf of the IP owner. It is possible to grant an exclusive licence for a limited scope, for example, only some of the exclusive rights of a copyright owner or to limit the licence to exclusivity in a particular geographical area or for a specific field or area of use.

Common issues to be addressed and provisions found in licensing agreements include:

- Will the licence be sole, exclusive or non-exclusive?
- Scope of the licence granted such as territory, medium, purpose or field of use, which copyrights are licensed (i.e. right to reproduce and communicate online only) and how long the licence is for.
- Manner of attribution or how the Creator will be credited.
- Payment structures such as upfront payments and/or annual licence fees or royalties.
- Samples, approval and quality control of products.
- Permitted alterations and modifications to designs and approval required from the Creator.
- Right to sublicense.
- Rights to register IP rights and ownership of improvements or enhancements made to the licensed designs.
- Rights to enforce IP rights against infringers.

See Arts Law Information Sheet**Licensing**, Arts Law contracts**Copyright Licensing Agreement**, **Copyright Licence Agreement – Fashion**, **Copyright Licence Agreement – Fabric**and **Copyright Licence Toolkit – Art Centres**, **Image Reproduction Licence for Merchandise**.

4. How do I stop others from using my artwork or designs?

The owner of IP rights such as copyright, a registered design or trade mark has the exclusive right to use and exploit their work and to license others to do so. If any person exercises one of the exclusive rights of the copyright owner in relation to an artwork or uses a design in relation to a product it is registered for without permission, the IP owner has the right to take legal action to stop the infringing activity and recover damages or an account of profits. Where a licence has been granted to use a design and the licensee does something that has not been authorised (outside the scope of the permission granted) this will be an infringement of copyright in the artwork or if a design has been registered infringe the registered design.

If you become aware of infringing activity, unauthorised action in relation to your artwork or designs, you should obtain legal advice regarding the infringing activity to determine what action can be taken to protect your interests. As IP and related laws and laws are national, each country has different laws, for example, some require registration to enforce rights in copyright and legal advice should be obtained.

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Whether copyright is infringed will depend on whether the infringing copying is done in relation to a substantial part of the protected artwork. What is considered substantial will be a qualitative assessment rather than quantitative one. You must also show there has been copying or that there is a connection to your copyright work, as independent creation of a similar work is allowed and does not infringe copyright. For works protected by copyright, where moral rights are infringed, action for infringement of the Creator's moral rights may also be taken.

Designs are infringed by using a design that is substantially similar in overall impression to the registered design. The design monopoly is an absolute monopoly so it is not necessary to establish copying or a connection to the design.

Action for infringement of trade mark rights may also be taken where the circumstances give rise to a cause of action.

For more information on enforcing IP rights see Arts Law Information Sheets **Copyright Infringement**, **Moral Rights**, **Protecting your designs.** and **Trade Marks**.

Preventing infringement

You can deter infringement by asserting your ownership of copyright or design rights on the products your designs have been applied to or the packaging or labelling they carry. For example textiles often carry a © symbol or a registered design number on the selvedge. Swing tags and labels on garments also include information such as the name or brand of the Creator, the © symbol or registered design number and may also include a statement that the design is protected by copyright or as a registered design.

Related branding on swing tags, other labels and packaging material will carry trade marks to indicate the origin of the goods and can also carry information about IP rights related to the products. Information related to copyright and registered designs can be included in the terms and conditions of use of a website, where a designer uses a website to promote and sell products bearing their designs.

5. How do I transfer or assign rights to IP in my artwork or designs?

IP rights are personal property. When you assign your rights to IP, the person you transfer the rights to becomes the legal owner of those rights, unlike when you grant a licence, where you retain ownership of the IP. There may be instances where it is necessary to transfer ownership (assign) in the copyright in an artwork or rights to a registered design to another person, for example, a company may be created to run the business that commercialises artwork and IP in the artwork needs to be formally transferred to the company. Another situation may be where an artist has licensed an artwork to a homeware design company and given them the right to register designs on the condition that when the licence ends, the artist is entitled to have the registered design transferred to them. The owner of IP rights, copyright registered design or trade mark can transfer ownership of those rights to another person. To transfer rights to an unregistered design, you would assign the copyright in the designs. It is also possible to assign rights to a design application before it is granted.

Requirements for a valid legal assignment of IP rights

For the transfer or assignment of copyright to be legally valid, it must be in writing and signed by the owner. A transfer of a registered design must be in writing and signed by both the person assigning the rights and the new owner.

In the case of copyright assignment there is nothing further to be done to record a change of ownership. For registered IP, such as designs and trade marks, the new owner should promptly apply to IP Australia to record the change of ownership in the Designs Register or Register of Trade Marks maintained by IP Australia. Until the Register is updated a new owner will not be able to take action for infringement to protect their rights

Partial transfers of rights

A transfer of IP rights maybe partial and limited by geography, field of use and similar. For example the assignment can be in relation to one or some of the exclusive rights of the copyright owner such as the right to reproduce or make copies or all the

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copyrights but for Australia only. A registered design or trade mark maybe assigned in full or part as well.

Future IP rights

Future copyright can also be assigned. While it is not possible to assign a future design, it is possible to contractually agree to do this. If an agreement is made to agree to the assignment of future IP, it is important to also include in the contract a further assurance that compels the other party to sign documents and do what is necessary to transfer the designs when they are created.

Other ways IP rights can be transferred

IP rights can also be transferred by a person's will or the laws of intestacy if the IP owner dies without a will.

6. Who can assist me to protect the IP in my artwork or designs if these are going to be commercialised in the fashion industry?

Arts Law, the Australian Copyright Council or Copyright Agency Limited can provide information on copyright and how to protect and enforce copyright. Arts Law also has sample agreements for licensing copyright in artwork or designs that will be applied to fashion items and other products. While Arts Law can provide information and preliminary advice on registering designs, you may need the assistance of a patent attorney to draft a design application, which requires specialist knowledge and the inclusion of technical drawings or photographs and to manage the application process through IP Australia. Further information on the design registration process can be found on the IP Australia website.

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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