

TO HAVE AND TO OWN

Intellectual property protection is an increasingly ambiguous area of business law, and many jewellers feel confused and ill-informed about their legal rights and obligations. REBECCA STEWART reports.

It sounds like a 'worst case scenario', but many designers and jewellers have had their original designs borrowed, inspired or just plain stolen at some point. Lacking the full weight of the law, it can be very hard to prove when a piece has been ripped off, and how.

With the expansion of online marketing and new sources of cheaper labour, intellectual property issues are becoming murkier by the year. But what exactly are intellectual property rights, and how can they benefit the industry?

Intellectual property (IP) is a broad term describing the set of laws used to provide protection and exclusivity to innovations. Various forms of IP include patents, trademarks, copyright and registered designs.

To the newcomer, deciding which one is applicable to their business, and how these rights can help is a legal minefield.

According to Trevor Choy of Choy Lawyers, "the main problem facing the industry is a lack of knowledge, which has led to an inability to make the most of the protection laws. Although flawed, the laws are under-utilised."

Design protection has never been a clear-cut position of 'this is mine and that is yours'. Choy, a renowned IP lawyer in Melbourne, is frequently called upon to interpret the bewildering and often conflicting laws protecting artists and designers.

"The laws have been put into place theoretically to protect all designers. Unfortunately, they are written by people who don't understand how the industry works."

Choy says this has given rise to countless misunderstandings, hearsay and a general conviction that to try and protect original jewellery design is a futile endeavour.

Melbourne jeweller Camilla Gough is no stranger to having her designs 'borrowed'. She speaks of a major local brand imitating a ring she had developed over many years. When the ring became a commercial success, Gough had to withdraw it amidst claims that it was, in fact, her who had done the copying.

"I've had stuff taken over the years, and it's very hard to prove. With the smaller designers, a phone call usually does the trick. With the bigger ones - well, I wouldn't even think about it. You just have to let it go."

Other jewellers have a similar reaction to Gough, believing having products stolen is an inevitable fact of selling a product commercially.

"I take it as a compliment when something gets ripped off," says Steven Sesselmann of

Bee Jewellery. "However, copying a jewellery design is not like copying and pasting words; it's difficult to define when it happens. Even if I gave a sketch to two designers, they may come up with two totally different pieces."

So, if lawyers and confidentiality contracts are out of the question, how do designers and manufacturing jewellers protect themselves?

Gough submits a standard form to retailers, protecting her exclusive rights to a piece. Constantly evolving as an artist, she never relies too heavily on one style, and is secure in her own distinctiveness as a jeweller. "You have to be confident, and you must keep changing."

In addition, Gough consciously uses quality materials, knowing that her designs would be hard to reproduce cheaply.

The consensus among jewellers is that if design protection was enforceable, everyone would register. "Every designers would love to see it, but it's not possible," Sesselmann says.

He files and dates sketches, then sends himself the drawings in an envelope to remain unopened as a record of the date of creation.

One of the loopholes in copyright is that it is lost if the owner applies a three-dimensional work industrially - specifically, more than 50 pieces. If this is to be the case, jewellers must then apply for design registration.

Recently updated, the Designs Act 2003



seeks to protect the appearance (shape, pattern or ornamentation) of a product, and not its function. In contrast, copyright only provides protection against someone making a copy, and therefore requires proof that it has taken place. The design protection law does not come into play until the product has been applied commercially, which can make it difficult for jewellers, who consider themselves artists also.

The process of making an application is not as arduous or expensive as it seems, and starts with the submission of a technical drawing. "People need to break down the designs they're going to sell into distinctive, individual elements," says Choy. "They need to ask what is unique about their design. The drawing needs to reflect that very specifically."

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Choy recommends legal advice to help one make the most of the designs law, and says the whole process (for one, or a range of designs) costs roughly \$1500 from start to finish. He suggests that the drawback of modern design is that products tend to be clean and simple, and therefore difficult to protect because of a lack of defining features.

He would like to see designers building into their products things that are distinctive only to them - for example, Tiffany Jewellers. Although their classic pieces are largely unregistered, they have a trademark on their instantly recognisable blue and white packaging.

So if copyright or a design has been infringed, how exactly do you define how much has been copied? What would be the legal cut-off point?

Choy cites recent cases in the fashion industry, where boutique designers have brought larger chains into court for infringements. "The law requires a lot of certainty. Only recently in Australia are these laws around IP are being tried in the courts."

Local fashion designer Bettina Liano has led the charge for other apparel companies. In 1999, Liano took legal action for copyright



infringement against Satch clothing company for its duplicates of her t-shirts and jeans. Despite assurances there was nothing she could do to protect copyright, Liano was successful with Middletons Lawyers, and determined to register her new designs every season.

Similar to the jewellery industry, registering each new design is an expensive procedure; however, others have followed Liano, sparking a flurry of out-of-court settlements.

Precedence is crucial. Choy says IP laws can be so complex that they are often only illustrated in examples, and refers to the "Philips head shaver" case in the late 1990s.

Until that time, Philips had been the only company to produce the distinctive triple head shaver. When Remington started producing the same product, Philips went to court and lost. When the original drawings were compared, the Remington version had a different handle, switches and overall appearance. The only design similarity was the triple head, a feature not fully emphasised in the technical drawings.

Although a variety of furniture makers, industrial designers, fashion labels and other artists are eligible for design registration, it is rare that a jeweller in Australia applies for it. The few companies who have applied are usually high-end distributors, looking to protect their branding. Their clients are often paying according to the quality of the stone in the piece and the perceived quality of its source, over design.

With the dominance of classic lines and a minimalist look, the move to protect marketing and branding is the future for many designers.

Many jewellers feel some trepidation about exposing their work. In particular, the internet poses a unique problem in that jewellers are

potentially displaying their creations to an unprotected and enormous global audience.

"I was a bit concerned before I put my images online," says Gough. "However, these days, you have to do it."

Most jewellers today continue to sell themselves in the same way they always have: small advertisements, occasional sponsorships and charity work, and, most importantly, word of mouth. To them, the potential dangers of exposure are "part of life."

Sesselmann suggests that, with a slight variation, retailers could send designs to parts of Asia for reproduction, and there was nothing local designers could do about it - a very common occurrence in the fashion industry as well.

"The foreign importers don't seem to care about issues of copyright. All they want to do is mould their products to the Australian market as quickly as possible," he says.

So what other steps could a business take to protect their IP? With the high expense of registering designs overseas (and, in most cases, that has to be done in every country), it is not an option for most designers and manufacturing jewellers.

IP Australia (www.ipaustralia.gov.au) is an excellent place to start for intellectual property issues, information sheets and links to IP legal services. The Arts Law Centre of Australia (www.artslaw.com.au) explains the Designs Act in relation to artists, and the Australian Copyright Council (www.copyright.org.au) provides advice and information sheets. In addition, there are other organisations to support creators rights, like the Intellectual Property Owners Association (www.ipo.org.au).

Searching the Australian IP database (through the IP Australia website) is a way to ensure that no one is infringing on your product, or vice versa. A rapid production and promotion cycle to prevent copiers, could be a good way to sell a product with a short life span.

With a pull between the slowness of the law and the needs of jewellers, it seems that a quick-fix to IP issues is an unlikely prospect. However, with some shrewd business planning and armed with knowledge of copyright and design protection, designers can see their way to defending what is justly theirs ♦

The jewellery workshop used in this story is courtesy of North Melbourne Institute of TAFE (NMIT), Fairfield campus.

WHAT IS IP?

Intellectual property rights are a series of legally enforceable laws surrounding your original inventions, research, development or creativity. They can be bought or sold in the same way as any other property.

Patents

A patent refers to protecting new, improved inventions or processes, and provides a monopoly for the inventor. It also prevents others from exploiting the invention. Examples include the Victa lawn mower and the Cochlear bionic ear.

Trademarks

A vital element of branding, a trademark is anything used to distinguish a product. It can be a letter, word, number, phrase, sound, smell, shape, logo, picture, aspect of packaging, or any of these. The Nike swoosh is one of the best known.

Copyright

Copyright protection is given automatically (without the necessity of displaying the © symbol), to protect the original expression of ideas, not the ideas themselves. This includes artistic or literary works, and software and engineering drawings.

When any material is written down, drawn, filmed or recorded, it is protected for free for roughly 70 years after the death of the author.

Names are too short to qualify for copyright protection and must be registered as trademarks. Copyright is infringed when a substantial part of the copyright material has been used, without the owner's permission.

Should you believe your work has been borrowed it is important to act quickly - delaying action may affect your rights at a later time. You also need to be completely sure that you are protected by copyright. Copyright does not protect ideas, concepts, styles, techniques or information. The rights that you have may lie in other areas of law such as trade secrets.

Design registration

The final stage for any artist wishing to protect their work in a commercial sense is design registration. This is the official procedure of lodging a design, having it assessed and filed, for up to 10 years. Once an item is registered as a piece of artistic craftsmanship, then all copyright protection is lost.