Fashion Law Handbook
Keys to fashion industry success:

1. Design show-stopping garments;
2. Stay on the right side of the law.

We can’t help you with the first part, but this handbook is designed to help you avoid the big legal holes that await the unwary designer. Whether or not you’re excited about protecting your IP, not screwing up massively on social media and not being screwed by your collaborators, ignorance in this case is definitely not bliss. But don’t worry, we’ve made it relatively pain-free.

Here we go.
Intellectual Property

Imposter or influential?
Are your designs legit and protected or just rip offs?

Your IP is both your most valuable, and most misunderstood, asset. Adequately protecting the creativity and originality of your work is critical. Intellectual property laws protect your designs, labels, and processes from being replicated.

The key areas of protection for you are copyright, designs, patents and trademarks.

Copyright

Copyright prevents the unauthorised use of your original artistic work by others, including sketches, patterns, and one off handmade garments or jewellery. Copyright is made up of a bundle of exclusive rights to do certain acts, such as the right to copy, publish and communicate the copyright material.

Copyright does not protect items that are “industrially applied”, so your actual garments are generally not protected by copyright (regarding that, see ‘Designs’ below).

Copyright infringement is not only direct copying. There are many different types of unauthorised activities that may constitute an infringement. Cotton On was found to have copied the “look and feel” of Elwood’s t-shirts because of similarities between the layout, arrangement and style of the designs. Examples of copyright infringements might be:
1. Reproducing the copyright work;
2. Displaying the copyright work in public;
3. Posting the copyright work online; or
4. Importing counterfeit goods for commercial purposes.

There is no system for registration of copyright material. If your stuff can be protected by copyright, then it is. You don’t have to do anything. But, for the fashion industry, designs and trade marks are where the serious stuff happens.
**Designs**

The general belief is that because the designer has developed the design, he or she is entitled to certain protection over that piece, including stopping others from copying it. This is not always the case. A design is protected in Australia if it is registered under the Designs Act. Unless your garment is classified as a ‘work of artistic craftsmanship’ under the Copyright Act (think Lady Gaga’s meat dress), only a registered design will give you enforceable rights for a maximum of 10 years to commercially use, licence, sell or protect your design.

A design is the overall appearance of a product that makes it unique. In fashion, this includes the shape, pattern and ornamentation on a garment. This can be as simple as a sleeve with ruffles on a Target t-shirt, or the silhouette of a couture gown by De La Renta. It does not include the feel or texture of the material (unless, like Lady Gaga’s meat dress, the material affects the appearance of the garment).

Under the Designs Act, a design is registrable if it passes the test of being ‘new’ and ‘distinctive’. That is, it must not be identical or substantially similar to any other design previously disclosed anywhere in the world (including the internet); whether or not it was independently developed. Even if the design is just a sketch, if you have registered it, you have a legally enforceable right over it.

Some tips on protecting your designs:
1. Do your research and ensure your design does not infringe someone else’s registered design.
2. Keep your design secret until the design is registered. So don’t exhibit it, sell copies of it or upload it onto the internet.
3. Once registered, include “registered design” statements on your swing tags to dissuade potential copiers.
4. Don’t bother trying to register a dress made of meat; this has already been done.

**Patents**

In the fashion industry, patents can be used to protect the way something works, as opposed to how it looks. If you have developed clothing or fabric that has a specific function you may be able to patent it. This makes you the owner of that invention, and you hold the exclusive right to commercially use it for a specified period of time. Getting a patent registered is extremely expensive and difficult, so there’s a low probability you’ll ever need to remember this paragraph.

**Trade marks**

Your label or brand is a valuable marketing tool. It identifies you and distinguishes your designs from other designers. After so much hard work building a label, you don’t want to have competitors launching products under deceptively similar brand names or logos, causing brand confusion. You can protect yourself by registering a trade mark.

Things you should register as trade marks include your name and logos (think Louis Vuitton monogram). Also think about in which countries you will be selling, as you will need to register in each of them to get protection there.

Shapes and colours can also be trademarked. The Tiffany & Co blue is probably the most famous example. But just because Tiffany & Co trademarked the distinctive blue, doesn’t mean they own it in all situations. Their ownership only extends to situations where it could be confused with their products e.g. gift boxes. Chances are, it’s probably ok to paint your house “Tiffany Blue”.
Business Names

Unless you are trading under your company name (if you operate a company) or your first and last name (if you are a sole trader), the law says you need to register a business name.

However, neither a company name nor a business name will give you any intellectual property rights.

The best way to protect your name is by a registered trade mark.

Who owns your lookbook? Contractors v employees

You will probably use lots of freelancers and contractors to help out in your business. One thing to think about: any intellectual property created by them is not actually yours, unless they agree to transfer it to you. So, that photographer who snapped your entire spring/summer lookbook actually owns the pics (even though you paid him). You do own all the IP created by your direct employees in the course of their employment, but when it’s a contractor make sure they agree to transfer the IP.
Do I really have to give a refund?

The Australian Consumer Law is a nationwide law that protects consumers' rights. Under it, your products must meet the following requirements:

1. They must be of acceptable quality (i.e., they’re safe, last a reasonable period of time and don’t have any faults);
2. They must match their description; and
3. Repairs and spare parts must be reasonably available.

If a product fails any of these, then the customer has the right to a repair, replacement or refund. The customer generally gets to pick which one of these she wants, however if the problem is only minor, then you can choose to simply repair (rather than giving a replacement or refund). If it’s major, then you have to give a replacement or refund.

You don’t have to do anything if the customer simply changes her mind, found it cheaper somewhere else, or decided the style was so last season.

If the product has been misused in a way that caused the problem, or you pointed out the problem before it was sold, then you’re off the hook too.

Avoiding a recall

A product being recalled isn’t only a question of poor taste, but rather a breach of legal requirements regarding product safety. In 2013 ASOS was forced to recall a line of leather studded belts worldwide, not because they were a fashion eyesore, but because it was found that over 500 hours of wear could cause injury of the radioactive kind.

In Australia, consumers can also directly sue a supplier for any loss or damage they incur from a defective good.

The Australian Consumer Law requires goods to be recalled if they:

1. May cause injury (even if misused in a reasonably foreseeable way);
2. Do not comply with a government imposed safety standard; or
3. Are subject to an interim or permanent ban.

A good place to start is to make sure that your product or garment is none of these.
Contracts

We totally get it: you’d rather stab yourself in the eye than read a contract. But unfortunately they’re really important. While everyone is in love with each other all is well, but as soon as something goes wrong a contract is your BFF. Here are some tips on the most common ones you’ll encounter.

Your Terms and Conditions

Every business needs a cracking set of terms and conditions. Your T&Cs should clearly describe what you’re doing and set expectations as to when you’ll do it and on what terms.

Over time, your products are likely to be enhanced and updated. You may make modifications here and there, add new items and remove others. You might invest in infrastructure and change the way your products are delivered. Or there might be a change to the laws affecting you.

When was the last time you took a good look at your T&Cs? Are they easy to understand? Do they help you close sales quickly and efficiently? Do they explain exactly what you’re doing for a customer? Here are the top 10 signs your T&Cs need a makeover:

1. They refer to the Trade Practices Act or the National Privacy Principles.
2. The liability clause appears in capital letters.
3. The dispute clause refers to arbitration but you have no idea what that means, or if it’s any different to mediation or the court system.
4. Your T&Cs are a mish-mash of terms you found on Google, “borrowed” from a competitor or were “donated” by a lawyer friend.
5. The same issues keep coming up in negotiations with customers.
6. You haven’t reviewed your T&Cs in the last 12 months. In fact, you have never actually read your T&Cs from start to finish. Your head hurts just thinking about it.
7. The Sales team hates your T&Cs. They complain that the document is not user-friendly, and customers are slow to sign off on your standard terms.
8. Your T&Cs sound like they were written in the 18th century. Is “hereinbefore” even a word?
9. You’re looking at selling the business and think a buyer won’t care about your T&Cs.
10. You don’t know why anything on this list is a problem.

Your T&Cs are living documents. If they don’t change as your business changes, they’re useless. The best T&Cs are clear, succinct and proudly stamped with your brand personality. Unless you’re a bank, don’t let your T&Cs make you look and sound like one.

Distribution Agreements: Planning to go global?

Engaging distributors is a great way to ensure your goods reach territories beyond your capacity.

When supplying goods there are a few things you should consider before signing a distribution agreement:

1. Reporting. What information do you need from the distributor? Consider rolling forecasts and regular progress reports to help manage your inventory.
2. Limit your risks. Any warranties you give on the goods should not apply if they have been modified, used, tampered with or installed without your authorisation.
3. How will you be paid? Upfront payment, or payment upon receipt of goods?
4. Term. Consider the length of the agreement and how it can be terminated. On termination, will you purchase the goods back from the distributor, and at what price?
Manufacturing Agreements: 10 tips to make sure you get what you want

You've nailed the designs and now it's time to sell them and make the mega bucks. First step? Get them manufactured. Here are our top 10 tips to consider when negotiating manufacturing agreements.

1. **Choose your manufacturer.** Local v offshore manufacturer options will no doubt be dictated by cost. If not for ethical reasons, at least consider the PR risk of having your products made in a sweatshop.

2. **Samples.** Provide decent approved samples and request test production runs before placing a full order.

3. **Quality control.** What procedures will you put in place? Will you oversee the manufacturing process or require samples from each batch?

4. **Minimum orders.** Don’t lock yourself into unrealistic minimum quantities; you will find yourself out of pocket in no time.

5. **Storage.** Will the manufacturer deliver the entire order to you, or will you require some to be held in storage? If so, ensure the manufacturer is responsible for all risk in the stored items.

6. **Delivery.** What method of delivery do you require and do you have strict retailer timeframes? If so, consider liquidated damages (agreed dollar amounts for each day late) for delivery delays.

7. **Insurance.** Consider who will be responsible for risk of damage to or loss of garments during delivery. If possible, place this obligation on the manufacturer.

8. **Packaging.** Will you require specific packaging for your garments? Or require other services, like tags to be attached? The more you can pass onto your manufacturer, the less work for you.

9. **Defective goods.** What will be your procedure for defective goods and/or product recalls? Consider a refund or a resupply, and an indemnity against any loss you incur.

10. **Confidentiality.** The intellectual property in the samples, drawings and specifications are yours. Ensure the manufacturer keeps these confidential – you don’t want your competitors producing knock-offs before you even hit the market!
Privacy (and Spam)

If you turn over more than $3 million per annum, the Privacy Act applies to you and it has big penalties for non-compliance. Under the Act, 13 Australian Privacy Principles govern the collection and use of personal information. Here are the most important ones.

**APP 1 – Open and transparent management of personal information**

Personal information is any info you have that is attached to an individual (eg. Mary bought your wrap dress in blue, size 10). You must manage the personal information that you have in an open and transparent way. This includes having a privacy policy which sets out how your business manages personal information. There are some very specific requirements for your privacy policy which are outlined in APP 1. The best place to put this is on your website.

**APP 2 – Anonymity and pseudonymity**

Individuals dealing with you must have the option of not identifying themselves or using a pseudonym. (Eg. you can’t make someone join your mailing list if they just want to buy a garment in your shop.)

**APP 3 – Collection of personal information**

You can only collect personal information where it is reasonably necessary for your functions or activities.

**APP 5 – Notification of the collection of personal information**

APP 5 sets out when and in what circumstances you must notify an individual of certain matters including your identity and contact details. Generally, if someone gives you their details (eg. signs up to your newsletter), either in store or online, you need to point them to your privacy policy.

**APP 6 – Use or disclosure of personal information**

You can only use information for the purposes for which you collected it (these should be set out in your privacy policy).

**APP 7 – Direct marketing**

You can’t send out direct marketing unless certain criteria are met (including that the person would reasonably expect you to, and you provide a simple opt out mechanism). Note this does not include electronic communications (email, text message), which are covered by the SPAM laws.

**APP 8 – Cross-border disclosure of personal information**

Strict requirements apply if you’re proposing to send personal information overseas. You must take reasonable steps to ensure that the overseas entity to which you’re disclosing the information does not breach the APPs. While some exceptions apply, it’s a high bar to ensure compliance.

**APP 11 – Security of personal information**

You must take reasonable steps to protect personal information you hold. Think IT, as well as physical security. You must destroy personal information which you don’t need.

**APP 12 – Access to, and correction of, personal information**

If you hold information about an individual, you must on request give them access to the information.
Direct marketing under the Spam Act

The Spam Act regulates the sending of ‘commercial electronic messages’. These are messages sent by email, SMS, MMS or instant message that, broadly speaking, offer, advertise or promote goods or services.

In order to send a commercial electronic message, you need:

1. The consent of the recipient. This can be express (where the individual has checked a box requesting the message or provided their email or number for that purpose) or inferred consent (where the conduct of the person leads you to reasonably believe they would consent to receiving the message);
2. Identification of your business in the message. The message must include information that accurately identifies your business; and
3. An unsubscribe. The message must contain a functional unsubscribe facility which allows the recipient to opt out from receiving any future messages. A request to unsubscribe must be honoured within five working days. The unsubscribe facility can include an email address for opt out requests, a link to a website with an unsubscribe function or simply the unsubscribe function itself.

Social Media

So, your brand is big on social media? Here are our top survival tips for not getting yourself sued.

1. Someone else is using my brand name on Instagram. Imposters are a pain. But there are a couple of things you can do. You'd probably have grounds for a court case on IP infringement, but let's call that the nuclear option. Most of the main social media platforms will block an imposter account if you can prove that the brand name belongs to you. The easiest way to do this is to show that you own the trade mark. Check out the T&Cs and you should find details of how to lodge your complaint. And (hint) if you haven't registered your brand as a trade mark, do it!
2. The chat on my business's Facebook page is getting nasty. The great thing about social media is how it lets you talk directly to your customers. The downside is that they can talk back. Worse, if your customers go feral on your Facebook page, you can be responsible for it. If someone contacts you and says they've been defamed on your social media page, you need to act quickly on the complaint to avoid legal liability. As a general rule, if you are able to control the content and someone complains to you about material on the page, you can get in trouble if you don't take it down.
3. Someone else is pinning my pictures! Be flattered. But, if this activity is affecting your business in a not-so-good-way, then contact the offending party and politely ask them to stop using your pictures (or charge them $$$ for doing so). If this direct approach doesn't work, you might have to go legal on their ass.
4. I've received a copyright infringement complaint, what do I do? Stop using the infringing image if you don't have consent. Copyright in a photo is generally owned by the photographer. Seek consent from the owner (where possible), or at least acknowledge their contribution. Don't be guided by the 'everyone else is doing it so it must be ok' principle on this, that'll be no defence if you get sued. Copyright infringement damages can ruin you.

Paid to post?

Your social media feed is full of them: posts by 'key influencers' raving about their fabulous new bag/shoes/coffee shower scrub/green smoothie. As a brand, you also know how important these people are for getting you brand exposure. It’s quite common for a brand to gain the exposure it wants by
sending out its key look for the season to bloggers for them to post about it on social media. What is not often clear is that these ‘key influencers’ have received the swag for free, and been paid to blog about it.

Law makers are clueing on to this and have set out guidelines that bloggers must adhere to when posting a sponsored post. In Australia, the ACCC has guidance material which states that online reviews (this includes promotions by bloggers) should be “transparent about commercial relationships”. The simplest way to do this is by including sexy (not) hashtags such as #ad or #sponsoredpost.

So, if you’re using the services of the increasingly powerful bloggersphere, just make sure your influencers are making it clear they’re getting paid to post.

Collaborations

Brand collaborations are awesome; when everything goes to plan

Collaborations are nothing new (remember 2007 when all we cared about was Kate Moss and Topshop bringing heroin chic to the masses?), but at the moment you can’t swing your tote in a high street store without taking out a dozen pieces designed by a couturier or celebrity.

Here are some things to consider before launching your next collaboration line:

1. Agree to not damage each other’s brands. Back in 2004 Karl Lagerfeld collaborated with H&M. When the collection was released, he turned on the Swedish giant, stating he would never work with them again because he had designed a range for “slender or slim” customers, and H&M made sizes for normal people. Nice one, Karl.

2. Intellectual Property. Be clear on who owns the designs.

3. Payment: Will the designer be paid a flat fee for providing the designs, or an ongoing royalty?

4. Termination. How can you pull the pin if it’s a flop? In one of fashion’s biggest WTF moments, Ungaro engaged Lindsay Lohan to design a few seasons’ worth of lines. The first show was the laughing stock of Paris Fashion Week 2009 and Ungaro quickly ended the relationship.

5. Define the market. Will the range be sold in one or two specific markets, or worldwide?

6. Competition and exclusivity. Will the designer be prevented from creating a range for a competitor for a certain period?

7. Promotion. What obligations will the designer have to promote the range? Jessica Simpson partnered with The Tarrant Group to produce a low-priced collection, including Princy jeans. Despite agreeing to promote the range, Jess refused to wear the jeans at public events, and ultimately admitted she much preferred True Religion. Tarrant sued for $100 million.

Exclusivity

Commit to being exclusive or stay a free agent?

The public battle between Ellery and retail giants Myer and David Jones is now over, with a settlement being reached. And there is a lesson for us all in dealing with exclusivity clauses.
Kym signed up to a contract to supply the Ellery label exclusively to Myer until 2014. But Myer sued when it discovered that the label was also being simultaneously supplied (under a similar exclusivity clause) to David Jones.

Many designers in the fashion industry (and any suppliers of high-demand products, really) can expect to see exclusivity clauses in their contracts, to stop them entering into negotiations with other purchasers. These clauses should be taken seriously, as they may have large ramifications for your business.

Some things to consider when it comes to exclusivity clauses:
1. Is the minimum quantity to be ordered by the purchaser high enough to justify tying yourself into an exclusive arrangement? Myer’s minimum order for the Ellery collection was said to be zero.
2. Make sure you are able to terminate the contract early if the purchaser does not meet the minimum order quantity.
3. If the contract is terminated due to a fault other than yours, ensure you are fairly compensated for all loss. This could include potential future sales or a pre-agreed figure.
4. Is the duration or type of exclusivity reasonable? Or does it unreasonably restrict your business? Unreasonable or overly restrictive exclusivity clauses may be found by the courts to be unenforceable.
5. Save yourself the heartache and don’t breach an exclusivity clause. Consider your termination options instead.

Celebrity Endorsements

What to do when Kendall Jenner wears your dress all wrong: the 411 on celebrity endorsement deals

Say you’ve snagged a Kardashian to tote your latest It Bag. She’s charging you a fortune, so you want to be sure you get what you’re paying for, and avoid disasters along the way.

Some important things to think about including in the contract:
1. Not to disparage your brand. She bags you, or lets slip that she’s paid to wear your product, and any goodwill you’ve created is gone.
2. Exclusivity. Your celebrity shouldn’t endorse or be associated with any competitor during the term of your agreement. Think Oprah tweeting her love of the Microsoft tablet from an iPad.
3. Morals clause. You don’t want your celebrity papped looking like a trashbag sprawled in the street with your product in shot. Define what you find morally reprehensible: your opinion of this may vary from Justin Bieber’s. Getting caught taking drugs, being publicly drunk and breaking the law are clear no-nos.
4. Be specific about media and appearances. If she is doing specific media and appearances, agree on the details, including time to be spent. You might expect more than a two minute nightclub cameo.
5. Public statements sign off. Consider requiring sign off for any public statements about your brand. Awful tweets tend to spread quite quickly, apparently.
6. Confidentiality. You want the details confidential. We still don’t know exactly who Samsung paid for that Oscars selfie which broke Twitter (something about $3m for a kiddies’ hospital and puppies).

We can’t guarantee your celebrity won’t punch a paparazzo, but at least you won’t be paying her for the pleasure.
Ethical Fashion

The inevitable future for Australian labels

While the fashion industry may be lagging in the move to more ethical production methods (we would never dream of buying cage eggs, but will trample anyone standing between us and a $69 cashmere v-neck), consumers’ demand for transparency on supply chain is growing.

We’re not suggesting that the only way to be an ethical fashion brand is to produce hemp kaftans or garments made from recycled car tyres, but the tide is turning and it’s always a good plan to be ahead of the pack. Despite fast fashion having a bad reputation in this area, H&M was just named one of the world’s most ethical companies, and has made a commitment to ethical production.

Here’s how you can too:

1. Your suppliers. A good start is to have all of your suppliers sign up to a code of conduct which is binding and commits them to meet the requirements you set regarding the environment, treatment of workers and animals, child labour, discrimination, bribery etc.

2. Investigate your supply chain. Due to rampant subcontracting (and sub-subcontracting) within the manufacturing industry, there are probably many more people involved in the production of your garments than you think. Getting your suppliers to sign up to your code of conduct is great, but physically visiting the factories is also important. Zara learned this the hard way in 2011 when it discovered that some of its garments were coming from a Brazilian sweatshop which had been subcontracted without its knowledge.

3. The Bangladesh Accord. Following the Rana Plaza factory collapse in Bangladesh in 2013, many fashion brands have signed up to the Bangladesh Accord. The Accord requires participants to publish all of their manufacturers in Bangladesh, and contribute to health and safety costs at the factories.

4. Certification. Whilst there isn’t a universally acknowledged certification system for ethical fashion just yet, you can look to certifications provided by organisations such as BCorp, Ethical Clothing Australia (if you manufacture in Oz), Ethical Fashion Forum, and Fairtrade to give you some cred.

Want more?

We are always happy to meet and have a chat about how we can help you out. To arrange a meeting, please call Justin Cudmore on 02 8216 3015 or email him on justinc@marque lawyers.com.au.