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## Fashion & Costume Designers

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This information sheet is for people involved in the design and production of clothing. We discuss copyright as it applies to clothing and some other issues which are relevant to fashion design. Some of the issues discussed in this information sheet will also be relevant to costume designers working in theatre, film and television.

For information about our other information sheets, publications and seminars program, see our website [www.copyright.org.au](http://www.copyright.org.au)

A Copyright Council lawyer may be able to give you free preliminary legal advice about an issue not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions and libraries. For further information about the service, see [www.copyright.org.au](http://www.copyright.org.au)

**The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer. Please note that Copyright Council lawyers cannot advise on the design/copyright overlap discussed in this information sheet.**

We update our information sheets from time to time. Check our website to make sure this is the most recent version.

### Key points

- One-off fashion garments, costumes and jewellery pieces are likely to be protected by copyright.
- You will generally only be able to rely on copyright protection if what you want to protect is a “work of artistic craftsmanship” (such as a one-off garment or necklace) or a design for an item you have not yet started to exploit commercially.
- If you intend to make multiple copies of items you have designed (such as a design for ready-to-wear clothes), you will need to look at your options under **design** law, not copyright law, and you will need to do this **before** you start marketing or manufacturing the items.

### Copyright protection for clothes, accessories and patterns

Copyright protects particular categories of works, including “artistic works”. “Artistic works” include:

- paintings, sculptures, drawings, engravings or photographs (including sketches and patterns for clothes, costumes and accessories); and
- works of artistic craftsmanship (such as hand-made garments, masks and jewellery).

### **Individual garments and other items**

Items of clothing that are individually created are likely to be works of artistic craftsmanship, and therefore protected by copyright. Individually made pieces of jewellery, hats, handbags and shoes may also be works of artistic craftsmanship.

For such an item to be protected by copyright it must be the product of an element of **craftsmanship** and be intended by its creator to have some aesthetic appeal. There is no exhaustive list of what may be protected as a work of artistic craftsmanship: this issue will depend upon the facts of an individual case.

In order to be protected by copyright, the item must be the product of the creator's skill, special training and/or knowledge. The prototype for a mass-produced article of clothing may be protected as a work of artistic craftsmanship if it is the product of the creator's skill. It is not necessary that it be made by hand. A work of artistic craftsmanship may also be made by more than one person. For example, one person may design it and another person may make it up; or one person could do the tailoring and another person apply beading or sequins.

However, a prototype which is only intended for use during an intermediate stage in the design process may not be a work of artistic craftsmanship in its own right. Similarly, you should not presume that an item of clothing is always a work of artistic craftsmanship: there have been cases where courts have held that garments lacked the necessary qualities, with the result that the designer could not rely on copyright protection.

Even if a garment is theoretically protected by copyright, copying it may not result in copyright infringement. See below, under the heading "The design/copyright overlap".

### **Patterns for garments and other items**

Generally, a pattern for a garment or other fashion item (for example, on paper or cardboard) is likely to be protected by copyright as an artistic work. However, the scope of this protection is limited.

Prior to 17 June 2004, the owner of copyright in a pattern for mass-produced clothes could take action for infringement if someone copied the pattern without permission (for example, by taking a garment apart to copy it, or copying commercial clothes patterns).

As a result of changes to the law that came into effect on 17 June 2004, the owner of copyright in a pattern now cannot generally take action for copyright infringement against people who "reverse-engineer" garments they have produced, but must rely on protection under the Designs Act. See the discussion below under the heading "The design/copyright overlap".

This area of law is complicated, and how the law applies depends on the particular facts and circumstances (especially where some or all of the relevant events took place before 17 June 2004). Please note that the Australian Copyright Council cannot advise on this issue. For advice on your situation, you should contact a lawyer in private practice.

Where a pattern for clothes or other items has been published, purchasers of the pattern generally have a licence to make the garment using the pattern. This issue is discussed in our information sheet *Sewing & Knitting Patterns*.

### **Designs printed on fabric**

Patterns or photographic images that are printed onto fabrics may be protected by copyright as artistic works (a photograph printed onto a t-shirt, for example). In addition to copyright protection, protection under the Designs Act may also be available.

### Written instructions and other text

Written instructions on how to assemble a garment are likely to be protected by copyright in the category of “literary works”. This means that someone wanting to reproduce the written instructions would generally need permission.

For information about other types of material protected by copyright, see our information sheet *An Introduction to Copyright in Australia*.

### Copyright does not protect styles, techniques, information or ideas

Copyright does not protect ideas or concepts. Nor does copyright protect styles, techniques or methods used in producing clothing. Rather, copyright protects particular items, which may be produced using such styles or techniques.

For example, the idea of making a dress with only one sleeve would not be protected by copyright, but a particular dress with this feature may be protected as a work of artistic craftsmanship. Similarly, a particular style of clothing such as peasant-inspired clothing would not be protected by copyright, although a particular item of clothing in that style may be.

### How do you get copyright?

For your work to be protected by copyright it must fall within one of the categories of protected material (such as those listed above). It must be the product of the creator’s skill or labour and not simply a copy of someone else’s work.

Copyright is free and applies automatically: there is no registration system for copyright and no fees to pay. As soon as the work is created and expressed in a material form (for example, by making the garment) copyright automatically protects the work.

### Copyright notice

Although it is not legally necessary, it is a good idea to place the copyright notice on your work. The copyright notice consists of the copyright symbol ©, followed by the name of the copyright owner and the date the work was created. For example, “© Kaf Tan Ltd 2012”.

This notice alerts people to the fact that the work is protected by copyright and you are the person claiming ownership of copyright. You can print or write the copyright notice on the work itself or on a label attached to the work.

### Rights of the copyright owner

The owner of copyright in a work is entitled to:

- **reproduce** the work (including by photocopying or scanning, printing out or making digital copies of a digital file, filming or photographing, and making a three-dimensional item based on a two-dimensional work (for example, making a shirt from a pattern);
- **make the work public for the first time** (for example, by making it available for sale); and
- **communicate** the work to the public (for example, by broadcasting the work, emailing a digital file containing the work or by making it available online on the internet or intranet).

In general terms, a person who wants to use copyright material in any of these ways needs the permission of the copyright owner.

## Who owns copyright?

### Agreements

In any case where there is an agreement covering copyright ownership or permission to use the material, you need to look at that agreement to work out what each party's rights are. We recommend that all such agreements be recorded in writing.

### Employees

If an **employee** creates copyright works as part of his or her job, the creator's employer owns copyright (unless an agreement has been made to the contrary). This rule does not apply to people who are not legally employees (such as contractors, freelancers, volunteers or people who are commissioned to do particular tasks).

### Governments

Where a State, Territory or Federal government "directs or controls" the creation of an item, or first publishes the item, that government owns copyright. Note that this rule does **not** apply to local governments.

### Freelancers and independent creators

If there is no agreement stating otherwise, and none of the specific rules on ownership apply, the creator(s) will be the copyright owner(s).

#### *Joint ownership*

If a copyright work is created by more than one person, the copyright may be **jointly owned** by the creators. However, a person will not be a joint owner of copyright if they do no more than make suggestions or discuss ideas about how the garment should look. In order to be regarded as a creator of a work under copyright law, a person must have had some responsibility for the way the ideas are expressed in the finished item.

Further information is provided in our information sheet *Ownership of Copyright*

## How long does copyright protection last?

For material created on or after 1 January 2005, the general rule that copyright lasts for the life of the creator plus 70 years. The rules on duration changed on 1 January 2005, as a result of Australia's obligations under the Free Trade Agreement with the US. The effect of those amendments is that, generally, anything that was still in copyright under the old rules on 1 January 2005 gets an extra 20 years protection.

Until 1 January 2005, the general rule was that copyright lasted until 50 years after the end of the year in which the creator died.

For more information, see our information sheet, *Duration of Copyright*.

## Exceptions

There are exceptions to copyright infringement.

Most relevantly to fashion and costume designers, there is an exception in the Copyright Act which allows for the filming of artistic works (such as unique costumes) if the work is merely incidental to the main purpose of the film.

Also, in some cases, people may be able to make uses of copyright protected works without permission (e.g. publish a photo of a unique costume) if it could be argued that this was a fair dealing, such as for the purpose of making a genuine critique or review, or for the purpose of reporting news. For more information, see our information sheet, *Fair Dealing*.

## The design/copyright overlap

The Designs Act provides protection for designs from which multiple copies are made. Registration is generally necessary for protection under the Designs Act. In many cases, items that could be registered as designs would also come into one of the categories of things that are protected by copyright.

For many years, successive governments have had a policy of **limiting** copyright protection for artistic works related to functional articles. The idea is that when it comes to the appearance and shape of functional items, the Designs Act is the more appropriate form of legal protection, and people wanting to protect functional or mass-produced items should register their designs.

To give effect to this policy, successive governments have included provisions in the Copyright Act limiting the scope of copyright protection for items that could be protected as designs. These provisions are generally referred to as “the design/copyright overlap provisions” and, while the policy behind them has remained the same, these provisions have changed over time.

As noted earlier, new legislation affecting the overlap provisions came into effect on 17 June 2004, intended to close “loop-holes” that emerged in previous legislation. In summary:

- it is intended that purely two-dimensional designs (such as drawings to be put onto T-shirts) retain the ability to have dual copyright and design law protection;
- people creating works of artistic craftsmanship can choose whether or not to register the design (but registering will generally result in a loss of copyright); and
- manufacturers of functional items that otherwise would be excluded from copyright protection can no longer rely on plan-to-plan copying or “advertising use” to establish a copyright claim.

You should also note that new Designs Regulations came into effect on 17 June 2004.

In particular, the old regulation listing types of products which could not be registered under the old Designs Act, and which could therefore be fully protected by copyright, has been repealed. (The types of products listed in the old regulation included “articles on which there is printing” such as dress-making patterns.)

If you have relied on this list in the past for the way you protect your products, you should get specific advice on your situation.

For further information, see our information sheet *Designs for Functional Articles*.

### **Copyright protection may be lost when multiple copies are made**

The law concerning the design/copyright overlap is complex.

If you are making multiple copies of your designs, or intend to do so, or if you have any other questions about the design/copyright overlap, you should get advice from a lawyer in private practice. It is particularly important to get such advice before starting to market or manufacture your designs, as doing this without registration could result in loss of legal protection for the designs.

### **Moral rights**

Creators of copyright works have moral rights in relation to those works. Moral rights protect the creator's reputation and are separate from copyright, which may be owned by a different person. Unlike copyright, moral rights cannot be assigned.

The creator's moral rights are the right:

- to be attributed as the creator of the work;
- not to have the work falsely attributed; and
- not to have the work treated in a way that could damage the creator's honour or reputation.

For more information see our information sheet *Moral Rights*.

### **“Customising” garments created by other people**

If you are altering or customising a garment for your own use, it is unlikely that any legal issues will arise. However, if you intend to market garments you have purchased and customised, you should be aware that this could raise legal issues under areas of law such as competition and consumer legislation. There have been cases in which clothing manufacturers have taken legal action against companies that marketed second-hand customised garments with the original labels. It is also possible that a creator or copyright owner could make claims concerning moral rights or copyright in these circumstances.

If you intend to sell customised garments commercially, you should get advice from a lawyer as to whether this might breach competition and consumer, or other laws.

### **Protecting ideas and concepts**

If a creator discloses information about a design on a confidential basis, for example to a clothing manufacturer, and that information is used, the creator may have a claim for breach of confidence. This area of the law may protect an idea or concept before it has been released to the public. To establish a breach of confidence the creator will need to prove that the information is of a confidential nature, was disclosed when an obligation of confidence was accepted or implicit, and that there was an unauthorised use or threat to use the information.

If you enter an agreement with a manufacturer to make clothes you have designed, you should seek advice from a lawyer in private practice on the terms and conditions that should be included in the agreement, including clauses that prevent the manufacturer from using your ideas in ways that could damage your interests.

This area of law is briefly discussed in our information sheet *Ideas: Legal Protection*. The Arts Law Centre of Australia also has a sample confidentiality deed available on its website:

[www.artslaw.com.au](http://www.artslaw.com.au)

## **Protecting the name of a fashion label**

Company and business names are not protected by copyright law. If you would like information on how you can protect your company and/or business name please read our information sheet *Names, Titles and Slogans*.

## **Common questions**

### **I am designing a couture gown. Can someone photograph it without permission?**

If it is a one-off, uniquely crafted gown, copyright may protect it as a work of artistic craftsmanship. Therefore, if someone wanted to photograph it, they would generally need your permission.

In some cases a person might be able to rely on a fair dealing exception although this would depend on all the facts and circumstances. In other cases, your permission might be implied from the circumstances (for example, if you chose to exhibit your work at a fashion show knowing that photographers would be present, it might be argued that your permission was implied).

### **Do I need permission to use a unique printed fabric in my fashion designs?**

In some cases the fabric may not be protected by copyright. However, if there is a unique artwork printed on the fabric, for example, it may be protected. For more information see our information sheet *Designs for Functional Articles*.

Making something from a physical item (such as fabric) is not a right that the copyright owner controls. Having said this, if you want to make an item of clothing and then photograph it, this would technically involve a reproduction of the fabric design and this is a right controlled by the copyright owner.

Generally speaking, if someone designs fabric and makes it available for commercial sale, then unless something is stated to the contrary, it is likely you can imply a permission to make clothing from it, and do other things that you would normally do with fabric and clothing (like photograph it).

### **If someone commissions me to create a costume, who owns copyright?**

Provided you are not acting in the capacity of an employee, the creator of the costume is usually the owner. Simply because someone pays you to create a costume does not make them the copyright owner. However, the commissioning party is likely to have a licence to use the costume for the purposes for which it was created.

However, if there is an agreement setting out who owns copyright and how each party is allowed to use the material, then this will apply. It is often a good idea to get a written agreement in place so that each party is clear what their rights are.

## **Further information**

For further information about copyright, see our website: [www.copyright.org.au](http://www.copyright.org.au)

IP Australia also publishes a guide to intellectual property for the clothing and fashion design industry. See "Fashion Rules": [www.ipfashionrules.gov.au](http://www.ipfashionrules.gov.au)

## **Reproducing this information sheet**

You may download and print one copy of this information sheet from our website for your reference.

## **Australian Copyright Council**

**The Australian Copyright Council is a non-profit organisation whose objectives are to:**

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



**Australian Government**



*The Australian Copyright Council has been assisted by the Australian Government through the Australia Council, its arts funding and advisory body.*

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